

**MARGINALISED WOMEN AND THE LAW: A CASE OF THE POKOT**  
**WOMAN.**

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**G34/36275/2010**

**A dissertation submitted to the University of Nairobi in partial fulfillment of  
the requirements of the award of laws (LL.B) degree.**

**9<sup>th</sup> May, 2014.**

**DECLARATION**

I, Loyatum Irene Cherotich, do declare that this dissertation is my original work and that it has not been submitted for examination for the Award of a degree in any other university or Institution. All secondary information used has been duly acknowledged.

Signed..... *Loyatum* .....

Date..... *16<sup>th</sup> May, 2014.* .....

This dissertation has been submitted with my approval as the university supervisor

Signed.....

Date.....

Lady Justice Nancy Baraza

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## **DEDICATION**

To the liberalization of the Pokot woman.

## ACKNOWLEDMENT

To the almighty God, I give thanks and praise for the strength I get from your word, guidance and favour. I am blessed and I do not take it for granted. To my parents, Paul and Eunice Loyatum my sincere gratitude for the love you have shown throughout my life for it has made me the person I am; you have instilled confidence, faith, hope, humility, appreciation and respect in me, things I treasure as I go through life. To my siblings; Eva, Denis, Mnaga't, Kevin, Toro and Vicky. I can tell the joy of a large family, the different characters and personalities have made me understand the world, the sarcasm that we often use has created a healthy mind in me so as I believe it has enhanced the problem solving abilities. To Toro and Vicky, you are both young, I pray that you find your passion in life and we will all be there to guide you. To my extended family, family friends and my own personal friends, you have been true and I thank you.

To my supervisor, Lady Justice Nancy Baraza; I thank you for your patience, time, honest opinion and invaluable guidance.

## **ABBREVIATION**

A.C.A-Amani Communities Africa

C.E.D.A.W -The Convention on Elimination of All Forms of Discrimination Against Women

F.C-Female Circumcision

F.G.M –Female Genital Mutilation

S.O.A-Sexual Offences Act

U.N-United Nations

U.N.D.P-United Nations Development Programme

N.G.O-Non-governmental Organization

L.S.K.J-Law Society of Kenya Journal

## **TABLE OF STATUTES**

The constitution, 2010(Kenya)

The Constitution (South Africa)

The constitution (Algeria)

Judicature Act

Marriage Bill, 2013

Matrimonial property Act, 2013

Customary Marriage Act, 1998(South Africa)

Prohibition of Female Genital Mutilation Act, 2011.

Children's Act

Penal Code

Sexual Offences Act, 2006.

Succession Act

Married Women Property Act, 1882

Land Bill, 1997(Uganda)

# **LIST OF CONVENTIONS, TREATIES AND INTERNATIONAL**

## **AGREEMENTS**

CEDAW-The Convention on Elimination of All Forms of Discrimination Against Women.

Vienna Convention of Treaties, 1969.

## TABLE OF CASES

Hyde v Hyde and Woomansee(1866)

Karanja v Karanja (1976) K.L.R (307)

Virginia Edith Wambui v Joash Ochieng and Otieno siranga,Civil case No 4873 of 1986.(S.M  
Otieno case)

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# CHAPTER ONE

## 1.0 INTRODUCTION

### 1.1 BACKGROUND OF THE PROBLEM

Living in a patrilineal society, women are seen as a disadvantaged group in a male dominated society<sup>1</sup>. Being disadvantaged as not only incapacitated them but put them down in the social ladder and they have been given little regard when it comes to their position in society.

International, regional and national studies have shown that there are reservations in law that have continuously been of negative impact to women by empowering men in all spheres and work against women using the substantial and procedural law to challenge all manners of discrimination against them.

The never ending woes of women have been contributed to by disparities and failure to access legal redress. On a larger scope most women go through the same treatment but others have it worse than others. This study aims to bring out the unawareness of marginalized women to their rights through the law with a special focus on Pokot women.

The Pokot are a patrilineal community among the forty two tribes of Kenya<sup>2</sup>. They have a social hierarchy where at the top are elderly men, young men, women and then children at the bottom. The social hierarchy can tell how women are lowly placed as sex and gender are the determining points in the social organization. From their myth of origin they believe that Tororot (God) created a man first then a woman who was to be the helper of the man and subordinate to him. Further, they believe that men have to exercise power over the women to please their God. Right

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<sup>1</sup> Kivutha Kibwana, Law and status of women in Kenya (Faculty of Law University of Nairobi and Claripress 1996)p.1.

<sup>2</sup> [www.Kenyanview.com/kenyantribes](http://www.Kenyanview.com/kenyantribes).

from the myth the woman, the woman is seen as a subordinate sex. Not only is the position of women in society seen here but also from the Biblical creation story in Genesis, the woman was created from the man's rib to be his companion<sup>3</sup>. Does this reflect on the religious divine will right from creation? Women's and girls' status can be seen to be subordinate to men's for they lack cultural empowerment and valued authority.

The inferiority of women is largely seen in the Pokot community evidenced by the narrator in the red spotted ox in his autobiography, Domonguria (a Pokot man) tells of a man who practiced witchcraft and when he was about to be stoned to death by a woman he cries out, "No, no! Let the men kill me! Please let me not die at the hands of a woman"<sup>4</sup>. This is how largely the woman is seen as the weaker sex; the narration being told in the 1970's shows how women's inferiority has dragged on from history into the current times.

This study will look at the law and how it is applied in the access to justice for Pokot women. These women's ability to assert their rights are constrained by the limitations placed on them by customs, culture, tradition, lack of knowledge on law and unawareness on their rights.

Many laws are drafted to be gender neutral but the factual reality is that a number of laws in Kenya contribute to promoting gender inequality and discrimination while it was passed to do the reverse<sup>5</sup>. In real life gender neutrality turns out to be gender bias in favour of men<sup>6</sup>.

As far as the new constitution is concerned, chapter four provides for various inherent rights that should be upheld. Customary law will be recognized as part of the unwritten laws of Kenya

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<sup>3</sup> The Holy Bible, Genesis.

<sup>4</sup> Pat Robins, *The red spotted ox: the pokot way of life*, p.46

<sup>5</sup> Patricia Kameri Mbote, 'Problem of women in Kenya vis-a-vis the East African Position' in Kenya section of international commission of jurists, also see *Enhancing women's Rights in Kenya* (Kenya section of International commission of Jurists 2003) p.95

<sup>6</sup> supra note 1, p.33.

but it should not be used to suffocate women's rights. Article 27 sees to it that every person exercises a right against discrimination<sup>7</sup>. The focus of this study is to show how knowledge on the law can make visible hidden power dominance and underpinnings of gender.

## **1.2 STATEMENT OF THE PROBLEM**

In the words of the United Nations, Equal Rights for women-A call for Action:

“Difference in sex roles begins at the moment of birth when the child is first identified as male or female. From that moment on, the child is expected to behave in accordance with the roles customarily assigned to his or her sex. By the time the girl becomes an adult she finds that her world has been slowly but effectively restricted by the rules and expectations of others. She learns that being born female set her apart from men and limits her rights in law and in practice.<sup>8</sup>”

From the extract and the ground reality women do not benefit from the law as much as men do. Patriarchy should be blamed for cutting into the law that it has synchronized. The Pokot woman suffers from lack of knowledge of her rights and it is worsened by the law when it is said it is gender neutral with the real truth being that it is not<sup>9</sup>.

The Pokot woman cries from the male dominance and as a set of social relations between men which enable them to dominate women.

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<sup>7</sup> The constitution of Kenya, 2010.

<sup>8</sup> CEDAW, United Nations, Equal Rights for Women-A call for Action (1973) p.6

<sup>9</sup> supra note 1, p.33

### **1.3 JUSTIFICATION OF STUDY**

The study is justified on grounds that the law as it ought to be should protect every person equally be it male or female and equal access to justice improves life as a whole for these Pokot women. Liberates her from the male dominated society, empowers her as an equal sex.

The question under research is generally from a feminist point of view but the fact of the matter remains open that issues affecting women in access to justice and full utilization of the law are extensive and are a major problem not only to the Pokot woman but the whole society as a unit.

### **1.4 RESEARCH QUESTIONS**

This study seeks to answer the following research questions formulated to aid in gathering the information regarding the research topic.

- 1.) Does the lack of knowledge and inadequacies in some areas of law incapacitate the Pokot woman from seeking legal redress?
- 2.) Does legal pluralism contribute to the woes suffered by the Pokot woman?
- 3.) Are the traditions, customs and culture part of the reason the Pokot women do not seek legal aid?

### **1.5 RESEARCH METHODOLOGY**

The method of research that this study intends to use is quantitative research methodology. It will help to create the connection between the marginalized Pokot women's customs, their environment and the law. It will give an in-depth understanding leading to unbiased findings that will give a general reflection of the Pokot women.

## **1.6 HYPOTHESIS**

1.) Basic presumption of this research proposal is that tradition, customs and beliefs aided by the existing law have continuously contributed to the impediment to gender equality in legal redress. The hypothesis is that lack of knowledge on existing laws and their rights have failed the Pokot woman and there is need for legal aid.

2.) There should be a system where all written and unwritten laws are in correspondence with reasonable practices in society. Patriarchy should be blamed, system of male dominance and as a set of social relations between men which enable them to dominate women<sup>10</sup>. Patriarchy should be an ancient understanding of society whereas equality, respect and non-discrimination should be the new guidelines to a more equal society with rights. Let men earn the power over their woman with respect and to use laws arbitrarily to dominate women.

3.) The plight of the Pokot woman should be brought to light and possible legislative measures made to protect her rights. Lack of knowledge is slowly and mercilessly eating into the Pokot society and destroying the mutual respect between the men and women leading the women to harbor resentment for the other sex<sup>11</sup>.

## **1.7 STATEMENT OF OBJECTIVE**

The general objective of my study is to discuss how and why the Pokot women are oppressed by their tradition, culture and customs despite the existence of substantive law that should aid them.

The paper looks at cultural practices that limit the access to justice and how the law has contributed to this constrain. It proposes that public awareness should be spread so as to

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<sup>10</sup> Carole Pateman: The Sexual Contract (policy Cambridge 1988)p.26

<sup>11</sup> Jennifer R. Fleishman, Georgia State University, Beads Of Empowerment: The role of body Art in challenging pokot gender identities.

overcome any form of discrimination against Pokot women and create an equal platform where the law is applied.

### **1.8 THEORETICAL FRAMEWORK**

This study will be based on the feminist and utilitarian point of view. Feminism is said to be a movement to end women's oppression (Hooks 2000, 26)<sup>12</sup>. The issue of marginalized women and the law needs to be addressed as it has caused under development of Pokot women politically, socially and economically.

Sex has become a weapon or a tool of oppression subordination and subjugation of females by males. The Pokot woman experiences lack of knowledge on the law and poor access to justice due to discrimination. This is why feminists are out to create awareness of women's rights to bring equality.

This study will majorly deal with liberal, radical and socialist feminism<sup>13</sup>. Liberal feminists believe that women behave in a manner that the environment conditions them to; for the Pokot woman, she does not know of any other acceptable way of life except that of the patriarchy. She will not question what she sees everyone around her obeying, she too will follow. Socialist feminism suggest that factors such as education and sexual orientation contributes to where a woman is placed in society. Finally, radical feminism the cause of women's oppression is patriarchy.

Utilitarianism advocates for greater happiness for the majority and therefore women make more than fifty percent of the population in the Pokot community.

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<sup>12</sup> Bell Hooks, 2000: Seeing the light: Visionary Feminism.

<sup>13</sup> www.Caragillis.com

## 1.9 LIMITATIONS

The main limitations to my study are:

a.) There is reluctance to divulge information.

The collection of data is a problem as most respondents are reluctant to divulge information as they do not view what they go through as a problem. They do not understand what the law provides, if it is sufficient enough and how they can be helped. They have accepted their position in the community that they do not question the men, the culture, tradition or custom; they view going against the grain of tradition a curse and the beginning of a bad omen from the wrath of God.

b.) Limited geographical coverage

Due to time limitations, the area that I collected my information is from south pokot and west Pokot and not the entire county which has a population of 512,990 according to the 2009 census which consists of 244,000 women<sup>14</sup>.

c.) Deliberate parameter

The study of women and the law is a worldwide problem ranging from developed countries to developing and third world countries; the only difference is the intensity. My study however is limited to the Pokot woman.

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<sup>14</sup> Kenya national census, 2009. Westpokot county data sheets-[Http://opendata.go.ke](http://opendata.go.ke)

## **1.10 DISSEMINATION**

After completion of the study on the research question, its findings and recommendations are proposed to be disseminated to the public through journals and newspaper articles so as to be informed on how the law affects the life of the marginalized Pokot woman and the university could use it in the lecturing of gender and the law.

## **1.11 LITERATURE REVIEW**

The issue of marginalized women is not a new concept in Kenya, a lot has been written on their cultures and tradition of these minority group the from assumptions. However, little has been written from a factual point therefore making these subject fresh for written and more detailed information on the marginalized Pokot woman with special emphasizes on the Pokot woman. Among writers who have dealt with the subject are;

Pat Robins writes the Pokot way of life. He narrates details on what their culture is all about without leaving out a single thing on their practices. Her narrative is more realistic than most writers as she writes about the Pokot culture and practices directly from the words of the autobiographer who happens to be a Pokot man who is well versed with their ways<sup>15</sup>.

Jennifer R. Fleischman relies on writings from anthropologist Kjartan Jonsson in his dissertation titled 'Pokot masculinity: Role of Rituals in Forming men' and anthropologist Elizabeth Meyerhoff dissertation titled 'Socio Economic and Ritual Roles of Pokot Women' uses their

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<sup>15</sup> Pat Robins, Supra note 4.

perspectives together with her own to unravel the Pokot<sup>16</sup>. She majorly deals with subject of the Pokot woman from feminist point of view.

Bianco Barbara has written many volumes on the Pokot people ranging from their political, social and economic perspectives<sup>17</sup>. Her literature is rich with Pokot cultures, she explains their ways simpler way for a person who reads about them to under. By analyzing the design, symbolic associations and how the Pokot woman uses cowhide belts to support and sometimes undermine the clan. She delves into patriarchy and how to achieve better understanding of political ramification of motherhood<sup>18</sup>.

Despite all the valuable study on the Pokot people that exists and will come in handy in my study, there is a gap that still exists and I intend to cover in my study. There are legislations in place that now cover this area, there are cultures that exist but there are also legal frameworks that exist on the same. The adoption and proper implementation of the law will change the way women are treated in this particular community. No research exists on the law and the cultures, the only research that exist are on the culture of the Pokot.

## **1.12 CHAPTER BREAKDOWN**

### **1.12.1 CHAPTER ONE**

This chapter will contain the proposal. The proposal contains the background problem, justification of the study, research questions, research methodology, hypothesis, statement of

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<sup>16</sup> Jennifer R. Fleischman Georgia State University Beads of Empowerment: The Role of body Art in challenging pokot gender identities.

<sup>17</sup> Barbara Bianco ,2000,'Gender and material in West Pokot,Kenya.In D.L Hodgson(ed) Rethinking Pastoralism in Africa, culture and myth of the patriarchal pastrolists.Oxford:James Curry.

<sup>18</sup> [www.pokot.org/resources/readingroom](http://www.pokot.org/resources/readingroom).

objective, theoretical framework, limitation of study, dissemination, literature review and the chapter breakdown.

### **1.12.2 CHAPTER TWO**

This chapter will deal with the concept of gender and a general expansion of the theoretical framework.

### **1.12.3 CHAPTER THREE**

Legal pluralism is a major part of the Marginalized Pokot woman's life therefore it will be discussed under this chapter and a comparative analysis of legislations and experiences of women in other jurisdictions.

### **1.12.4 CHAPTER FOUR**

As a common phrase, 'there is no problem without a solution'. This chapter will contain the researcher's recommendations on how to heal the woes of the Pokot woman reflecting on the three major interests; public, private and individual interest. It will contain a general conclusion from the researcher's point of view.

## CHAPTER TWO.

### 2.0 INTRODUCTION.

It is a fact that in Kenya, as many African countries, middle and upper class women-not to mention under class women-are still substantially marginalized as a function of patriarchy and male hegemony<sup>19</sup>. Unfortunate as it is, they have used different channels to assert their voices as an able sex and equal to the men. The cause of discrimination can be attributed to our patriarchal society despite the existence of the law.

The fact of being born female or male in all human and non-human primates in societies carries with it a specific behavioral assignment<sup>20</sup>. The assignment is due to the gender hierarchies that exist which determine how women and men differentiated and ordered in society.

This paper largely deals with the concept of gender and the law of marginalized women paying special focus to the Pokot woman. Therefore, it is worth noting that although human rights are supposed to mitigate in equality and to provide a level playing field for all, often the potential benefits of human rights to the improvement of women's lives are circumscribed by the limitation placed upon their domestic application, by the invocation by states of reservation on international law<sup>21</sup>.

It is interesting to note that the women's convention<sup>22</sup> is one of the most heavily reserved of all United Nations Human Rights Treaties<sup>23</sup>. Although not permitted, states continue to enter

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<sup>19</sup> Kivutha Kibwana, supra note 1.

<sup>20</sup> "A Legal analysis of gender disparities in Access to Education in Kenya"-Vane Nyaboke Omae-Akama, thesis LL.M.

<sup>21</sup> Justice for the Poor: perspective on accelerating Access, Ayesha Kadwani Dias and Gita Honwana Welch.

<sup>22</sup> Convention of Elimination of All Forms of Discrimination against Women, 1979(CEDAW), 1249 UNTS 13.

<sup>23</sup> Supra 21

reservations which subject the treaty (CEDAW) to domestic law<sup>24</sup> or which provide in general terms that the interpretation of the convention will be subject to religion, custom, tradition or culture<sup>25</sup>. These reservations impact negatively upon women's ability to enjoy equal rights with men in both public and private sphere and militate against women using the law to challenge discrimination.

In the view of the CEDAW committee, the Article 1 to 5 and 24 CEDAW form the general interpretive framework for all of the convention's substantive Articles. The three obligations that is central to the interpretative framework:

- 1.) To ensure that there is no direct or indirect discrimination in law, and that women are protected from discrimination.
- 2.) To improve the de facto position of women through concrete and effective policies and programmes; and
- 3.) To address prevailing gender relations and persistence of gender –based stereotypes.

Sexuality appears an interactive dynamic of Gender as an inequality<sup>26</sup>.

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<sup>24</sup> Vienna Convention on the Law of Treaties, 1969, Art 27. Human Rights Committee General Comment 24 on the issues relating to Reservations made upon ratification or accession to the covenant or the optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (2 November 1994) CCPR/C/21/Rev.1/Add 6; CEDAW General comment 4 on Reservations; UN Doc A/42/38; CEDAW General Comment 20 on Reservations UN Doc A/47/38.

<sup>25</sup> Human Rights Committee General Comment 28 On equal rights between men and women (article 3) CCPR/C/21.Rev. 1 Add.10, paras 5,9; CEDAW General Comment No.21 on marriage and family relations UN Doc A/49/38(1994) paras.41-7; CEDAW' Statement on Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women Adopted by the Committee on the Elimination of Discrimination Against Women'.

<sup>26</sup> UN Doc.HRI/GEN/1/Rev. 7, General Recommendation No.25(2004), on Article 4, Paragraph 1, of the convention on the elimination of All forms of discrimination against women-Temporary Special measures, Para 7.

Women's quality of life, as measured by such indicators as education, urbanization, employment and incomes, has improved considerably since independence<sup>27</sup> but the full realization of women's potential has not been reached.

## **2.1 The concept of gender in Kenya**

Women have played significant roles in the Kenyan society for centuries. Despite the fundamental social, cultural, economic and political roles they play, women have had to struggle to assert their voices and emancipate themselves from the debilitating effect of patriarchy<sup>28</sup>. Law as an institution to a large degree contributes to the maintenance of the traditional male hegemony<sup>29</sup>.

Kenya is largely a patrilineal country, the Pokot being part of the marginalized communities in Kenya; the rights of women have been largely side-lined compared to those of men. Women continue to be viewed as the weaker sex which has contributed to gender inequality. The hallmark of African customary law is the dominance of older male members over property and lives of women and their juniors<sup>30</sup>.

Failure of the Pokot women to access legal redress and lack of legal awareness can be greatly attributed to the society power structure where men hold most of the power. Evident from most of our legal provisions, our statute books contain rules and principles which are or can be seen as a legitimization of the subordination of women to men; women have been systematically removed from active participation in the production processes alongside men<sup>31</sup>. Article 81 (b) of

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<sup>27</sup> Kivutha Kibwana, supra note 1.

<sup>28</sup> The Law society of Kenya Journal (Vol. 9(1) 2013)

<sup>29</sup> Supra note 20

<sup>30</sup> Gender consideration in constitution making: Engendering women's right in the legal process –Dr. Patricia Kameri-Mbote.

<sup>31</sup> Dr. Patricia kameri Mbote, supra note 30.

the Constitution of Kenya, 2010 states, not more than two-thirds of members of elective public bodies shall be of the same gender<sup>32</sup>, more often than not, statements like this out rightly suggest that men make the two-thirds while the one-third is for women. Unfortunately, the rule facilitating gender balance has been logistically difficult<sup>33</sup>.

In December 2012 the Supreme Court issued an advisory opinion on the gender balance issue on elective seats for women in the national assembly and nominative seats designated for women in the senate<sup>34</sup>. The ruling expressed the court's opinion that the gender principle was subject to progressive realization and that it would not be applicable in the March 2013 elections<sup>35</sup>. The then House speaker, Kenneth Marende, noted that the 2015 date set for full realization of the gender equity is considerably far and that the process of progressive realization can be hastened<sup>36</sup>. Law can be used to reinforce or give permanence to certain social injustices leading to marginalization of certain groups of people<sup>37</sup> despite Article 100(a)(e) providing that parliament shall enact legislation to promote the representation in parliament of women and marginalized communities respectively<sup>38</sup>. In the realm of women's right, legal rules may give rise to and emphasize gender inequality.

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<sup>32</sup>Supra note 7, Article 81(b).

<sup>33</sup> Odipo Osano(2012) "why achieving gender rules requires constructive thinking", standard digital at <http://www.standardmedia.co.ke/?articleID=2000067828&PageNo=1&storytitle=why-achieving-gender-rule-requires-constructive-and-creative-thinking> (accessed 19 October 2012)

<sup>34</sup> LSKJ 9 (1) (2013)

<sup>35</sup> Republic Of Kenya supreme court of Kenya Advisory Opinions, Application 2 of 2012, In the Matter of the Principle of Gender Representation in the National Assembly and the senate (2012) eKLR.

<sup>36</sup> Anthony Gitonga (2012) "Marende: respect gender ruling", Standard Digital, 15 December 2012, at [http://www.standardmedia.co.ke/?articleID=2000072931&Story\\_title=Kenya:%20Marende:%20respect%20gender%20ruling](http://www.standardmedia.co.ke/?articleID=2000072931&Story_title=Kenya:%20Marende:%20respect%20gender%20ruling) (accessed 15 December 2012).

<sup>37</sup> Gender consideration in constitution making: Engendering women's right in the Legal process, Dr. Patricia kameri Mbote.

<sup>38</sup> Supra note 7, Article 100.

Therefore, one of the potent tools meant to be used in redressing gender inequality may itself perpetuate it<sup>39</sup>.

## **2.2 Law and gender discrimination among marginalized pokot women**

The Constitution of Kenya 2010 under Article 27 provides for the right against discrimination<sup>40</sup>; despite this provision, men and women follow different paths in society that has rendered men superior to women leading to discrimination of women. Margaret Schuler states;

‘The laws themselves are often unjust or discriminatory, limiting the rights of women. The application of law, even when adequate is often arbitrary or prejudicial toward women and women tend to be unaware of their legal status, of the effect law shave on them, or even that they are objects of injustice.’

The Pokot woman is occasioned to the informal justice system and the formal system is just but a tale heard. Proven further in the research paper, this system has not yield much for this common woman suppressed by the patrilineal system and lack of legal awareness. Even in cases where some Pokot women are willing to give a try to new ways that are protected by the law, there are several other factors away from the obvious that have tied down these women. The cost incurred in seeking legal redress where most of them are housewives depending on their husbands for a livelihood, the distance covered to access a court is long as most courts are set up in the county headquarters, time spent in and out of court and a major phobia created by the informal justice system where justice is for the men. These has led to difficulty of these women accepting and utilizing the formal justice system where they can rely on real and substantive law on some of their demeaning cultural practices leading them to opt for what they are occasioned to.

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<sup>39</sup> Dr. Patricia kameri Mbote, supra note30.

<sup>40</sup>Supra note, Article 27.

The only law the culturally caged Pokot woman knows is the law of her husband and she will accept the remedies set by this man whose law she spiritually follows by the letter of his unwritten script.

Legal pluralism is a reality for the Pokot woman as a balance has to be strike. Access to justice, in societies where religion and culture are important makers of the identity for women ,must balance-as a matter of political necessity and reality-these religious and cultural sources of identity must, as a matter of human dignity, be subject to equal protection of rights<sup>41</sup>.

Margaret Schuler writes that the problem of the inferior legal status of women centres around three key issues:

- 1.) The laws themselves are often unjust or discriminatory, limiting the rights of women;
- 2.) The application of the law-even when adequate-is often arbitrary or prejudicial towards women; and
- 3.) Women tend to be unaware of their own legal status, of the effect laws have on them, or even that they are objects of injustice.

Many women are still affected by customary and religious laws and any law that ignores customary and religious legal tenets will be observed more in breach than in observance<sup>42</sup>.

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<sup>41</sup> Ayesha Kadwani Dias and Gita Honwana Welch, *supra* note 21.

<sup>42</sup> Dr. Patricia Kameri Mbote, *supra* note 30.

## **2.3 Theoretical framework**

### **2.3.1 Utilitarianism**

Roscoe Pound approach was for a functional approach to law. His approach harmonizes with that of the utilitarian school which propounds the greatest happiness of the greatest number of people. All he was mostly concerned about was the need for the legal order to influence societal needs so that the law would not appear foreign or alien to the people<sup>43</sup>. Bentham says that the quest for pleasure and avoidance of pain is key to understanding human behavior. If the eradication of bad cultural practices and more subtle application of the law will bring more happiness to the Pokot woman, why not vouch for it?!

A good policy maximizes the happiness of the majority and utilitarianism is essentially a majority approach.

Women in Kenya constitute fifty percent of the population; this translates to the Pokot woman constituting a majority in her community. This calls for the rights of the Pokot woman being asserted so that the greater happiness of the community as a whole is attained. One of the deleterious effects of gender discrimination against the Pokot woman is that her community is rendered poorer by ignorance, de-emphasizing and marginalizing over half its population<sup>44</sup>.

### **2.3.2 The feminist approach**

For a very long time from history, women have been limited in almost every respect from the family life to the work place. A woman's path was pre-ordained and a few questions would be set forward on this chosen path by the courageous few who were determined to liberate the other

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<sup>43</sup> Law 516 Jurisprudence II Fully edited.

<sup>44</sup> Kivutha Kibwana, supra note 1.

women but before the wave to emancipate began, the woman's path remained as narrow as it had been. In the words of a woman in the book, 'A strange stirring', "The female really does not expect a lot from life. She's here as one's keeper-her husband or her children's"<sup>45</sup>. This remains true in Kenya's struggle for independence in the 1950's and 1960's where women were the home keeper's to take care of their children as their husband went to the fighting camps and they were to prepare food as well for the freedom fighters.

Feminism is a global phenomenon which gained speed right from the 19<sup>th</sup> century having 3 distinct waves but all of them aimed at freeing women from the male dominated world then and has continued to the present moment. It aims at acting as a counter to the putative patriarchal strands in the dominant culture while differing during the progression of the waves; it is a continuing movement that sought to challenge the political structure, power holders and cultural beliefs and practices.

The research paper aims at according the same rights to the marginalized Pokot woman to access the same rights accorded to her male counterpart at law without necessarily implying that the woman should be treated as the more favourable sex but by simply enlightening that some cultural practices in these minority community demeans the woman giving her a lesser platform in the community and at law in consideration of several factors.

The research paper does not intend on criticizing every bit of the ways of the Pokot woman, culture is a beautiful thing, its preservation is important but if there is need to eradicate some practices to make it even more beautiful; then it should be done. Giving priority to inherited cultural practices is a very skeptical issue.

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<sup>45</sup> Coontz, Stephanie. *A Strange Stirring: The Feminine Mystique & American Women at the Dawn of the 1960's*. New York basic books, 2011, 42.

### **2.3.3 Liberal feminism**

The theoretical framework of this research paper gives special consideration to liberal feminism. Liberal feminists believe in personal autonomy, a life of a person's own choosing. To attain the life of one's own choosing there are several enabling factors that should be perfect to facilitate this but in the normal environment which women live in there are several counteracting factors that sabotage this and because of these factors, women remain locked in 'their place in society'<sup>46</sup>. In the case study of the Pokot woman one of the sabotaging factors, most of them are ignorant of their rights and have become accustomed to what they have grown up practicing, that enlightening them on the real law provisions looks like a lie and more of a way of wrecking the family setup for them. What they do not know is that being born in a particular cultural milieu is not an exercise of freedom—quite the contrary<sup>47</sup>.

### **2.3.4 Radical feminism**

The women work to outdo the 'gender system' and patriarchal nature of inherited traditions and institutions. They do not seek any special privilege for women and simply demands that everyone receives equal considerations without discrimination on the basis of sex. Article 27(2) of the constitution of Kenya 2010 states, "Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres"<sup>48</sup>. This cannot be put further into a clearer view than it is; the constitution is the supreme law of the country. The sad bit is that the Pokot woman does not have access to this knowledge unless they are enlightened on this, they remain ignorant.

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<sup>46</sup> Plato.Stanford.edu/entries/feminism.

<sup>47</sup> Human Development Report 2004, Cultural liberty in today's diverse World-United Nations Development programme(UNDP).

<sup>48</sup> Supra note 7, Article 27.

Patriarchy is a cause of oppression for most women, not only the Pokot woman. Consequently, the Pokot woman is forced to submit to the authority of men and accept it without question. As a result of this, the Pokot woman is sometimes subjected to certain inhuman and degrading treatment. Their freedom is curtailed and they are prohibited from participating in the socially, economically and political activities in the society.

Diana H.Coole states that radical feminism;

‘.....Its aim has been to recast personal identities; to reclaim language and culture from their masculine forms...’

Equality should be beyond institutionalized equal rights and opportunities; equality would be expressed in everyday behavior, in private relationships, in people’s attitudes to each other in their everyday dealings<sup>49</sup>.

Feminism also aims at engaging with the government, the law, the social and cultural practices equality among the sexes and beliefs of the society and participate in a gainful economic activity “all with a goal” of bringing equality among the sexes<sup>50</sup> and prevent the marginalization of any set of people on the basis of their gender, age, sexual orientation, ability, race, religion, nationality, location, ability, class, caste or ethnicity<sup>51</sup>. Truth be stated, Pokot women are among the most discriminated in Kenya especially that they are among the marginalized tribes whose cultures are strongly held to. The women’s sexual orientation and gender have become nothing less than their source of discrimination and they have adapted to these woes of discrimination so dearly that it has become “their normal” and any question cast on their culture comes as a prick into their lives as a whole and the woman who questions this set up is shunned as lacking family

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<sup>49</sup> Justice & the duties of social equality-Carina Fourie, University College London.

<sup>50</sup> Rise -of-womanhood.org

<sup>51</sup> Report on Feminist leadership & movement Building Institute (FLAMBI) by Nelly Njoki-Program coordinator Amani Communities Africa (ACA).

values, too liberal and a men basher crossing boundaries. If the Pokot woman can be made aware of how the law can intertwine with her cultural, political and social set-up, she will be more alive to the idea of liberal feminism.

In Kenya however, Feminism is treated with suspicion not just by men but even by some women who have worked in the women's and gender movement for many years. This is due to the misconception of what feminism is and its association with the more radical stance that is given more publicity than the core of feminism which is basically humanism, justice and fairness for all<sup>52</sup>.

## **2.4 Conclusion.**

In society there always exists a gap between rights as they exist in law and rights as they are enjoyed by citizens. The Pokot woman does not know her rights. There has been a rapid result initiation programme spear headed by the Constitution implementation commission (CIC) which aims at educating Kenyans on the provisions of the Constitution. This programme has been running for a while but it has not reached the local person on the grassroots. If such a programme can reach the Pokot woman, bit by bit, the realization of a better life for her may be reached.

This research paper will answer the research question on legal pluralism, its effect on the Pokot woman and the relation between the legal systems. It will delve more into legal awareness and why it has not been achieved for the Pokot woman. Her rights under our legal statutes are important in this research paper. Discriminatory law, traditions and customs against this Pokot woman will be a center of discussion; these include early marriages, Female Genital Mutilation,

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<sup>52</sup> History of Feminism in Kenya.

right to access justice, right to education and right to own property. Proper recommendations will be stated and discussed in the hope of a new awakening for the Pokot woman.

The full potential of the Pokot woman can be realized if the demeaning impediments to her life will be eliminated ,addressing on issues of gender inequality, the dissemination of her rights dispatched ,the law be applied properly and the certainty from the law as a recourse where sex is used as the basis for unfair treatment.

To understand the role of the law in women's lives, one needs to understand not only the intention and rationale behind the law but also the consequence of the law on individuals<sup>53</sup>.

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<sup>53</sup>Patricia Kameri Mbote,supra,note 19 at page 167.

## **CHAPTER 3**

### **3.0 Introduction**

The previous chapter expounded on the gender concept and theoretical framework of the research paper in relation to the marginalized Pokot woman paper. This chapter will seek to answer the research question on legal pluralism in relation to the dilemma that exists in the application of state law and non-state law and the place for both these systems in Kenya especially when it comes to the marginalized communities like the Pokot. Legal pluralism has become a major theme in most jurisdictions in the world.

Derogatory practices by the Pokot community on its women are the backbone of the research paper as the aspect of law and how it applies is brought out. There are aspects that our law has or does not have that may be important if we adapt from other jurisdictions or these other jurisdictions can adapt from us. This can be done through a comparative analysis.

### **3.1 LEGAL PLURALISM**

Studies on gender and legal change in former African colonies have to take into account that the lives of women and men are affected by a plurality of norms<sup>54</sup>, it is not a matter to contest that the marginalized Pokot woman too is affected by legal pluralism. Legal centralism and legal pluralism are analytical frameworks that provide different understandings of the law<sup>55</sup>. Legal centralism denotes a unified system of rules, which are enforced through state machinery<sup>56</sup>. The national legal system is 'pluralistic' in the sense that it recognizes some religious and customary

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<sup>54</sup>Dr. Patricial Kameri Mbote, supra note 30.

<sup>55</sup> Ibid

<sup>56</sup> Ibid

law, mainly as personal law for quite restricted purposes<sup>57</sup>. The plural legal system exists in all multicultural societies, including our own and this automatically extends to the Pokot woman.

Legal pluralism allows for the protection of minority groups at the same time imposing the mainstream substantial law of the country. This can be illustrated by Article 11 of the constitution 2010 which recognizes custom as an heritage of its people<sup>58</sup>.

Legal pluralism may be divided into two namely, juristic and diffuse;

a.) Juristic legal pluralism

Juristic legal pluralism arises in situations where the official legal system recognizes several other legal orders and sets out to determine which norms of these legal orders will apply. Thus, the official legal system provides an operating environment for the plural legal orders. For example, a constitution may provide for the operation of certain religious or customary laws for particular ethnic or religious groups.<sup>59</sup> In juristic legal pluralism, which is common in colonial and post-colonial Africa, state law is the ultimate authority and it dominates other plural legal orders<sup>60</sup>. The Judicature Act (Cap. 8 of the Laws of Kenya), for instance, sets out the sources of Kenyan law and places the Constitution as the supreme law of the land; In the event of conflict of laws, the constitutional position prevails<sup>61</sup>.

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<sup>57</sup>William Twining, Normative and Legal Pluralism, General Jurisprudence (2009), ch.16(b)  
[www.cambridge.org/us/...file/202015/](http://www.cambridge.org/us/...file/202015/)

<sup>58</sup>Supra note 7, Article 11 states, 'This constitution recognizes culture as the foundation of the nation and the cumulative civilization of the Kenyan people and nation'.

<sup>59</sup> Ibid, Article 11-culture, Article 170-Kahis courts, Article 44-lanuage and culture, Article 56-minorities and marginalized groups.

<sup>60</sup> Dr. Patricia Kameri Mbote, supra note 30.

<sup>61</sup> Judicature Act, sec 3

## b.) Diffuse legal pluralism

Diffuse legal pluralism arises where a group has its own rules regulating social behavior whose but it allows for operation is neither sanctioned nor mandates from state law<sup>62</sup>.

Juristic legal pluralism is what applies in Kenya as the Constitution is the supreme law of the State it recognizes custom as the foundation of the nation as long as it is not repugnant to morality and human rights. It has been seen that there has been some form of consensus in the two systems but it is hard to conceptualize the 'legal' in 'legal pluralism'<sup>63</sup>. This is where to draw the border line between the legal and non-legal phenomena<sup>64</sup>. Critics argue that the plural system can legitimize traditional practices that are inconsistent with the expansion of freedoms<sup>65</sup>. Many traditional practices reject on the equality of women, for example in property rights, inheritance, family law and other realms<sup>66</sup>.

Section 3(2) of the Judicature Act states;

"The high court, the court of Appeal and all subordinate courts shall be guided by African customary law in the civil cases in which one or more of the parties is subject to or affected by it, so far as it is applicable and not repugnant to justice and morality or inconsistent with any written law".

Despite the use of the plural system, traditional institutions of this sort are not protected by the Bill Of Rights; under the constitution, discriminatory institutions would not be appropriate<sup>67</sup>.

The Kenyan case which largely applies on legal pluralism is the S.M Otieno case<sup>68</sup> which dealt with a burial saga where a question on the place of customary law in the national legal system

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<sup>62</sup> Dr.Patricia Kameri Mbote,supra note 30.

<sup>63</sup> Supra note 57

[www.cambridge.org/us/...file/202015/](http://www.cambridge.org/us/...file/202015/)

<sup>64</sup> Ibid

<sup>65</sup> Ibid

<sup>66</sup> Ibid

<sup>67</sup> Supra note 21 at pg.103

was raised. The Otieno case is a reminder that the state legal pluralism is not unimportant or uninteresting as some socio-legal scholars have suggested<sup>69</sup>.

Legal pluralism does not require the wholesome adoption of all practices claimed to be “traditional”. The accommodation of customary law cannot be seen as an entitlement to maintain practices that violate human rights, no matter how “traditional” or “authentic” they may claim to be<sup>70</sup>. This is why the woes of the marginalized Pokot woman need to be addressed as she lies on the border line of state law and non-state law therefore creating a dilemma. There are ups and downs in both systems but the traditional Pokot culture negatively impacts on their women.

### **3.2 DISCRIMINATORY LAW, TRADITIONS AND CUSTOMS AGAINST THE POKOT WOMAN.**

The Pokot woman has become a victim of the law and their culture, it is important to delve on the derogatory practices like, female genital mutilation, early/forced marriages, right to access to justice and right to own property. The law in whatever form, effectively regulates behavior by social consensus<sup>71</sup>. So issues of judgment, justice, fairness, and even right and wrong are relative to specific cultures and not absolute terms in themselves<sup>72</sup>. The law according to the researcher should not be selective in its applicability. Under Article 27(1) of the Constitution of Kenya, all human beings are equal before the law and are supposed to have equal benefit and protection of the law. Therefore, in order for the government which is the custodian of the society to be effective, it should ensure that all its citizens are well protected against unhealthy cultural

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<sup>68</sup> Virginia Edith Wambui v Joash Ochieng and Otieno siranga, Civil case No 4873 of 1986.

<sup>69</sup> Supra note 57, [www.cambridge.org/us/...file/202015/](http://www.cambridge.org/us/...file/202015/)

<sup>70</sup> Ibid.

<sup>71</sup> Mary Adhiambo Mbeo, Oki Ooko-Ombaka. Women and the law in Kenya.

<sup>72</sup> Ibid.

practices. Article 3 of the CEDAW<sup>73</sup> convention which Kenya has ratified requires that all member states should align their cultural practices in the sense they do not violate human rights issues and specifically with regards to women.

### **3.2.1 Female genital mutilation**

Female Genital Mutilation or Female Circumcision (FGM/FC) is a collective name given to several traditional practices that involve the cutting of the female genitals as a rite to womanhood<sup>74</sup>. In the Pokot community, girls in their teenage years are circumcised by a traditional practitioner with the approval of their fathers.

Section 2 of the Prohibition of Female Genital Mutilation Act, 2011 states that Female Genital mutilation comprises of;

All procedures involving partial or total removal of the female genitalia or other injury to the female genital organs, or any harmful procedure to the female genitalia, for non-medical reasons, and includes-

- (a) clitoridectomy, which is the partial or total removal of the clitoris or the prepuce;
- (b) Excision, which is the partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora;
- (c) Infibulations, which is the narrowing of the vaginal orifice with the creation of the covering seal by cutting and appositioning the labia minora and the labia majora, with or without excision of the clitoris,

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<sup>73</sup> Supra note 22, 1975

<sup>74</sup> Anika Rahman and Nahid Toubia, Female Genital mutilation: A guide to Law and Policies

But does not include a sexual reassignment procedure or a medical procedure that has a genuine therapeutic purpose<sup>75</sup>.

Under the Pokot culture, before a girl undergoes circumcision, she has to get the approval of her father. The test for her father's approval is the placing of a hot coal on the girl's nails and if she does not flinch, she is ready to uphold her family's dignity through the circumcision knife<sup>76</sup>. The placement of a hot coal on the nail amounts to cruelty therefore demeaning to her dignity which is protected in the constitution of Kenya 2010<sup>77</sup>. The other reason for the father's approval that I noted from an elderly woman is to allow the father to gather honey to make the traditional brew and food for the celebration after the girl leaves her isolation hut after her healing, this is more of a show on celebration on how he can cater for an entire village without running short of food or drinks. Normally, the celebrations will be done on the last months of the year where they harvest honey on approval, she along with girls who are to be circumcised in the same season with her undergoes a ceremony where their bodies are tattooed as a start of the initiation into womanhood.

On the circumcision day, the girls go around singing circumcision songs and smear ash on their faces an indication of their transition. They then head to a chosen river where they undress in front of onlookers, sit in a stone and await their cutting. It is the role of a close female family member to lift the girl after her cut, their fathers too stands by the river and watch the girls transition to women. The fathers of the girls who undergo the cut with bravery sheath their spears while those of the girls who cry during the cut raise their spears as if to spear them as a

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<sup>75</sup> Prohibition of Female Genital Mutilation Act, 2011.

<sup>76</sup> Supra note 4.

<sup>77</sup> Supra note 7, Article 28

sign of disgrace<sup>78</sup>. The dignity of the Pokot girl at this stage is not respected especially that she has developed as a woman and she is required to undress in front of onlookers.

As revealed by the older women, the fundamental reason advanced for female circumcision is the need to control a woman's sexuality<sup>79</sup>, this is a sentiment echoed by many other researchers on FGM thereby showing that it is a common among communities that practice it. It is alleged to reduce a woman's sexual drive/demand, retain her virginity and therefore reduce her promiscuity. Because sexuality is socially constructed, it has different meanings depending on its context<sup>80</sup>. According to the utilitarianism approach all human beings to be accorded the greatest pleasure possible. That is to mean anything done on someone should be effected with purpose of maximizing happiness and pleasure. Circumcision takes away the enjoyment of sex for the Pokot woman and makes her more of a tool of sex for the man.

Though the practice of FGM in the Pokot community has gone down with the coming of age of civilization and anti-FGM crusades, it has not been fully eliminated .Can the government play a role in eliminating FGM? Yes the government can. This has been done by the implementation of the Prohibition of Female Genital Mutilation Act, 2011.

In a statement by Hon.Jebii Kilimo she stated;

“My suggestion is let the government and anybody working for children's rights carry out education and awareness among the community to let them know the dangers of FGM/FC.Those campaigns have been carried out but they must be continuous”.

An offence in female genital mutilation is committed as stated in section 19 of the prohibition of female genital mutilation Act which states;

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<sup>78</sup> Supra note 4.

<sup>79</sup> ‘...there have been few rigorous studies investigating the significance of women's sexuality with regard to the continuation or abandonment of FGM’ [www.who.int/reproductivehealth/topics/fgm/fgm-sexuality/en/](http://www.who.int/reproductivehealth/topics/fgm/fgm-sexuality/en/)

<sup>80</sup> Anika Rahman and Nahid Toubia Female Genital Mutilation:A guide to laws and policies worldwide

(a) A person, including a person undergoing a course of training while under supervision by a medical practitioner or a midwife with a view of becoming a medical practitioner or a midwife, who performs genital mutilation on another person, commits an offence<sup>81</sup>.

(b) If in the process of committing an offence under subsection (1) a person causes the death of another, that person shall, on conviction, be liable to imprisonment for life<sup>82</sup>.

FGM should be viewed as a serious initiation rite in terms of the health risks it poses to the Pokot woman. As a Maasai woman from Tanzania said:

“In my work as a traditional birth attendant I have seen many women and girls suffer and die as a consequence of FGM. Because I have seen this suffering, I feel pity in my heart and this is what drives me to go far and wide in the community telling them to stop FGM<sup>83</sup>”.

The right of girls and women to abandon FGM has ample support in international law. What remains to be explored is the extent to which governments have a duty to ensure that the girls and women in their jurisdictions are empowered to make such a choice<sup>84</sup>. Achieving social justice for women requires recognition of varied set of interconnected rights<sup>85</sup>. These rights give rise to an equally diverse set of governmental duties<sup>86</sup>. Once identified, these duties provide useful framework for governmental action to address FGM<sup>87</sup>.

Section 3(2) of the Judicature Act states;

“The high court, the court of Appeal and all subordinate courts shall be guided by African customary law in the civil cases in which one or more of the parties is subject to or affected by it, so far as it is applicable and not repugnant to justice and morality or inconsistent with any written law”.

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<sup>81</sup> Supra note 75, 2011.

<sup>82</sup> Ibid.

<sup>83</sup> Female Mutilation: Human Rights horror [dayofthegirl.org/female-genital-mutilation-human-rights-horror/](http://dayofthegirl.org/female-genital-mutilation-human-rights-horror/)

<sup>84</sup> Ibid

<sup>85</sup> Ibid

<sup>86</sup> Ibid

<sup>87</sup> Supra note 75, 2011

FGM is a very intrusive rite to the privacy of a young Pokot woman; it washes away her dignity as a woman at a very young age.

### **3.2.2 Early/forced marriages and violence against the pokot woman**

Marriage in the Pokot community is performed according to the Pokot customary law which is recognized in the Marriage Bill, 2013<sup>88</sup>. Though their customs allow for polygamy, wife inheritance is not a common practice among these people. This section will look at early marriages through abduction and betrothal alongside the beating of wives in the Pokot community.

Like any marriage, it follows by an engagement and a series of acts like dowry payment that will culminate into a marriage<sup>89</sup>, dowry negotiations are done by the girl's male relatives. It establishes a relationship between a man and a woman, regulates their sexual activities, locates their children in the kinship system and influences the inheritance of their property<sup>90</sup>.

In the case of Hyde v Hyde<sup>91</sup> was the first case to define marriage as a voluntary union. Marriage under sec 3(1) of the Marriage Bill, 2013 defines marriage as;

'Marriage is a voluntary union between a man and a woman whether in a monogamous or polygamous union and registered under this Act<sup>92</sup>.'

As found from interviewing women from Chepareria, betrothal of young girls to older men or young men is a common practice done to maintain a good bond between the families involved.

This is proven in the bibliography of Domonguria in 'The Red spotted Ox' where he narrates about his sister after her circumcision and states;

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<sup>88</sup> Marriage Bill, 2013 section 6(1)(c)

<sup>89</sup> Bowen, Cynthia Grant, Women and the Law in the Sub-saharan Africa

<sup>90</sup> Ibid

<sup>91</sup> Hyde v Hyde and Woomansee (1866) 1.P & D.130 '...Marriage as understood by Christendom is the voluntary union for one man and one woman to the exclusion of others.' [www.uniset.ca/other/th/LRIPD130.html](http://www.uniset.ca/other/th/LRIPD130.html)

<sup>92</sup> Supra note 88, 2013.

‘Shortly afterwards, father arranged for her to be married to a fine man named Lopedur. We rejoiced at her wedding, and the cattle of her bride wealth augmented our herd. My sister became an exemplary wife and mother<sup>93</sup>.’

The above extract is proof that marriage happens at an early age for the Pokot girl and the sad part is that it happens mostly after her circumcision. This is an indication that from a certain young age she experiences a continuous series of rites under her culture that unacceptable under the bill of rights.

Through his bibliography, this is not the only incidence. The bibliographer, Domonguria, himself abducts a lone girl on the road because he thinks of her as beautiful, has forced sexual relations with her and finally keeps her as his own wife. She later reviles to him the reason why she was walking alone on the path when he abducted her and he sates;

‘Then she told me why she had been travelling alone on the day I accosted her by the road. A terrible man, who she had spurned repeatedly, had gone to her father to negotiate a marriage without her consent, and she knew her father would agree, because the man was wealthy. Desperate, she was running toward a safe sanctuary...<sup>94</sup>,’

The fundamental part to contract for marriage is consent but in the Pokot culture the Pokot woman does not have the right to consent. While a father is meant to be the protector of his children, he is more of an enemy for the marginalized Pokot woman as he benefits from her early marriage.

The Pokot have a traditional dance ‘kidong’aa’, during this dance a man can abduct a girl that he wants, she will become his wife and no more negotiations will be done after that. All that the man has to do afterwards is to pay the dowry as an appreciation to the girl’s parents. The act of abduction in itself is an offense<sup>95</sup>.

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<sup>93</sup> Supra note4.

<sup>94</sup> Ibid.

<sup>95</sup> Children’s Act, sec13.

What amounts to a marriage under the Pokot customary law is insensitive to the Pokot woman in that her consent is not valued. Despite sec 44 (3)(c) of the marriage Bill, 2013<sup>96</sup> requiring that for a marriage under customary law to go through, there must be consent from the parties involved.

Marriage starts at a very young age for the young Pokot girl, her years of being a child and enjoying teenage life are taken away by the imposition of marriage on her and replacing it with parental responsibilities instead. Sec 44 (3)(a) of the Marriage Bill, 2013<sup>97</sup> states that the legal age for marriage under customary law is 18 years of age.

### **3.2.3 Marital battering/violence**

Any reader from a more civilized community would think that early marriages are just it for the Pokot woman but they are mistaken, she also suffers from violence in marriage.

Historically, male dominance has created an imbalance that has led to the abuse of women in marriages<sup>98</sup>. The Pokot woman is not treated any differently than her husband's property after the payment of dowry and being a pastoralist community a great deal of dowry is paid.

The then Attorney General and presently the senator Bungoma county, Amos Wako acknowledged in 1999 that;

“... Violence against women pervades all social and ethnic groups. It is a societal crisis that requires concerted action to stem its course ... culture does influence the relationship between various groups in the society and ... some cultural practices, beliefs and traditions have had the tendency to relegate women to second class status in society thereby not only violating their rights as a human being [but also] leading to discrimination against some women ... customs and cultural practices have found their way not only into law but are used as a justification for violence against women.”

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<sup>96</sup> Supra note 88, 2013.

<sup>97</sup> Ibid.

<sup>98</sup> Mary Adhiambo Mbeo, Oki Ooko-Ombaka. Women and the law in Kenya

L'Orange stating from a 1915 ruling from a London Magistrate writes that the judgment is much better than an earlier one that stated that 'Women like walnut trees should be beaten everyday', he goes ahead and writes;

'Historically a woman on marriage was passed from authority and control of her father to that of her husband. The husband like her father before him was given the legal and moral rights to manage and control her behavior. Physical coercion was viewed merely as one the means at his disposal to be used to achieve acceptable behavior. This sanctioning was borne out of the 1915 ruling from a London magistrate that a husband of a nagging wife should beat her at home...<sup>99</sup>'

CEDAW in its General Recommendation on Violence against Women noted that;

'States may... be responsible for the private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish of violence, and for providing compensation<sup>100</sup>,

Violence amounts to assault under the Penal code<sup>101</sup> and it attracts a sentence. If it amounts to actual bodily harm it is a misdemeanor attracting a sentence of imprisonment of 5years, with or without corporal punishment. If it amounts to death, it will be prosecuted as murder or manslaughter. The Pokot woman finds solace in law if it is properly administered.

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<sup>99</sup> L'Orange,H.Forms of crisis Intervention and types of immediate and structural measures to Render Assiatance to women Assaulted in the Family.The state of New South Wales,Australia.Branch for the advancement of Women,United States.

<sup>100</sup> CEDAW, Violence Against women, General Recommendation No.19(Eleventh session 1992),A/47/38(General Comments),para 9.

<sup>101</sup> Penal Code,Chapter 63 Of the Laws Of Kenya.

### **3.2.4 Marital rape.**

Apart from the routine battering, the pokot woman suffers from marital rape. On interviewing from Ortum on being interviewed said that it is their marital duty to give in and satisfy their husbands sexual demands. What happens in the case she does not consent?

The pokot woman like most women suffers from marital rape because silently it is socially acceptable as husband's prerogative. This causes her physical and emotional damage where it is not reported. Society overlooks spousal rape as seen in the study of Arthur Okwemba who is a journalist with African Women and child feature service in Kenya in her article which was part of gender links opinions and commentary service stated that when she presented her finding on marital rape to two editors of a well-known newspaper they refused to publish it.

It leaves them vulnerable to a point they no longer play a role in controlling her own sexual and reproductive health. It has occasioned to these women having more children than they can manage to maintain and the small age gap between them is an indication of poor nurturing of the children.

The sexual offences Act, 2006 does not define spousal rape but it defines rape under sec 3.

Sec 43(5) of the Sexual Offences Act provides;

‘This Act shall not apply in respect to persons who are lawfully married to each other<sup>102</sup>,

This shows that unless you are physically hurt, spousal rape is acceptable within some degrees of the law. This begs the question, who is to look out for the minors forced into early marriages?

Sec 69 (1) of the Marriage Bill, 2013 states the grounds for dissolution of a marriage under customary law are;

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<sup>102</sup> Sexual Offences Act, 2006.

- a.)Adultery;
- b.)Cruelty;
- c.)Desertion; or
- d.)Any valid ground under customary law of the petitioner<sup>103</sup>.

The grounds for dissolutions are largely seen in the Pokot household but a lot needs to be done to make the Pokot woman realize that the law can aid her in dissolving an abusive marriage and understand the meaning of consent as defined in sec 74 of the sexual offences Act, 2003<sup>104</sup>.

The Pokot woman also needs to realize that the legal age for marriage is eighteen years as provided in the marriage Bill, 2013<sup>105</sup>.Therefore early marriages for the marginalized Pokot woman are illegal and so is a marriage contracted without the consent of both parties involved.

### **3.2.5 Access of justice for the pokot woman.**

The Pokot woman is accustomed to the informal justice system in dealing with her civil and criminal matters. Article 159 (1)(c) of the constitution,2010 allows for alternative dispute resolution<sup>106</sup>.The informal system sanctions the application of norms that include customary law that are generated outside the structure of state.

Though this procedure of accessing justice is understood by the Pokot woman, it prejudices her. The justice system is largely patriarchal in nature especially that it is written, not rigid and orally submitted therefore is easy to manipulate the outcome of any case. The reason for this as a Pokot woman from Ortum stated is that, men win cases so that he does not lose the woman's respect as the head of the family and that of his children. She further stated that in the few cases where the

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<sup>103</sup> Supra note 88,2013.

<sup>104</sup> The SOA2003,Sec 74 defines consent '...a person consents if she agrees by choice and has the freedom and capacity to make that choice.'

<sup>105</sup> Marriage Bill 2013 ,section 4.

<sup>106</sup> Supra note 7, Article 159.

perpetrators should be punished, and who are the authorities to solve a conflict, differ paradigmatically from the official law<sup>111</sup>.

There is a delicate balance between the application of local structures for the sake of their legitimacy and the reinforcement of asymmetric social relationships-which may further marginalize the weak and the poor<sup>112</sup>, in this case the Pokot woman.

### **3.2.6 Pokot women and property rights.**

The Pokot woman according to her culture cannot own property. Contrary to popular belief that she owns the cattle given as dowry, those animals are for her parents and shared among the people that helped in her upbringing. The best she can own are her utensils, not even her children are considered hers but her husband's. Land is considered be clan property, she can till it as a wife but cannot own it even after her husband's death.

The Pokot being from a pastoralist community largely relies on the application of customary norms when it comes to property. These norms prejudice the Pokot woman.

Important steps have been taken to emancipate women from the constraints imposed by traditional society and to enforce the constitution's prohibition against sexual discrimination<sup>113</sup>. However; much remains for the Pokot woman to realize her full legal rights in relation to property rights in relation to property. She needs to know that just as her male counterpart, she has the potential to own and manage property.

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<sup>110</sup>Supra 107.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Mary Adhiambo Mbeo, Oki Ooko-Ombaka. Women and the Law in Kenya

Though the succession Act aims at a universal application<sup>114</sup> under the domain of customary law, cultural rules as well as norms dictate who is entitled the deceased's property and is not subject to the modern notions of wills<sup>115</sup>. Sec 32 of the succession Act exempts some gazetted areas including West Pokot from application of the Act on agricultural land, crops and livestock<sup>116</sup>. On a more realistic note, agricultural land, crops and livestock is all a Pokot household owns in totality. Since they are legally exempted from the application of the Succession Act, the Pokot woman is at nobody's mercies when it comes to matters of inheritance.

Legal notice no.94 of 1998<sup>117</sup> stated districts which are allowed to apply customary laws and further sec 33 of the succession Act states;

'The law applicable to the distribution on intestacy of the categories of property specified in section 32 shall be the law or custom applicable to the deceased's community or tribe, as the case be'.

The Pokot woman should realize that spouses have equal rights to own property under the Married women property Act. The implication of the decision in Karanja's case<sup>118</sup> is that the Act is applicable to all systems of marriage under Kenya law and has the potential of removing inequalities experienced by women especially within the concept of customary law<sup>119</sup>.

Sec 1(1) of the Married women property Act that a married woman is capable of acquiring, holding and disposing by will or otherwise of movable and immovable property as her separate property in the same manner as if she is a single woman<sup>120</sup>.

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<sup>114</sup> The Law of succession Act, section 2 (1)

<sup>115</sup> Tanja Chopra, Illusion From Inclusion, at pg 28

<sup>116</sup> The Succession Act, Sec 32

<sup>117</sup> Legal Notice no.94 of 1998.

<sup>118</sup> Karanja v. Karanja (1976) K.L.R. (307).

<sup>119</sup> Dr. Patricia Kameri-Mbote 'Property rights of women in Kenya vis-à-vis the East African position' Enhancing women's rights in Kenya at pg 96

<sup>120</sup> Married Women Property Act.

Although this situation is changing through liberal judicial intervention and increasing advocacy on women's rights, specific policy interventions and legislative measures are necessary to ensure that women are empowered to access matrimonial property<sup>121</sup>. Initiatives like these should be aimed at going far and deep in to our society for that it can reach the marginalized Pokot woman.

### **3.3 Comparative analysis**

Gender in relation to the law is constructed differently in different cultures. There are ones that are still very rich when others have faded with time. Different jurisdictions have enacted legislations that are gender (in) sensitive. There are aspects from their legislation to pick from and other loopholes to avoid. This section of the research paper will look at a comparative analysis of South Africa and Kenya while randomly touching on other jurisdictions of the world.

#### **3.3.1 Kenya**

The move by Kenya into a multiparty state was the start of the reform agenda towards democracy and the protection of human rights. The old constitution as was seen by many was a statute that did not protect the rights of women. That led to the campaign towards the drafting and adoption of the Constitution, 2010.

Article 2 of the constitution 2010 provides for the supremacy of the constitution. The constitution is the supreme law and is therefore binding to all persons and state organs. Its validity and legality is not subject to contention.

The National values and principles of governance according to Article 10 (2) (b) are human dignity, equity, human rights, non-discrimination and protection of the marginalized. The Pokot

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<sup>121</sup>Janet Kabebe Macharia Women ,Law,customs and practices in East Africa, Laying the Foundation

woman being from a marginalized community, this article largely applies to her as her rights are breached, she is discriminated against and she needs protection from the law to attain equity.

The most important to the improvement of the constitution, 2010 is the introduction of chapter four on the Bill of rights. It is an integral part of our state and the major reason for the promotion and protection of human rights as stated in Article 19(2) of the constitution 2010 is to preserve dignity, promote social justice and the full realization of the potential of all human beings.

Kenya is one of the signatory to the CEDAW adopted in 1979 by the UN General Assembly, and spearheaded the Nairobi forward –looking strategies for Women initiative in 1985<sup>122</sup>.As part of the 2000 National Gender Policy, a National Commission on Gender and Development was enacted through an Act of Parliament in 2003<sup>123</sup>.

The Judicature Act<sup>124</sup> states all the sources of law that the courts may use in its jurisdiction in deciding cases.

In the past, the lack of enforcement mechanisms has made Kenya’s bill of rights imperative for most the history<sup>125</sup>.The introduction of the Prohibition of Female Genital Mutilation Act has been a way forward and the application of the Penal Code can no longer be applied on cases of FGM unless it leads to death then it can be treated as man slaughter.

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<sup>122</sup>Frederick Cowell ,’The road to Kenya’s New constitution ‘  
[www.consultancyafrica.com/index.php?option=com\\_content&view=article&id=567:the-road-to-kenyas-new-constitution&catid=91:rights-in-focus&itemid=296](http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=567:the-road-to-kenyas-new-constitution&catid=91:rights-in-focus&itemid=296)

<sup>123</sup> Ibid

<sup>124</sup> ,Judicature Act,chapter 63 of the laws of Kenya,sec 3

<sup>125</sup> Kuria,G.K,’litigating Kenya’s Bill of Rights’ in K.Kibwana,(ed) Human Rights and Democracy in East Africa,Nairobi.

### **3.3.2 South Africa**

South Africa having gone through the apartheid era has gone through a lot in terms of their legislation. The Kenyan constitution, 2010 borrows a lot from the South African constitution especially when it comes to the Bill of rights.

Section 9 of the South African constitution<sup>126</sup> is on equality same as the Article 27 of our constitution, 2010<sup>127</sup>. This is a rich section that was borrowed from the South African constitution as compared to what was provided in our old constitution which did not bar discrimination based on sex<sup>128</sup>.

Though our constitution is more gender sensitive, it recognizes culture as a foundation of Kenya<sup>129</sup> and this transcends to it being used against the Pokot woman who does not know her rights under the law. Sec 30 and 31 of the South Africa constitution provide for the right to culture which must be done in compliance with the Bill of Rights. Article 42 of the Algerian constitution guarantees all political, economic, social and cultural rights for the Algerian woman, while Article 81 provides she must participate in the development of the country<sup>130</sup>. This is a more precise provision that Kenyan legislations should adopt, they should be more specific and not just a broad sense of terms in there provision.

An Equality court was proposed in South Africa on the enactment of the promotion of equality and prevention of unfair Discrimination Act 2010 which advanced on prevention of unfair discrimination in public and private life of individuals. The introduction of an Equality court will

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<sup>126</sup> South Arican constitution.

<sup>127</sup> Supra note7.

<sup>128</sup> Supra note 1.

<sup>129</sup> Supra note 7,Article 11

<sup>130</sup> Supra note 1, pg3.

help in aiding the Pokot woman as most of her woes are as a result of inequality and discrimination in the Pokot community.

Equality outlaws discrimination of any person on grounds of gender and culture including F.G.M

<sup>131</sup>.Under Sec 12 (2) (a), the south African children's Act explicitly prohibits genital mutilation or circumcision of female children as opposed to sec 8(b) of Equality Act which prohibits discrimination based on FGM<sup>132</sup>.On this, south Africa can borrow a lot on the Kenya legislation as it has an entire Act on FGM, The Prohibition Of Female Genital Mutilation Act. The children's Act, 2001 also protects the girl child from harmful cultural practices like female circumcision.

Kenya is still working on legislation on domestic violence; The Protection against Domestic Violence Bill 2012.South Africa has legislation on domestic violence, the domestic violence Act 1998 which extends extra protection for the South African woman alongside the prevention of family violence Act. Our Kenyan legislation should speed the process to ensuring the Bill turns into an Act soon, if the Kenyan woman is to get extra assurity against violence, the Pokot woman too benefits from this legislation.

Spousal rape is greatly overlooked by most countries, Kenya for instance should follow in the path of Poland which was the first to illegalize it alongside Czecholovakia,Soviet Union,Denmark,Sweden,Norway to mention but a few.

The Ugandan Land Bill, 1997 has a specific clause imposing restriction on sale, mortgage and transfer of land by family members; any such transfer would require written consent of the

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<sup>131</sup> Barbara Kitui 'Female Genital Mutilation in SouthAfrica' [www.africlaw.com/2012/06/07/female-genital-mutilation;in-south-africa/](http://www.africlaw.com/2012/06/07/female-genital-mutilation;in-south-africa/)

<sup>132</sup> Ibid.

resident spouse and dependent children<sup>133</sup>. Another clause voided any decisions affecting customary land that disregarded the rights of women and children, specifically where those decisions denied them access, ownership of use of land<sup>134</sup>. A more subtle legislation should be introduced to cover for the rights of women in customary law for them to have rights to own and manage their property like the male counterpart especially in marginalized communities like the Pokot. Legislation on women and property is wanting in Kenya as we apply the Married Women's property Act, 1882 pending the enactment of the Matrimonial property Act, 2013.

South Africa has an entire legislation on customary marriages, it is called Customary Marriages Act 1998. While our Kenyan Marriage Bill is still on the table, it provides that parties to a customary marriage has to be on the consent of both parties. The South African Act is a better version as it provides that spouses in a customary marriage have equal status and capacity.

So much can be borrowed from jurisdiction but the ultimate goal that should be met is equality especially when it comes to women. Through helping the normal woman through law, the Pokot woman is also liberalized from the discriminatory cultural practices. Article 5(a) of CEDAW, obligates state parties to ensure that all cultural practices that are violate to the rights of women are eliminated<sup>135</sup>.

### **3.4 Conclusion.**

There is so much law other the world's jurisdiction, some to borrow from and some to shun from. The beauty of any legislation is when it tries by all means to address the existing issues of its citizens.

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<sup>133</sup> The Draft Land Bill, 1997 clause 15, Enhancing women's rights in Kenya pg 68,

<sup>134</sup> Ibid

<sup>135</sup> Supra note 22, Article 5 (a).

As much as there is application of legal pluralism, it should not be viewed as involving the denial or weakening of such ideals as liberal democracy, human rights and the rule of law<sup>136</sup>

The practices on the Pokot woman are more of an illustration of emotional abuse apart from the physical abuse in marriage. The practice of FGM is more a rite that promotes promiscuity as young girls are exposed to sex immediately after their healing as they become wives.

The continuous education of the Pokot woman on her legal rights and the sensitization programme to reinstate her mind to more acceptable practices is the way to go in the hope that she will reawaken from her impeding derogatory culture.

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<sup>136</sup> Supra note 57, [www.cambridge.org/us/...file/202015/](http://www.cambridge.org/us/...file/202015/)

## **CHAPTER FOUR**

### **4.0 CONCLUSION**

Throughout the research paper we have delved on the topic of marginalized women and the law: a case study of the Pokot woman. As a researcher I've seek to bring the reader on how the cultural practices among the Pokot have impacted on the Pokot woman. Through the general look, the research paper as dealt with ; the concept of gender, the theoretical framework on feminism and the utilitarianism, legal pluralism, derogatory practices on the Pokot woman and a comparative analysis among jurisdictions. Through this I seek to understand what qualifies the acceptable and unacceptable norms in the Pokot community?

It is clear from the research paper that the marginalized Pokot woman is very subordinate to her male counterpart and is disadvantaged by cultural beliefs and worsened by the lack of awareness of her rights. If she is to fully participate in building herself she should be liberated, treated with dignity and the impediments that prevent her participation should be eliminated.

There have been efforts by the public and private donors alongside NGO's such as World Vision Kenya, Setat and Sentinel to educate and pursue gender equality in the Pokot community.

Sentinel and Setat have been among the best known NGO's to address the issues of women, they use older women who are more liberal from the Pokot community to educate the Pokot Women on her woman rights. However, with such assistance there has been resistance from the Pokot woman with the perception that these are modern ways that will erode her off her cultures and has a result, this her led to the continuity of gender discrimination, cultural gap, ignorance of their rights and the law.

It is important that the Pokot woman does not confuse what she goes through as normal or as her freedom of expression and choice.

Despite the controversy that exist on the universal and cultural practices, the existence of human rights, including the CEDAW, represent important values<sup>137</sup> and are a necessary point of reference for the liberation of the Pokot woman.

Even under emergency conditions, no derogation is allowed in respect to certain core rights such as right from inhumane treatment<sup>138</sup>. Therefore, practices such as early marriages, violence in marriages, FGM, marital rape and denial of property rights for the Pokot woman is not justified under the realm of human rights.

## **4.2 RECOMMENDATIONS**

### **4.2.1 Human Rights Monitoring**

The cause of the woes of the Pokot woman as seen is majorly attributed to her lack of knowledge on her rights and her cultural practices. The government alongside other private institutions like NGO's should per take a role in monitoring that the rights of the Pokot woman are not infringed.

This can be done through a sensitization programme where the community as a whole is educated on the emotional and psychological effects of infringement of rights. The informal justice delivery personnel may for instance be guided by state law when it comes to dispute resolutions so that they may cease from unfair judgment and instead rely on democratic governance and the rule of law.

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<sup>137</sup> Jane.s.Jaquette and Gale Summer, Women and Gender equity in Development Theory and Practice at pg 132

<sup>138</sup> Smokin Wanjala and Kivutha Kibwana, Democralization and reform in Kenya.

The researcher commends the government on its outstanding fight against FGM but a lot need to be done, it should embark on the national plan to eliminate FC/FGM launched in November 1999 to emphasize on education and outreach over criminal prosecution<sup>139</sup>. The Pokot woman needs to be educated on the effects of this rite so that she does not lean on the baseless cultural significance of FGM.

Advocating against derogatory practices against the marginalized Pokot woman should not be seen as an importation of foreign western ideas into their way of life to erode their traditions. Instead it should be seen as a means to prevent the oppression of women through backward cultures. Violence in marriage is not an act of love, it is a way that insures men assert their authority where in the real sense they do not have or deserve any. For how long will the rights of the Pokot woman be infringed? It is time for her to stand and speak up against the cultural vices.

#### **4.2.2 Expanding on Access to justice**

Expanding access to justice can be done through democratic governance and justice programming. Justice for the Pokot woman is constrained by both illiteracy and powerlessness; they have no means of, or capacity for, literary expression, facilities for cultural or artistic expression<sup>140</sup>. Therefore she is unable to resist the oppression placed upon her.

A way should be found to incorporate state law and non-state law to avoid cases of the Pokot woman being treated with cruelty with the justification of their culture and the operation of the informal justice system that is not consistent. It should be known that the traditional justice system is not supposed to act contrary to the constitutional provisions of the fundamental human rights.

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<sup>139</sup> "Kenya plans to eliminate Female circumcision," panafican News Agency, Nov 18, 1999.

<sup>140</sup> Ayesha Kadwani Dias and Gita Honwana Welch, supra note 21.

Evident from the research, men are the main dispute settlers; women are not included in solving disputes. The researcher therefore advocates for a more inclusive system so that women are heard, where there is admissible evidence, it should be admissible and men should not be cautioned lightly where they are found guilty.

#### **4.2.3 Enacting and implementing better law.**

As discussed in chapter 3, spousal rape is not criminalized in Kenya. The sexual offences Act provides that the Act does not cover persons that are married. Spousal rape should be condemned by the law and an Act that deals with the same be enacted.

Part of marriage of the Pokot woman is abduction. The penal code does not define abduction of persons within the country especially when it comes to abduction of young girls for early marriages. The penal code should therefore borrow a few provisions on abduction from the Children's Act.

The Prohibition of Female Genital Mutilation Act in the researcher's view is very swallow as it only creates two offences under the Act when in the actual sense acts of FGM can lead to death of the Pokot woman. A provision should be enacted to deal with death caused by FGM.

The succession Act should incorporate provisions that are in line with the Pokot customary way of property rights instead of excluding them entirely from its application. The Pokot woman should be able to have property rights when it comes to matters of inheritance.

## BIBLIOGRAPHY

### Books

Red Spotted Ox: a pokot way of life by Pat Robins an autobiography of a pokot man in the 1970's. Copenhagen: International work Group for Indigenous Affairs.

Jennifer R. Fleischman, Georgia State University, Beads of Empowerment: The role of body Art in challenging pokot gender identities.

Ayesha Kadwani Dias and Gita Honwana Welch, Justice for the poor; perspectives on accerating access.

Bianco B. 2000. 'Gender and Material culture in west pokot, Kenya.'

D.L.Hodgson(ed).Rethinking pastoralism in Africa: gender, culture and myth of the patriarchal pastoralist.Oxford:James Currey Rosado M.Z,women culture and society of theoretical over view(Stanford university press 1990)p. 17-42

Margaret schuler,Empowerment and the law:strategies of third world women,(Washington DC OEF International 1986)

Tove Stang Dahl, Women's law: An introduction to feminist jurisprudence (Oslo Norwegian University press) 1987

United Nations, Equal Rights for Women-A call for Action (1973)

Anika Rahman and Nahid Toubia,Female Genital Mutilation: A guide to laws and policies worldwide.

Bowen, Cynthia Grant Women and the Law in the Sub-Saharan Africa.

Tunja Chopra Building Informal Justice in Northern Kenya, Tunja Chopra.

Mary Adhiambo Mbeo, Oki Ooko-Ombaka, Women and the Law in Kenya

Tunja Chopra, Illusion From Inclusion .

Janet Kabebe Macharia, Women, Law, customs and practices in East Africa, Laying the Foundation.

William Twining, Normative and Legal Pluralism, General Jurisprudence (2009), ch.16 (b)

Carole Pateman: The Sexual Contract (policy Cambridge 1988)

Jane S. Jaquette and Gale summer, Women and Gender Equity in Development theory and practice.

Kivutha Kibwana, Law and status of women in Kenya (faculty of law university of Nairobi and claripress 1996)

Report on Feminist leadership & movement Building Institute (FLAMBI) by Nelly Njoki-Program coordinator Amani Communities Africa (ACA).

Human Development Report 2004, Cultural liberty in today's diverse World-United Nations Development programme (UNDP).

Coontz, Stephanie. A Strange stirring: The Feminine Mystique & American Women at the Dawn of the 1960's. New York basic books, 2011, 42.

Justice & the duties of social equality-Carina Fourie, University College London

History of Feminism in Kenya

Law 516 Jurisprudence II Fully edited

The Law society of Kenya Journal (Vol. 9(1) 2013

A Legal analysis of gender Disparities in Access to Education in Kenya, Vane Nyaboke Omae-Akama, LL.M Thesis. (Unpublished)

Justice for the Poor: Perspectives on Accelerating Access, Ayesha Kadwani Dias and Gita Honwana Welch.

### **Legal Notice**

Legal Notice no.94 of 1998.

### **Cases**

Virginia Edith Wambui v Joash Ochieng and Otieno siranga, Civil case No 4873 of 1986.(S.M Otieno case)

Karanja v. Karanja(1976) K.L.R. (307).

Hyde v Hyde

### **Website**

Rise –of-womanhood.org

[www.africlaw.com/2012/06/07/female-genital-mutilation;in south-africa/](http://www.africlaw.com/2012/06/07/female-genital-mutilation;in south-africa/)

[www.consultancyafrica.com/index.php?option=com\\_content&view=article&id=567:the road-to-kenyas-new –constitution&catid=91:rights-in focus&itemid=296](http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=567:the road-to-kenyas-new –constitution&catid=91:rights-in focus&itemid=296)

[www.uniset.ca/other/th/LRIPD130.html](http://www.uniset.ca/other/th/LRIPD130.html)

[www.cambrige.org/us/...file/202015/](http://www.cambrige.org/us/...file/202015/)

[www.who.int/reproductivehealth/topics/fgm/fgm-sexuality/en/](http://www.who.int/reproductivehealth/topics/fgm/fgm-sexuality/en/)

[Plato.Stanford.edu/entries/feminism](http://Plato.Stanford.edu/entries/feminism)

Odipo Osano(2012) “why achieving gender rules requires constructive thinking”, standard digital at <http://www.standard media.co.ke/?article ID=2000067828 & Page No=1 & story title=why-achieving gender rule requires-constructive and creative-thinking> (accessed 19 October 2012)

Anthony Gitonga (2012) “Marende:respect gender ruling”, Standard Digital,15 December 2012,at [http://www.standard media.co.ke/?article ID=2000072931&Story\\_title=Kenya:%20Marende:%20 respect%20gender%20ruling](http://www.standard media.co.ke/?article ID=2000072931&Story_title=Kenya:%20Marende:%20 respect%20gender%20ruling)(accessed 15 December 2012).

### **Statutes**

Vienna Convention on the Law of Treaties, 1969.

The constitution of Kenya, 2010.

Convention of elimination of discrimination against women (CEDAW) 1979

Universal Declaration of Human Rights (UDHR) 1948

African charter on Human and People’s Rights (1986)

International Covenant On economic, social and cultural rights (ICESCR) 1966 The south African constitution,1996.

The Algerian constitution.

The Draft Land Bill,1997(Uganda)

Customary Mrrriages Act,1998(SouthAfrica)

The Domestic Violence Act,1998(SouthAfrica)

The Prevention of Family Violence Act(SouthAfrica)

The prevention of Equality and Protection of Unfair Discrimination Act,2010(South Africa)

Education Act,2013.

Married Women Property Act

The Law Of succession Act.

Marriage Bill,2013.

Sexual Offences Act,2006.

Children's Act,2001.

The penal code chapter 63 of the laws of Kenya.

### Articles

Patricia Kameri Mbote,Gender consideration in constitution making: Engendering Women's rights in the legal process ,in University of Nairobi Law Journal)(UNL 2003

L'Orange,H.Forms of crisis Intervention and types of immediate and structural measures to Render Assistance to women Assaulted in the Family.The state of New South Wales,Australia.Branch for the advancement of Women,United States.

Kuria,G.K.,'litigating Kenya's Bills of Rights' in K.Kibwana,(ed) Human Rights and democracy in East Africa,Nairobi.

Dr, Patricia Kameri Mbote,'Property rights of women in kenya vis-à-vis the East African position'

Frederick Cowell 'The road to Kenya's new constitution'

Female Genital Mutilation in South Africa by Barbara Kitui

**Advisory Opinion**

Republic Of Kenya supreme court of Kenya Advisory Opinions, Application 2 of 2012, In the Matter of the Principle of Gender Representation in the National Assembly and the senate (2012)

eKLR