Colonial and Postcolonial Constructions of Family Law

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Sylvia Wairimu Kang'ara, *Beyond Bed And Bread: Making The African State Through Marriage Law Reform -- Constitutive And Transformative Influences of Anglo-American Legal Thought,* 9 **Hastings Race & Poverty L. J.** 353 (2012), available at Comparative L. Rev.

Western legal regimes tend to characterize family law as a field regulating private relations between adults, as well as between adults and their children and as "the opposite" of both public law and the law of market exchange. During the latter part of the twentieth century, feminists analyzed how the legal treatment of family relations as private amounted to a public endorsement of private coercion.[1] More recently, comparative law scholars have begun to study and understand the emergence of family law as a distinct field in western legal thought.[2] Over and over again, the emergence of family law, a surprisingly recent phenomenon, is associated with constitutive moments in the making of modern states: from federalism in the U.S. to the construction of nation-states in Europe. Sylvia Wairimu Kang'ara's *Beyond Bed and Bread: Making the African State Through Marriage Law Reform* is an important new contribution to this literature, demonstrating the central role that reforming marriages played in the construction of colonial and post-colonial states in the parts of sub-Saharan Africa colonized by Britain.

The Article begins by analyzing the central role that the invalidation of customary marriages in Africa played in colonial administration. During the initial legal encounter between common law and African customary laws, judges invalidated large swaths of prior legal relations. In a (professed) effort to align colonial practices with English morality, colonial administrations superimposed a classical legal scheme of thinking about the family and the market at a moment when most of the African economy depended upon a different household model. Instead of the separate spheres ideology that characterized family law of the classical legal tradition, African customary marriages were based on an economically active household—often composed of polygamous units engaging in economically important exchanges of property through marriage, such as the bride-price. Starting from an assumption that individual free will was the building block for any civilized legal system, colonial judges invalidated customary marriages as repugnant to English colonial morality. They looked hard, but did not seem to find any African subjects capable of becoming "individual holders of exclusive and absolute rights" in the classical legal tradition. Critically, customary marriage's failure to cultivate subjects that were suitable rightsholders marked the first step toward property expropriation in the name of empire building.

In this way, Kang'ara shows that, far from being an act with merely moral significance, "defining marriage was an important act of conquest and a corner stone of the market oriented state" that emerged via colonialism. To begin with, under the customary legal system, marriage and communal land tenure were inextricably linked. English common law disrupted this link by disentangling customary marriage law from property law. Under the common law view, customary marriage was morally repugnant and therefore invalid. Judges proclaimed communal ownership of property and other resources presumptively valid, but inefficient, and therefore inferior to the common law's regime of individual property rights. This mass invalidation of customary marriages and communal land tenure had, of course, enormous distributional consequences. In the formal economy, it allowed employers and bureaucrats to ignore rights that the newly introduced commercial law was supposed to award the colonized, such as workers' compensation claims for wronged workers' spouses. In the informal economy, it allowed the emergence of newly-entitled heads of households, opportunistically invoking formal property rights to exclude traditional communal rights to resources.

But as Kang'ara shows, this sweeping invalidation of African law became unsustainable when colonial administrators

realized that vast swaths of conquered territory would be ungovernable without it. This realization led to a “legal dualism,” with English colonial courts supposedly applying customary law. In marriage law, courts started accepting the possibility of “converting” customary unions into formal, Western-style marriages. The possibility of conversion had significant, unintended distributional consequences. Previously polygamous men now had to choose one formal wife, leaving pauperized polygamous wives in their wake. Jurisdictional conflicts between African courts and colonial courts ensued. Struggles between kin members asserting succession rights on the basis of customary law and newly-minted Christians asserting individual rights over property acquired during marriage intensified.

Kang’ara then tells the story of a dramatic shift in attitude towards customary law, which came about with the advent of socio-legal jurisprudence in the first half of the twentieth century. Rejecting the idea of the inferiority of customary law, Professors Eugene Cotran (1938-) and Antony Allott (1925-2002) of the School of African and Oriental Studies in London provided what Kang’ara calls the “doctrinal staging” for modern family law in post-colonial, national states. Cotran accomplished the first step, identifying characteristics common to all African customary marriages despite huge fragmentation in marriage practices. Allott further noted that African marriages performed functions such as capital production and investment commonly attributed to English corporate or property law, thus dignifying an institution largely stigmatized in early colonialism. These moves led to the Restatement Project of African customary law (1968), whose main characteristic, according to Kang’ara, was the excavation of individualism within African customary law. To that end, Cotran classified customary marriage rules as core or peripheral. A marriage that violated core rules was invalid; one that violated merely peripheral rules was valid. Consent and capacity to consent were deemed core, while dowry, animal slaughter, and cohabitation were deemed peripheral. Polygamy could be set aside in the Restatement Project not because of its moral repugnance, but because of its supposed lack of economic significance and its value simply as a cultural totem. This classification was, of course, conspicuously close to western ideas about marital validity and the non-economic nature of family relations, but it provided post-colonial courts with an opportunity to expunge customary law “without committing treason against African national pride.”

In all, Kang’ara has drawn a compelling picture of the complex set of legal interactions that led to the building of modern African family law. Far from a coherent customary law that was initially shut out of courts only to become accepted eventually, Kang’ara provides several illustrations of the idiosyncratic legal hybrids that emerged from the interactions of English common law and customary marriages. Moreover, she argues that these hybrids emerged to deal with problems common in liberal legal regimes everywhere, namely, the tensions between individualism and community against the background of a market-driven economy. In the colonial context, individualism was read onto “western” law and community onto African customs, at the same time as common law in the U.S. was reading community onto the family and individualism onto the market. For instance, the initial conversion of customary marriages into Western-type marriages left a legacy of individual property owners borrowing against previously communal property. When borrowers defaulted and their family members tried to protect themselves against foreclosure, courts appealed to the idea of the customary African trust to protect dispossessed family members. Kang’ara astutely observes that these court-created customary trusts in favor of family members were similar in effect to the gradual weakening of titled-based property distribution upon divorce in the United States, through equitable remedies and the eventual adoption of equitable distribution statutes. In the African context, the number of potential losers from a legal insistence on individual rights in marital property was broad. It involved more kin members than the divorcing homemaker in the United States, but the legal mechanism devised to deal with their plight was similar in function.

Kang’ara’s work highlights the central role that disentangling the family from the economy has played in creating market-driven regimes and provides new insights about how this process unfolded in parts of sub-Saharan Africa formerly colonized by Britain. These insights are relevant for comparative family law scholars and theorists of legal pluralism, as well as for law and development scholars. The family and its regulation have been and remain central in the political economy of liberalism. To see this centrality, one needs to go beyond claims of culture and identity and focus instead, as Kang’ara urges, on the profound transformations that liberal regimes demanded of pre-modern households.

The article manifests a somewhat ambivalent relationship to the idea of African customary law as an effect of the colonial encounter rather than a pre-existing system of legal rules. Even though Kang'ara amply demonstrates the invention of "African customary law" from the initial colonial period through the post-colonies, she occasionally seems to imply a clean distinction between a pre-existing customary law and western law. This is a complex problem deserving further attention. The importance of the contribution, however, remains unchanged. It provides a valuable window into colonial and post-colonial constructions of family law, highlighting surprising commonalities with parallel processes elsewhere in the western world.

1. *See e.g.,* Elizabeth M. Schneider, *The Violence of Privacy* 23 **Conn. L. Rev.** 973 (1990-1991).
2. Janet Halley and Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism—Introduction to the Special Issue on Comparative Family Law* 58 **Am. J. Comp. Law** 753 (2010).

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