

**Gendered Dimensions of Marriage and Divorce Registration
Laws in Africa**

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Executive Summary

This report analyzes the gendered impacts of inadequacies in marriage and divorce registration in six countries on the African continent. The six countries reviewed are Uganda, Kenya, South Africa, Rwanda, Burkina Faso and Morocco, representing the different types of legal systems prominent on the continent:¹

- Uganda is a mixed common law and customary law system, although Islamic law plays a large role for the Muslim population;
- Kenya is a mixed common law, customary law, and Islamic law system;
- South Africa is a mix of common law and civil law (by way of the Netherlands), although customary law governs many tribal communities in the country;
- Rwanda is a mix of civil law (by way of Belgium and Germany) and customary law;
- Burkina Faso is a mix of civil law (by way of France) and customary law; and
- Morocco is a mix of civil law (by way of France) and Islamic law, but Jewish law and customary law continue to play an important role for certain populations.

A review of each of these legal systems reveals a common thread: each legal system fails to adequately recognize various marriages embraced by the population and in doing so, denies women in these marriages important rights. The choice to recognize or not recognize certain marriages is not reflective of the legal traditions predominant in any nation. Rather, it likely reflects the social values of the population, as well as the development and policy goals of the state.

Marriage registration law has tremendous impacts on the rights of women and children, because it controls which marriages are legally recognized by the state. Legal recognition is the key to obtaining rights to property and maintenance during and after marriage. In addition, the process of registration adds an additional layer of government oversight, which allows authorized officiants to ensure that marriages are entered into with free and full consent, and that the minimum age of marriage is being upheld.

Divorce registration law, when considered on its own, reveals fewer gendered consequences. However, gendered effects are laid bare by the discrimination evident in the difference in available grounds for divorce for men and women, the mandatory minimum length of marriage some countries institute before a divorce may be initiated, and the difficulty accessing courts to pursue a formal divorce decree and exercise legally-

¹ The legal system classifications listed herein are drawn from the University of Ottawa's Juriglobe classification system. *Juriglobe-World Legal Systems*, UNIV. OF OTTOWA, <http://www.juriglobe.ca/eng/rep-geo/cartes/afrique.php> (last visited July 28, 2016). There is no uniformly agreed upon measure of how to determine when a legal tradition rises to the level of being considered part of the legal system, as opposed to having influence within the legal system. Thus, for example, some might argue that Rwanda is a civil law nation in which customary law has significant influence. Juriglobe, on the other hand, classifies it as a mixed system. To be accurate and consistent, this report uses the Juriglobe classifications, but also clarifies what other legal traditions maintain a significant influence, especially in the realm of family law.

protected rights to property and maintenance. Additional interview or survey research may reveal gendered dimensions of divorce registration that are not immediately evident upon a reading of the laws.

A. Marriage Registration

The biggest issues faced by women relate to the state's non-recognition of certain types of marriages. In each of the countries reviewed, several types of marriages fail to gain recognition, either because the registration process creates opportunities for marriages to remain unregistered, or because the legal system opts not to recognize certain marital relationships despite their persistence. Marriage registration is particularly important for women, because it allows women to access rights through marriage that are often otherwise unavailable to them. Although many of the statutory laws are imperfect and continue to preference men, they do grant women rights upon entry into, during, and at the dissolution of marriage. Upon entry into marriage, the registration process allows a government official to determine that the marriage was entered into legally, with full consent of the spouses, and does not violate minimum age of marriage requirements. During marriage, many — though not all — statutes provide that spouses have rights to access property, not be evicted, and not be alienated from property by the other spouse. Upon divorce, statutes provide rights to maintenance. Upon the death of a spouse, statutes provide at least some level of inheritance rights for spouses when there is no will to govern the disposition of property.

These rights are particularly important for women because they often otherwise do not have direct access to property. Historically, men, as heads of household, were the ones who controlled property and able to inherit. Throughout the continent, where customary norms controlled most societies, a woman's access to property, particularly land, was granted from the men in her life. The result is that even today, assets are predominantly held by men.

Absent a registered marriage, these statutory rights are not immediately available to women. In some countries, such as Uganda and South Africa, courts are willing to hear arguments that a marriage existed despite the lack of registration. However, obtaining a court declaration that a marriage exists is not easy. It requires overcoming various hurdles to access to initiate court proceedings, as well as providing sufficient evidence to meet burdens of proof. Arguing that a marriage exists or existed can be very difficult if the other party to the marriage refutes it, or, in the case of the death of a spouse, if the surviving relatives refute the marriage. The desire to keep property is strong motivation for a spouse or surviving relatives to refute the existence of a marriage.

Not all unregistered marriages operate outside a legal regime. Spouses in an unregistered customary law or Islamic law marriage are subject to the rules set forth by the relevant customary law or Islamic law tradition. Although customary law varies from community to community, and customary regimes permit the constant negotiation of rights, generally wives have fewer rights to property in most customary regimes. Under customary law, it is important for property to stay with the clan, and thus property flows through men. A

woman's access to property before she is married comes through her father or brothers, and after she is married through her husband. Upon death of her husband or a divorce, she typically does not have any guaranteed rights to the marital property, unless she is raising minor children from the marriage.

Islamic law typically grants wives greater rights than customary law, but the rights do not rise to the level of full equality. Women in Islamic marriages own their dowry outright, are granted some rights to maintenance depending on the type of divorce, and are guaranteed a share of inheritance.

Women in marriages outside of statutory, customary, or religious law are left with little to no protection.

Key sites of vulnerability due to non-registration or non-recognition are found in customary law marriages, unrecognized polygynous marriages, and cohabiting unions:

- **Customary Law Marriages.** In each of Uganda, Kenya, and South Africa, while customary marriages are recognized, the burden of registering these marriages falls to the parties to the marriage, increasing the likelihood that the marriages will go unregistered. In Rwanda, Burkina Faso, and Morocco, marriages pursuant to customary law are not recognized by law, despite the fact that customary law continues to be a prevailing force for sections of the population. Although customary law does sometimes afford some protections to widows and divorced wives, these protections are minimal and substantially weaker than the available protections under statutory law.
- **Polygynous Marriages.** Polygynous marriages receive varying degrees of recognition. Burkina Faso permits polygyny provided that the spouses to the first marriage, at the time of marriage, affirmatively select an option to become polygynous. In Uganda and Kenya, polygynous relationships are permitted in both Islamic and customary marriages. In South Africa, polygyny is only permitted in customary marriages, though it continues to be practiced by the Muslim population. Rwanda does not permit polygyny in any form, though it continues to be practiced in certain regions, and Morocco recognizes it in accordance with Islamic law. In South Africa and Rwanda, the continued practice of unlawful polygyny puts junior wives and their children at risk. In these cases, polygyny presents a public policy problem as governments have an incentive to prohibit it in order to protect women's rights. However, failing to recognize the rights of junior wives leaves these women at risk of poverty if the marriage ends for any reason. South African courts have put in place some protections for junior wives, suggesting that some legal measures may be available to protect these women while allowing the state to continue to uphold a policy of non-recognition of polygyny.
- **Informal or *De Facto* Marriages (referred to in various countries as cohabitation, concubinage, and "come-we-stay" marriages).** This catch-all

term refers to all other informal marriages that exist in fact, though they may not be recognized by law. In countries such as the United States, these relationships may be considered “common law marriages” once they achieve a minimum duration and certain other characteristics. They are not given legal recognition by any of the countries surveyed, although evidence suggests that a significant percentage of the population of countries such as Kenya and South Africa engage in these forms of long-term relationships. Women in these relationships are at particular risk because they have no rights if their partner leaves or dies. Children resulting from these relationships also face greater obstacles asserting rights to maintenance.

In all six countries, informal marital relationships and customary marriages present the greatest risk of vulnerability for spouses, particularly wives. Though some, but not all of the countries surveyed recognize customary relationships, the registration process for these relationships is not automatic, and thus these marriages run the risk of falling through the cracks. Some research suggests that men are unwilling to actively register their marital relationships, creating hardship for women in marriages that require additional steps to achieve registration. In addition, although young couples are engaging in cohabitation with greater frequency, many countries refuse to recognize these relationships, often on moral grounds.

Without laws expanding the types of marriages recognized by law or, in the case of marriages that are against public policy, laws granting additional protections for women in those relationships that continue to operate outside the law, nations’ progress towards gender equality will continue to be stunted.

B. Divorce Registration

The law on divorce registration does not appear to have many gendered complications. For the most part, registration is an automatic process completed upon the conclusion of divorce proceedings. However, in some cases women are not granted equal rights to obtain a divorce, or the law requires a minimum time period before a divorce can be initiated, encourage informal separation over divorce, ultimately creating the potential for a loss of rights. When a registered marriage ends informally, spouses are unable to exercise the rights to marital property, spousal maintenance, and child maintenance typically granted upon divorce.

To the extent inequalities are evident, they relate to substantive inequalities in divorce law, such as unequal grounds for divorce. In Uganda and Morocco, for example, the laws grant different grounds for divorce for men and women. While Uganda’s Supreme Court has held that these provisions must be read and applied in non-discriminatory fashion, Uganda’s parliament has continued to ignore the court’s directive that it redraft the law. In addition, there may be gendered bias on the part of officials involved in adjudicating divorces (court clerks, judicial officers, registrars, etc.) that is not evident on the face of the law and that can be uncovered with field research.

To the extent that laws institute mandatory time minimums before a divorce can be initiated, couples may opt to informally separate rather than waiting the necessary period to initiate a formal, legal divorce. In Kenya, a divorce in a civil marriage cannot be initiated until 3 years have passed since the celebration of the marriage. It is possible that some couples, rather than waiting the 3 years, choose to informally separate instead. It is unknown how many couples return to initiate a formal divorce after the 3 years have passed.

Outside of the language of the law, an ability to access the relevant institutions can prevent couples from formally registering a divorce. Where formalizing divorce requires visiting a formal court, parties living in remote, rural areas, lacking income for travel or court fees, lacking child care, or otherwise unable to take the time necessary to spend multiple days in court to iron out a contentious divorce, are boxed out of the formal divorce processes. Though these issues of access do not directly pertain to what is written in legislation, they must be addressed if the rights granted by law are to become truly available to the populace.

I. Introduction

This report analyzes the gendered impacts of inadequacies in marriage and divorce registration in six countries on the African continent. The six countries reviewed are Uganda, Kenya, South Africa, Rwanda, Burkina Faso, and Morocco, representing the different types of legal systems prominent on the continent. A review of the different types of *de facto* marriages in each country, as well as the laws governing marriage, divorce, succession, and land, reveals that highly negative consequences flow to women as a result of the lack of registration and recognition of certain types of marriages. The research does not reveal a link between the lack of registration and any particular type of legal system. Rather, as laws governing the substance and process of marriage tend to reflect the morals and values of a society, the differences in recognition and rights granted to spouses are likely more a reflection of the morals, social norms, and development priorities of each of the countries reviewed.

Access to formal divorce registration is important because separating spouses in a registered marriage cannot obtain statutory rights granted upon divorce without going through a formal divorce process. In some countries, women and men are granted unequal rights to divorce, sometimes forcing one spouse or another to stay in the marriage or risk losing rights to property and maintenance by informally separating. Typically, the party who suffers in this scenario is the wife. Additionally, in each of the countries reviewed, further research should be conducted to determine the extent to which obstacles to access prevent parties from seeking a formal divorce.

This report does not review the registration, recognition, and dissolution of foreign marriages.

This report proceeds as follows. Section II provides context for the reader unfamiliar with African legal systems or marriage laws. Sections III through VIII provide a brief review of each of the countries surveyed. These sections briefly describe the legal system of the country, list the laws reviewed, provide an overview of the types of marriages recognized in the country, describe the gendered dimensions of marriage registration, as well as the gendered dimensions of divorce registration. These sections are designed to provide an overview of the most salient points. Thus, laws selected were chosen because they tie to some of the key rights a person might gain in marriage. In Africa, where land has tremendous economic and social value, and where lack of property rights can cause severely cripple a person's ability to subsist, access to marital property and the ability to assert rights over marital property are extremely important. Section IX provides a brief conclusion.

II. Context: Legal Systems and Marriages in Africa

A. Legal Systems in Africa and Countries Surveyed

The continent of Africa is characterized by legal pluralism. Customary law remains a prevailing force throughout much of the continent, although in no case is it the primary source of government authority. Countries otherwise base their governments on civil and common law, and some maintain a very strong Muslim law tradition as well. The areas of personal law sometimes also include different laws for Indian-origin and Christian communities.

The report begins with heavily common law jurisdictions and ends with the civil law jurisdictions. In Uganda, the prevailing legal traditions are common law and customary law, with Islamic law exerting a significant influence for the Muslim population. Kenya is a mix of common law, customary law, and Islamic law. Juriglobe describes South Africa as a mix of largely common law and civil law, although there are tribal communities in the country that continue to operate under custom. Rwanda is a mix of civil law and customary law, Burkina Faso is a mix of French legacy civil law and customary law, and Morocco is a mix of French legacy civil law and Muslim law, with Jewish and customary law playing an important role in the marriages of certain sub-populations. The civil law, common law, customary law, and Islamic law traditions are described below.

1. Civil Law and Common Law

The colonial legacy left African states with legal systems steeped in either civil or common law. The differences between the two are nuanced, and many argue that they are actually converging to a common position. Still, there are some key philosophical differences between the two systems.

Civil law systems are commonly referred to as “code-based” systems. That is, all the law is to be found in the written code enacted by the appropriate legislative body. Rwanda, Burkina Faso, and Morocco, as predominantly civil law nations, have a set of codes in which all laws are located. Later laws passed by the legislature amend or add to the code. Under a strict civil law approach, judges are not capable of creating law. That is, they are only able to apply the law as written in the code. Civil law systems do not adopt *stare decisis*, and as such, prior judicial decisions are not binding law, they are simply persuasive. However, the principle of *jurisprudence constante*, pursuant to which judges will adhere to a consistent trend of decisions, is accepted in civil law nations. Over time, in various nations and to varying degrees, the judiciary has gained some power and in many nations is now more than simply a mouthpiece.

Common law systems also have written laws, but written laws are not the only sources of law. Common law judges can and do create law when the need arises, especially when there is no written law that is applicable. The principle of *stare decisis* is a fundamental principle of common law. Lower courts are bound by decisions of higher courts and

judges are expected to adhere to their own prior decisions. A choice not to follow precedent requires explanation.

The differences between civil law and common law do not necessarily translate into differences in the content of various laws. In terms of family law, it is not evident that there is one type of matrimonial regime recognized in most or all civil law nations and another in most or all common law nations. Rather, family law seems to be very specific from nation to nation, reflecting the morals and cultural preferences rather than the legal system, and must be analyzed accordingly.

2. Customary Law

Any discussion of African customary law must begin with a caveat. Due to its very nature, customary law is specific to the community in which it operates. Thus, any discussion of African customary law is made up of generalizations, and some exception is likely to be found somewhere. The term “law” is often disputed as an appropriate moniker for the system of norms that governs rules and behavior in these societies, but it is useful shorthand, and will be the term used in this report.

Customary law typically is described as a needs-based, organic, and fluid system of law. It is often unwritten, and not expected to be rigidly applied. Rather, it is responsive to the needs of the community. Norms can be disputed and changed as needs require. Over time, however, due in part to political and economic changes, customary law has become quite static, and norms are more rigidly applied. Thus, practices which were once considered to be quite protective of women, such as widow inheritance, persist despite the fact that women no longer find relief in these practices.

3. Islamic Law

Islamic law is subject to different schools of jurisprudence and frameworks for interpretation.² As a result, the substantive content cannot easily be conveyed in pithy phrases. However, the sources of Islamic law informing these schools of jurisprudence are:

- The *Qu’ran*, which is considered to contain the revelations of God. Although most of the verses do not pertain to legal matters,³ matters of marriage and inheritance are specifically covered in the *Qu’ran*, and are cited as the support for various Islamic family law rules today.
- The *Sunnah*, which is a record of the actions and teachings of the Prophet Muhammed and is now understood as a “narrative...prescribing the narrative conduct of believers.”⁴

² See HAMID KHAN, ISLAMIC LAW: PRACTITIONER’S GUIDE 27-47 (INPROL 2013), http://inprol.org/sites/default/files/publications/2013/islamic_law_guide-july_2013_final_0.pdf.

³ *Id.* at 19.

⁴ *Id.* at 21.

- *Qiyas*, or analogical reasoning. This can be likened to legal reasoning by analogy and is used to question whether a rule contained in the *Qu’ran* or *Sunnah* is applicable in a new case.⁵
- *Ijma* means consensus. This allows a view that has consensus backing to achieve the level of binding law.⁶
- *Ikhtilaf* is a doctrine of disagreement, and permits a Muslim to choose which interpretation of law to follow, provided that such interpretation is not contrary to “Islam’s most basic principles.”⁷

B. Overview of Types of Marriages

The following is a brief overview of the types of marriages covered in this report. The below descriptions are meant to serve as a general guide to the various types of marriage, and do not cover all the details or nuances of any of these types of marriage. Beyond the general scope provided below, any nation or community may have its own individual variation.

- Statutory/Civil marriages – the term “civil” marriage typically refers to non-religious marriages performed in accordance with procedures set forth by the state. Registration is completed before a civil servant. In states that embrace a state religion, civil marriages and religious marriages may be one and the same.
- Islamic marriage – Islamic marriages are recognized as their own type of marriage in many African states, and they may follow the rites and procedures dictated by the religion. Islamic marriages place value on marriage contracts, which specify the rules by which the given couple wishes to follow in married life. This marriage contract may specify the amount of the *mahr* or *sadaq*, which is the dowry the husband pays to the wife upon their entry into marriage, as well as amounts either party may agree to pay in the event of divorce. The specifics of marriage and divorce will vary depending on what school of thought is embraced by local communities or the law. However, the following elements do arise in the context of at least some African Islamic marriages:
 - Polygyny⁸ – Polygyny in Islamic marriage is much debated. Although it is permitted in verse 4:3 of the *Qu’ran*, the language also seems to only permit the taking of additional wives if those wives can be treated justly. Still, many Muslim communities in sub-Saharan African adhere to the

⁵ *Id.* at 24.

⁶ *Id.* at 25.

⁷ *Id.* at 26.

⁸ Polygyny refers specifically to the practice of a single man taking multiple wives.

belief that polygyny is freely permitted, and polygynous marriages are not uncommon in the region.⁹

- *Khula/Khol* divorce – This practice allows a wife to initiate a divorce before the appropriate adjudicatory or religious body. In some cases, a woman must be willing to pay some form of compensation to her husband to effectively obtain a *Khula/Khol* divorce.
- *Talaq* divorce – Also known as repudiation, this practice allows a husband to unilaterally and orally initiate a divorce by stating, “*talaq*.”¹⁰ This statement is followed by a waiting period, called *iddat*, during which the couple tries to reconcile. For a divorce to be complete, the *talaq/iddat* process must be performed three times, with no reconciliation occurring. In Morocco, the repudiation process must be authorized by a court in order to dissolve the marriage.
- Access to property – Upon divorce, a woman’s right to property is determined by the authority overseeing the divorce. A woman retains ownership over her *mahr*, except in limited circumstances, such as the marriage ending prior to its consummation. Courts may determine whether a husband should pay his spouse a fixed sum as compensation for the divorce and maintenance of any children. In addition, the marital contract may specify whether and how much compensation should be paid upon divorce. Upon death of any person, the *Qu’ran* specifies certain inheritance shares. Verse 4:12¹¹ specifies that if a wife dies and leaves no child, her surviving husband receives ½ of her estate. If she leaves a child, the surviving husband receives ¼ of her estate. However, if a husband dies and leaves no child, his surviving wife receives only ¼ of his estate. If he leaves a child, the surviving wife receives 1/8 of the estate. If there are multiple surviving wives, they are sometimes required to share the entire 1/8 share.¹²
- Customary marriage – marriages under the customs and tradition of a clan, tribe, or local community are common throughout the African continent. These customs and traditions vary from community to community, and thus, cannot be easily described with a broad brush. However, some common elements do arise in various African communities:

⁹ The USAID STATcompiler, reviewing all DHS data available in sub-Saharan Africa, reveals that it is not uncommon for men and women to be in marriages with multiple co-wives, and in some countries polygamy was reported among 25% or more of survey respondents. USAID BETA STATCOMPILER, <http://beta.statcompiler.com/> (last visited Feb. 29, 2016).

¹⁰ Depending on the school of thought, this statement may need to be made before a minimum number of witnesses to be considered valid by the relevant adjudicatory body or council.

¹¹ The Noble Quran, verse 4:12, <http://quran.com/4> (last visited Mar. 1, 2016).

¹² In Uganda, for example, co-widows share an eighth share of their deceased husband’s estate. Valerie Bennett, Ginger Faulk, Anna Kovina, and Tatjana Eres, *Inheritance Law in Uganda: The Plight of Widows and Children*, 7 GEO. J. GENDER & L. 451, 460 (2006).

- Polygyny – some African customs permit men to take additional wives. Laws vary as to whether the consent of the current wife is required.
- Divorce – grounds for divorce vary from community to community, but typically a wife has fewer grounds for divorce than a husband.
- Bride price – many communities consider bride price a required element of marriage, even as laws are passed at the state level asserting that such a practice is optional only. The practice involves the payment of money from the groom’s family to bride’s family. Unlike the *mahr* under Islamic law, the bride wealth does not go to the bride, but rather becomes the property of her family members. Many communities also believe that upon divorce, the bride price must be repaid to the groom’s family, absent exceptional circumstances.
- Access to property – property tends to travel through the men of the family. The overarching motive of traditional, clan-based land ownership is the retention of property within the clan. Because women are not considered to be true members of the clan (as daughters, they are expected to eventually marry off and join a different clan; as wives, they are only members of their husband’s clan for as long as they remain married into the clan), traditionally women only had access to land through their fathers or husbands. A women’s access to marital property upon death or divorce is thus extremely limited. However, if her husband has died, she is often permitted access to and use of the land while she is raising children, and sometimes some form of maintenance for raising those children if she is divorced.¹³ In recent years, however, the practice of running widows off of marital property, regardless of whether she is caring for minor children, has become increasingly common.
- Hindu marriage – Hindu marriages are performed in accordance with the rites and customs of the form of Hinduism practiced by the local community. Local custom may dictate how the marriage and divorce are actually implemented, but state laws tend to view Hindu marriages as largely operating under the civil marriage and divorce structure. In at least some African nations, the term “Hindu” is used to describe any person of Indian origin practicing a religion that has Indian roots, which includes Indian Buddhists, Jains, and Sikhs.
- Christian marriage – Christianity is a widespread religion, and church marriages remain common in many African states. However, as with Hindu marriages, while Christian marriages and divorce may be influenced by local religious views, by law African Christian marriages largely operate under the civil marriage and divorce structure.

¹³ See Aparna Polavarapu, *Reconciling Indigenous and Women’s Rights to Land in Sub-Saharan Africa*, 42 GA. J. INT. COMP. L. 93, 110-119 (2013).

III. Uganda

A. Legal System and Laws Reviewed

Uganda is a former British colony that gained independence in 1962. Uganda's legal system is thus heavily based on the English common law, although like many of its neighbors, customary law plays an important role in the everyday lives of the Ugandan people, especially in rural areas. Islamic law is also an important influence in the country's Muslim communities.

The laws governing the various matrimonial regimes in Uganda are: the Marriage Act,¹⁴ the Customary Marriage (Registration) Act,¹⁵ the Hindu Marriage and Divorce Act,¹⁶ the Marriage and Divorce of Mohammedans Act,¹⁷ and the Marriage of Africans Act.¹⁸ The Divorce Act¹⁹ governs divorce in Hindu, civil, and Christian marriages. In addition, the Land Act,²⁰ Mortgage Act,²¹ and Succession Act²² were reviewed for their impacts on spousal rights relating to property during the life of a marriage and to inherit property from a deceased spouse.

B. Types of Marriages Recognized

The various marriage laws provide the rules for civil, Christian, Muslim, and customary marriages, as well as marriages according to the rites of any religion with roots in India.²³ The Marriage of Africans Act contemplates Christian marriages, but defers to the substantive provisions of the Marriage Act in setting the rules for marriage. Under the various laws:

- **Polygyny** is only permitted in Islamic and customary marriages, although Hindu marriages that were already polygynous prior to September 1, 1961 (the date the Hindu Marriage and Divorce Act entered into force) remain valid.
- The **minimum age of marriage** varies. In civil and Christian marriages, spouses entering their first marriage must be at least 21 years of age. In Hindu and customary marriages, the minimum age of marriage for males is 18 years, and for females 16 years. In all four types of marriages, a father's consent is required for any person younger than the minimum age to marry. The mother's consent is only sought if the father is deceased or otherwise incapable of giving consent. In Muslim marriages, minimum age is governed by Mohammedan, or Islamic, Law.

¹⁴ The Marriage Act Cap. 251 (1904) (Uganda).

¹⁵ The Customary Marriage (Registration) Act Cap. 248 (1973) (Uganda).

¹⁶ The Hindu Marriage and Divorce Act Cap. 250 (1961) (Uganda).

¹⁷ The Marriage and Divorce of Mohammedans Act Cap. 252 (1906) (Uganda).

¹⁸ The Marriage of Africans Act Cap. 253 (1904) (Uganda).

¹⁹ The Divorce Act Cap. 249 (1904) (Uganda).

²⁰ The Land Act Cap. 227 (1998) (Uganda).

²¹ The Mortgage Act (2009) (Uganda).

²² The Succession Act Cap. 162 (1906) (Uganda).

²³ The definition of "Hindu" in the Hindu Marriage and Divorce Act includes Hindus, Buddhists of Indian origin, Jains, and Sikhs. The Hindu Marriage and Divorce Act Cap. 250, § 1(2) (1961) (Uganda).

C. Gendered Dimensions of Marriage Registration

Though the Ugandan legal regime provides for registration of marriages and divorces of all the major types of marriages in the country, gaps in the registration leave many spouses in unregistered marriages without rights. Most often, the wives in these marriages face the brunt of these negative consequences, due to the lack of rights available to women under traditional structures.

The legal structure of registration appears to only truly safeguard civil and Christian marriages, which are automatically registered pursuant to the laws.²⁴ However, in practice, religious houses of worship appear to be incorporated into the registration infrastructure, with Mosques, Churches, and Temples having the opportunity to be licensed as places of worship for marriage.²⁵ The rules for registration of Hindu marriages are to be set by the Minister, and the law implies that these marriages are to be registered by the officiant.²⁶

Pursuant to the law, customary marriages²⁷ and Muslim marriages²⁸ are only registered after the parties apply for official registration. The registration procedure for Muslim marriages expressly favors husbands, placing the responsibility to apply to register a marriage on the husband and only granting the right to apply to a wife if her husband dies before the marriage can be registered or if he fails to apply for registration within the requisite period.²⁹ However, Muslim mosques reportedly maintain registers and have a systematic method of registration.³⁰ To the extent this is true, the risk of Muslim marriages remaining unregistered is minimized. In addition, the law is clear that the lack of registration does not render invalid any Mohammedan marriage or divorce that would otherwise be valid.

Thus, customary marriages appear to be the most likely to remain unregistered and lacking statutory legal protection. In addition, customary relationships in which bride price has not been paid not only lack statutory protection, but often also lack customary protections.

²⁴ The Marriage Act Cap. 251, § 25 (1904) (Uganda). Civil marriages are performed in the presence of a registrar. Churches licensed to perform marriages are required to keep a register of all marriages performed there. ICRW, *supra* note 30.

²⁵ <http://ursb.go.ug/services/civil-registration/licensing-a-place-of-worship-for-marriage/>

²⁶ The Hindu Marriage and Divorce Act Cap. 250 (1961) § 5 (Uganda).

²⁷ The Customary Marriage (Registration) Act Cap. 248 (1973) § 6 (Uganda). Parties to a marriage have 6 months from the date of marriage to apply for registration. *Id.* Failure to register a customary marriage is punishable by fine. *Id.* at § 20.

²⁸ The Marriage and Divorce of Mohammedans Act Cap. 252, § 5 (1906) (Uganda). Applications to register marriages under Mohammedan law must be made within 1 month from the date of the marriage. *Id.*

²⁹ *Id.*

³⁰ INTERNATIONAL CENTER FOR RESEARCH ON WOMEN AND UGANDA LAND ALLIANCE, PROPERTY RIGHTS IN MARRIAGE AND FAMILY: A TRAINING TOOLKIT 5, <http://www.icrw.org/files/images/Property-Rights-and-Gender-A-Training-Toolkit-Property-Rights-in-Marriage-and-Family.pdf> [hereinafter ICRW].

Women in unregistered customary marriages lose out on statutory rights that are available to those in registered marriages. These laws provide greater protections to women than they would otherwise receive under customary law. Upon marriage, registration allows civil servants to ensure that spouses are freely consenting to the marriage and of the appropriate age. During marriage, laws protect spouses against alienation of property. The Land Act requires spousal consent before one spouse can alienate land “on which the person ordinarily resides with his or her spouse and from which they can derive their sustenance.”³¹ Additionally, the Mortgage Act requires spousal consent before a marital home is mortgaged.³²

The Succession Act is the statutory law governing inheritance, although a number of its provisions relating to intestate succession were declared unconstitutional due to their discriminatory nature. Although the Act grants inheritance rights to female heirs, the offending language continued to grant greater rights to men.³³ As a result of the Constitutional Court decision, lower courts should and often do grant widows full rights to matrimonial property. The law also provides that a surviving spouse and any surviving male children under the age of 18 or surviving and unmarried female children under the age of 21 may continue to occupy the residential holding they were living in if it was the principal residence of the decedent.³⁴ Tellingly, the Act does not specify what happens to a woman’s property when she dies intestate, revealing the implicit assumption that marital property—and the common reality that most other property—belongs to the husband.³⁵

In an unregistered customary marriage, a woman’s only hope is to appeal to customary norms. Under customary law, a woman is generally unable to inherit in full her husband’s property. If she has minor children, she is able to manage and use the property in trust for her sons.³⁶ In some cases, she is able to remain on clan land if she agrees to be “inherited” by one of her husband’s male relatives. In addition, the practice of widow eviction—widows being chased off of marital property—remains a problem in some rural areas.

A woman who is able to prove the existence of a customary marriage should still be able to go to formal court and benefit from rights granted in the Succession Act, the Land Act, or other relevant acts. However, proving the existence of a marriage that was not registered can be difficult. In a 2013 High Court case, a judge refused to recognize a

³¹ The Land Act Cap. 227, § 39 (1998) (Uganda).

³² The Mortgage Act, §§ 5-6 (2009) (Uganda).

³³ Among the offending language were provisions that preferred male heirs to female heirs, granted a widow only 15% of a deceased husband’s property while allocating 75% to lineal descendants, increasing the widow’s share to 50% in the case where is no lineal descendant and to 99%, when there is both no lineal descendant and no dependent relative. The Succession Act Cap. 162, §§ 2, 27 (1906) (Uganda).

³⁴ *Id.*, Second Schedule.

³⁵ Florence Asimwe and Owen Crankshaw, *The Impact of Customary Laws on Inheritance: A Case Study of Widows in Urban Uganda*, 3 J. OF L. AND CONFLICT RES. 7, 9 (2011).

³⁶ Asimwe and Crankshaw, *supra* note **Error! Bookmark not defined.**, at 8.

customary marriage when the only evidence provided was a letter stating that bride price had been paid.³⁷

In an even more difficult situation are women who are in unregistered marriages that cannot qualify as customary marriages because the customary rites were not completed. This problem arises when bride price remains unpaid.

Many customary marriages in Uganda require the payment of bride price to complete a marriage.³⁸ When men—or their families—cannot afford to pay bride price, some communities and clan groups do not consider a couple to be married even if they hold themselves out as such and have completed other necessary customary rites. The result is that upon widowhood or divorce, women are not only unable to benefit from statutory rights granted upon marriage due to the fact that their marriage was unregistered, and they are also unable to claim any customary rights typically owed to them because bride wealth was never paid. This would also be true for men in these marriages, but realistically, because men have greater access to and assumed ownership over property, especially under customary law, the negative consequences are more severely felt by women.

D. Gendered Dimensions of Divorce Registration

Dissolution of marriage in civil, Christian, and Hindu marriages is governed by the Divorce Act, although the Hindu Marriage and Divorce Act provides some additional grounds for divorce for Hindus. Dissolutions of customary marriages are conducted in accordance with the applicable custom and dissolutions of Muslim marriages are governed by Mohammedan law, typically as applied by Qadhi courts.

Of the various marital regimes, only Muslim marriages have clearly gendered provisions relating to divorce registration. However, these provisions result from existing inequalities in divorce, and do not in themselves create additional gendered effects. As with marriage, divorces under customary regimes are the most likely to remain unregistered. Substantively, each of the matrimonial regimes has divorce provisions that are unequal as between husbands and wives, denying women the same rights as men to seek a divorce.

Additionally, outside of a customary law marriage, seeking a legal divorce may require overcoming hurdles to access which are often insurmountable to women living in poverty or in rural areas. Accessing civil courts or Qadhi courts may require long distance travel, payment of court fees, and loss of income from being away from the field and finding childcare. In customary marriages, because the local clan can implement the appropriate rites and processes, access is not as much a problem. However, if a woman seeks to

³⁷ *Wamono v. Equity Bank Uganda Ltd & Anor* (2013), <http://old.ulii.org/ug/judgment/commercial-court/2013/98-0>

³⁸ Uganda's supreme court has recently declared the demand for repayment of bride wealth to be unconstitutional.

contest the decisions of the clan by going to a Magistrate Court, she will face the same obstacles to access that those in other types of marriages face.

i. Divorce Act (civil, Christian, and Hindu marriages)

The Divorce Act occupies a peculiar space, in that several provisions of the act were held to be discriminatory by Uganda's Supreme Court, but the law has yet to be amended by the Ugandan Parliament. The Divorce Act, as written, provides that a husband may petition for the dissolution of marriage on the grounds that his wife has committed adultery.³⁹ A wife, on the other hand, may petition for the dissolution of marriage on the grounds that her husband has: (1) changed his professed religion from Christianity to another religion and married another woman, or (2) been guilty of, "(i) incestuous adultery; (ii) bigamy with adultery; (iii) marriage with another woman with adultery; (iv) rape, sodomy or bestiality; (v) adultery coupled with cruelty; or (vi) adultery coupled with desertion, without reasonable excuse, for two years or upwards."⁴⁰ These provisions were declared discriminatory for providing unequal grounds of divorce based on sex. The Supreme Court held that the Act must be construed as providing these grounds of divorce to both parties, and all related provisions must be adjusted accordingly in their reading.⁴¹ Thus, going forward, courts have been required to accept the listed grounds of divorce from either a husband or wife.

The Act does not provide for no-cause divorce.

ii. Marriage and Divorce of Mohammedans Act

The Marriage and Divorce of Mohammedans Act anticipates *Khula* and *non-Khula* divorce.⁴² The act clearly states that marriages under the Marriage and Divorce of Mohammedans Act are not authorized relief under the Divorce Act, but may be granted relief by any competent court pursuant to Mohammedan law. In Uganda, Qadhi courts have jurisdiction over Muslim marriage, divorce, and inheritance.

In the case of non-Khula divorce, the register must be signed by the man initiating the divorce and at least one witness.⁴³ In the case of a Khula divorce, the register must be signed by both parties to the divorce (or a representative as necessary) and at least one witness.⁴⁴ These differences in registration are reflective of the fact that in Uganda, non-Khula Islamic divorces may be initiated by men. Although women may initiate Khula divorces, in many cases she may be expected to pay compensation to complete the divorce, meaning she may have to experience great monetary loss in order to leave a marriage. However, because these rules are governed by Qadhi courts and may change

³⁹ The Divorce Act Cap. 249, § 4 (1904) (Uganda).

⁴⁰ *Id.*

⁴¹ Uganda Ass'n of Women Lawyers v. Att'y Gen., (2004) UGCC 1, <http://www.ulii.org/ug/judgment/constitutional-court/2004/1>.

⁴² The Marriage and Divorce of Mohammedans Act Cap. 252, § 5 (1906) (Uganda).

⁴³ *Id.*

⁴⁴ *Id.*

over time, further field research should be conducted to determine how the courts are implementing the rules of Islamic divorce.

iii. Customary Marriage (Registration) Act

Divorce under customary law is done in accordance with custom. Divorce disputes may be handled by clan leaders, Local Council Courts, or Magistrate Courts. A divorce handled by clan leaders is likely to be entirely informal. Local Council Committees, though technically no longer operating legally, are connected with the formal court system of Uganda. Divorces mediated by local council committees are thus more likely to find themselves formally registered, although it is not guaranteed. If a divorce petition finds its way before a Magistrate court, it will enter the formal system and be documented accordingly. Magistrate courts often consider customary law in making decisions that impact customary institutions, but the extent to which customary law is followed will vary from court to court. Thus, some women may find themselves in better financial positions when using the formal court system, while others may not.

IV. Kenya

A. Legal System and Laws Reviewed

The legal system of Kenya is pluralistic, comprising of common law (based on the English common law), customary law, and Islamic law. Kenya's common law legacy comes from its history as a British colony, and the Islamic law has been attributed to the spread of Islam via early trade. Though only 11.1% of the population is estimated to be Muslim,⁴⁵ Islamic law is given some prominence in the Constitution. The Constitution qualifies the right to equality "to the extent necessary" for the application of Muslim law with respect to matters of personal status, marriage, divorce, and inheritance,⁴⁶ and creates Kadhis' courts to have jurisdiction over these matters with respect to professed Muslims.⁴⁷

The laws reviewed are the Marriage Act,⁴⁸ which consolidated Kenya's various marriage laws in 2014 and sets the terms for civil, customary, Hindu, Muslim, and Christian marriages; the Matrimonial Property Act,⁴⁹ which governs the disposition of marital property; the Law of Succession Act,⁵⁰ which governs the rules of inheritance; and the Children Act,⁵¹ which is designed to give effect to and protect the rights of children.

B. Types of Marriages Recognized

Prior to the enactment of the Act, there were seven different laws governing the various forms of marriage in Kenya.⁵² Although the Marriage Act permits multiple forms of marriage, it also consolidates a number of the characteristics of marriage, providing that:

- "Parties to a marriage have equal rights and obligations at the time of marriage, during the marriage, and at the dissolution of the marriage."⁵³
- The minimum age of marriage for both men and women is 18 years.⁵⁴
- Marriages conducted under the Marriage Act must be witnessed by two competent witnesses.⁵⁵

⁴⁵ UNITED STATES CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK: KENYA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html> (last visited Mar. 1, 2016).

⁴⁶ CONSTITUTION art. 24(4) (2010) (Kenya).

⁴⁷ CONSTITUTION art. 170 (2010) (Kenya).

⁴⁸ The Marriage Act, No. 4 KENYA GAZETTE SUPPLEMENT No. 42 (2014).

⁴⁹ The Matrimonial Property Act, No. 49 KENYA GAZETTE SUPPLEMENT No. 183 (2013).

⁵⁰ Law of Succession Act Cap. 160 (2008) (Kenya).

⁵¹ The Children Act Cap. 141 (2010) (Kenya).

⁵² The Marriage Act repealed the prior Marriage Act, The African Christian Marriage and Divorce Act, The Matrimonial Causes Act, The Subordinate Court (Separation and Maintenance Act), The Man Marriage and Divorce Registration Act, The Mohammedan Marriage Divorce and Succession Act, and The Hindu Marriage and Divorce Act.

⁵³ The Marriage Act, No. 4 KENYA GAZETTE SUPPLEMENT No. 42, § 3(2) (2014).

⁵⁴ *Id.* at § 3(4).

⁵⁵ *Id.* at § 5(1).

However, some differences are retained:

- Christian, civil, and Hindu marriages are monogamous.
- Customary and Muslim marriages are presumed to be “polygamous” or “potentially polygamous.” A “potentially polygamous” marriage may be converted to a monogamous marriage if both parties declare their intent to make such a conversion, and at the time of conversion the husband only has one wife. Polygamy in this context really means polygyny, in that it only contemplates husbands taking on additional wives.

Perhaps most importantly, the Marriage Act contains an important clawback provision with respect to Muslim marriages, stating, “[a]ny provision of this Act which is inconsistent with Islamic law and practices shall not apply to persons who profess the Islamic faith.”⁵⁶ Thus, the Act’s provisions regarding, *inter alia*, property rights and divorce are not necessarily applicable to parties to an Islamic marriage.

C. Gendered Dimensions of Marriage Registration

The Marriage Act permits registration of: Christian, civil, customary, Hindu, and Islamic marriages. Any marriage that was legally valid prior to the commencement of the Marriage Act retains its validity.⁵⁷ However, the Act provides that parties to any unregistered Hindu, Islamic, and customary marriages entered into prior to the commencement of the Marriage Act *shall* apply for registration within three (3) years of the coming to force of this Act,⁵⁸ implying that failure to register these marriages may have negative consequences. Without substantial outreach, there is a strong likelihood that any such marriages will remain unregistered.

Primary responsibility for registration of civil,⁵⁹ Christian,⁶⁰ Hindu,⁶¹ and Islamic⁶² marriages falls upon the authorized officiant. Responsibility for registering customary marriages, however, falls upon the parties to the marriage.⁶³ Both parties to a customary marriage must apply within six (6) months of the marriage and appear before the Registrar to receive a marriage certificate.⁶⁴ The Marriage Act does not punish a failure to register a customary marriage.

This means customary marriages are most vulnerable to remaining unregistered. Women in other unregistered, informal long-term relationships, known in Kenya as

⁵⁶ *Id.* at § 49(3).

⁵⁷ *Id.* at § 98.

⁵⁸ *Id.* at § 96(2)-(3).

⁵⁹ *Id.* at § 54.

⁶⁰ *Id.* at § 53(1).

⁶¹ *Id.* at § 56(1).

⁶² *Id.* at § 57(1).

⁶³ *Id.* at § 55(1).

⁶⁴ *Id.* at § 55.

“come-we-stay” marriages, also suffer a lack of legal protection. Customary and Islamic marriages, even when registered, do not always trigger legal protection from the state, and in some ways women in those marriages suffer as though they were in unregistered marriages.

Though statutory laws remain problematic and continue to discriminate against women in a variety of ways, they do grant protections to women in registered marriages that are otherwise unavailable in unregistered or informal marriages. In some cases, Muslim and customary law marriages, even though registered, are exempted from the statutory protections.

During the course of a marriage, the Matrimonial Property Act grants wives equal rights to property with their husbands;⁶⁵ clarifies that wives have legal personality to contract, sue, and be sued in their own names—rights formerly only held by male heads of household;⁶⁶ and restricts certain transfers and other forms of alienation of matrimonial property by only one spouse or a third party.⁶⁷ Islamic law marriages are entirely excluded from this Act, and rights to property are subject to Islamic law as applied by the local Kadhi courts.⁶⁸

During and after a legally-recognized marriage, both spouses and children can petition a court to order maintenance payments.⁶⁹ A finding of paternal responsibility for children born out of wedlock requires an additional showing that the father has acquired parental responsibility.⁷⁰ Upon divorce, spouses are able to assert rights to property, though these rights are contingent upon the extent of the spousal contribution.⁷¹

⁶⁵ The Matrimonial Property Act, No. 49 KENYA GAZETTE SUPPLEMENT No. 183, § 4 (2013).

⁶⁶ *Id.*

⁶⁷ Matrimonial Property includes the matrimonial home(s) and any household goods and effects contained therein, as well as other property jointly owned and acquired during the subsistence of the marriage. *Id.* at § 6. During the life of the marriage, a spouse may not be evicted from the matrimonial home excepted by court order or other limited legal circumstances. *Id.* at § 12(3)-(4). The matrimonial home may not be mortgaged or leased without written and informed spousal consent. *Id.* at § 12(5). Additionally, any matrimonial property acquired by one spouse during marriage is presumed to be held in trust for the other spouse. *Id.* at § 14(1). Monogamous marriages offer some greater protections, requiring spousal consent to sell, gift, lease, mortgage, or otherwise alienate matrimonial property. *Id.* at § 12(1).

⁶⁸ *Id.* at § 3.

⁶⁹ The Marriage Act provides that a court may order maintenance payments when a spouse refuses to provide for the family or household, upon divorce or separation, or in certain other situations. The Marriage Act, No. 4 KENYA GAZETTE SUPPLEMENT No. 42, § 77(1) (2014). In addition, the Children Act creates a presumption of joint responsibility on the part of both parents to maintain their child, *if both parents were married to each other at the time of the child’s birth*. The Children Act Cap. 141, § 90(a) (2010) (Kenya).

⁷⁰ The Children Act Cap. 141, § 90(e) (2010) (Kenya).

⁷¹ The Matrimonial Property Act provides that “ownership of matrimonial property vests in spouses according to the contribution of either spouse towards its acquisition,” and will be divided between the spouses upon divorce. The Matrimonial Property Act, No. 49 KENYA GAZETTE SUPPLEMENT No. 183, § 7 (2013). In polygynous marriages, property acquired by the husband and the first wife prior to the entry of a second wife belongs equally to the husband and first wife. *Id.* at § 8. Any property acquired while a husband has multiple wives is owned by the husband and each of the wives, taking into account any contributions made by any of the parties to the marriage. *Id.*

Upon the death of a spouse, the surviving spouse has some guaranteed rights to property. Pursuant to the Matrimonial Property Act, a surviving spouse will retain property interests in matrimonial property. Under the Succession Act, a widow stands to inherit some of her husband's property, as well as a life interest in the remainder of the net estate, although she loses that life interest upon remarriage.⁷²

Statutory property rights upon death or divorce do not entirely extend to customary marriages, and do not extend to Islamic law marriages at all. Within customary marriages upon divorce, the applicable customary law must be considered when dividing matrimonial property.⁷³ Upon death, certain agricultural lands are only permitted to devolve in accordance with customary law.⁷⁴ Islamic marriages are exempted from the provisions of both the Succession Act and the Matrimonial Property Act,⁷⁵ and are instead governed by Islamic law as applied by Kadhi courts.

The failure to register a marriage puts women at risk of being left with no property or rights to sue for child maintenance. Much like in Uganda, women in informal marriages, unregistered customary marriages, or any other form of unregistered (a risk for all marriages entered into prior to commencement the Marriage Act) are vulnerable.

Although the women's movement pushed for the recognition of cohabiting couples—referred to locally as “come-we-stay” marriages—in the Marriage Act, it failed to gain traction. Thus, although “come-we-stay” marriages are common, spouses in those marriages have no statutory protections. If one of the parties dies or walks away from the marriage, the other party will have to go to court to obtain any protections, and requires convincing the court to make a presumption of marriage.

To obtain relief from the court, the party or parties must show that the relationship was intended to be a marriage and that both parties thought of themselves as married. This can be particularly difficult if the other party is challenging the presumption of marriage, or, in the case of a spouse's death, when the family of the deceased challenges the presumption of marriage. This is common in cases where a widow is chased off marital land by her deceased husband's family.

Proving the existence of a marriage which was celebrated according to the rites of the relevant religion or law but which also remained unregistered can be equally difficult. For example, a wife trying to prove an unregistered customary marriage in court will need to prove that the rites of marriage were completed. As with come-we-stay marriages, when the opposing party has an interest in disproving the marriage, proving a properly celebrated marriage is increasingly difficult.

In both types of relationships—“come we stay” and previously valid but unregistered marriages—spouses, typically wives, and children are denied significant rights. In a

⁷² Law of Succession Act Cap. 160, §§ 35-36 (2008) (Kenya).

⁷³ The Matrimonial Property Act, No. 49 KENYA GAZETTE SUPPLEMENT No. 183, § 11 (2013).

⁷⁴ Law of Succession Act Cap. 160, § 32 (2008) (Kenya).

⁷⁵ *Id.* at § 4(2); The Matrimonial Property Act, No. 49 KENYA GAZETTE SUPPLEMENT No. 183, § 3 (2013).

society and economy where men are typically the main breadwinners and landowners, women have a very difficult time laying claims to marital property and asserting rights of control, access, or even consent over the use of property meant to be used for the household. Without the protections offered to legally-recognized spouses, these women face the risk of losing access to any property they improved upon, acquired with their partners, or would otherwise be characterized as matrimonial property.

In addition, absent a registered marriage to point to, both women and children face greater obstacles asserting rights to maintenance both during the life of and after the relationship. Courts have granted maintenance payments when paternity is proven, though proving paternity is difficult and requires financial resources not always available to the suing party.

D. Gendered Dimensions of Divorce Registration

The Marriage Act governs divorce for all types of marriages except Islamic marriages, which are governed by Islamic law. Registration of a divorce or annulment is initiated by the courts, and a decree of divorce or annulment must be delivered to the Registrar by the court issuing the decree.⁷⁶ Substantive discrimination in the available grounds for divorce is not an issue in Kenya, at least as written in the law. Acceptable grounds for divorce vary depending on the type of marriage. Within each type of marriage, however, the written legislation grants both spouses the same grounds for divorce. The grounds for divorce in Islamic marriage are not set forth in legislation, and instead are determined by Islamic law as applied by Muslim leaders.

Women in civil marriages may suffer harmful consequences as a result of the legally required minimum length of marriage before a divorce can be initiated. In order for women to benefit from the protections granted to them by law upon divorce, a divorce process must be initiated and completed. The Marriage Act provides that a party to a civil marriage may not petition for separation or dissolution until three years have passed since the celebration of the marriage.⁷⁷ Unhappy spouses may choose to separate informally rather than wait the three years. Additional research should pursue whether such spouses are likely to follow up with a timely divorce petition after the requisite three years have elapsed.

Those living in poverty or in rural areas, or otherwise suffering problems of access, may also find themselves choosing to separate informally rather than going through a formal divorce. Women who cannot obtain childcare, cannot afford the loss of income that accompanies spending all day in court, or cannot access or afford transportation, may find themselves simply unable to proceed with a formal divorce, thus losing out on any rights they may have had even if their marriages had been registered.

⁷⁶ The Marriage Act, No. 4 KENYA GAZETTE SUPPLEMENT No. 42, § 60 (2014).

⁷⁷ *Id.* at § 66.

V. South Africa

A. Legal System and Laws Reviewed

South Africa is a mixed common law and civil law system. The civil law tradition is a result of the influence of Dutch settlers, and the common law from the British colonial government, which incrementally took from the Dutch the various lands making up modern-day South Africa. In addition, the customary law tradition of the indigenous people has survived, and continues to influence many native communities. In fact, the constitution provides that “courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”⁷⁸

South Africa’s marriage laws include the Marriage Act,⁷⁹ the Recognition of Customary Marriages Act,⁸⁰ and the Civil Union Act.⁸¹ Additionally, the Divorce Act⁸² sets the terms for divorce for all marriages except customary marriages, and the Matrimonial Property Act⁸³ governs matters relating to matrimonial property. This report also reviews relevant provisions of the Intestate Succession Act,⁸⁴ the Reform of Customary Law of Succession and Regulation of Related Matters Act,⁸⁵ and the Maintenance of Surviving Spouses Act,⁸⁶ which govern, *inter alia*, rights of surviving spouses upon the death of a spouse.

B. Types of Marriages Recognized

The Marriage Act permits registration of civil marriages, as well as marriages performed pursuant to the Christian, Muslim, Jewish, and “any Indian religion.”⁸⁷ Though the required rites of marriage vary depending on the religion,⁸⁸ the Marriage Act sets some common requirements. Among them, the Act provides for the hearing of objections to any marriage;⁸⁹ and prohibits the first marriage of minors absent consent from a parent, guardian, or child welfare commissioner, provided that boys under 18 and girls under 15 may not marry without consent from a Minister or public service officer.⁹⁰ Marriages registered pursuant to this Act may be monogamous only.⁹¹

⁷⁸ S. AFR. CONST. art. 211 (1996).

⁷⁹ Marriage Act 25 of 1961 (S. Afr.).

⁸⁰ Recognition of Customary Marriages Act 120 of 1998 (S. Afr.).

⁸¹ Civil Union Act 17 of 2005 (S. Afr.).

⁸² Divorce Act 70 of 1979 (S. Afr.).

⁸³ Matrimonial Property Act 88 of 1984 (S. Afr.).

⁸⁴ Intestate Succession Act 81 of 1987 (S. Afr.).

⁸⁵ Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 (S. Afr.).

⁸⁶ Maintenance of Surviving Spouses Act 27 of 1990 (S. Afr.).

⁸⁷ Marriage Act 25 of 1961, §§ 2-3 (S. Afr.).

⁸⁸ *Id.* at § 34(a).

⁸⁹ *Id.* at § 23.

⁹⁰ *Id.* at §§ 24-6. However, a marriage of minors is not necessarily voided due to lack of consent at the time of marriage. *Id.* at § 24A.

⁹¹ DEPARTMENT OF HOME AFFAIRS, REPUBLIC OF SOUTH AFRICA, MARRIAGE CERTIFICATES, <http://www.dha.gov.za/index.php/civic-services/marriage-certificates>.

The Civil Union Act provides for the recognition of same-sex marriages, and permits marriages conducted by a marriage officer or the appropriate member of any religious denomination that has applied for the right to solemnize marriages under the Civil Union Act. The Civil Union Act provides that marriages are monogamous, and that civil unions are subject to the legal consequences of marriage set forth in the Marriage Act.⁹²

The Recognition of Customary Marriages Act, which commenced on November 15, 2000, recognizes all customary marriages entered into prior to November 15, 2000, provided they are valid under customary law.⁹³ All customary marriages entered into on or after November 15, 2000 must meet the requirements of the act, which include a minimum age of marriage of 18 years unless consent is provided by a parent or guardian, consent of the spouses, and that the marriage be celebrated in accordance with customary law.⁹⁴ The Act also provides that spouses in a customary marriage have equal capacity and status.⁹⁵ Customary marriages may be polygynous.

C. Gendered Dimensions of Marriage Registration

Customary marriages are at highest risk of remaining unregistered, as the burden of registering the marriage falls on the spouses. The laws contemplate that all other marriages are registered immediately, with the assistance of the officiant.⁹⁶

Parties seeking to register a customary marriage must apply to the registering officer and provide any information required by the officer. If the customary marriage was entered into prior to the commencement of the Recognition of Customary Marriages Act, parties have up to 12 months after the commencement of the act (or a longer period if so prescribed by the Minister) to register the marriage.⁹⁷ If the customary marriage was entered into after the commencement of the Act, parties must register the marriage within three (3) months (or a longer period if so prescribed by the Minister) of the completion of the marriage rites.⁹⁸ The Act does provide for certain stopgaps if the parties fail to register their own marriage. If the marriage is not registered, any party with a “sufficient interest” may apply to the registering officer to investigate whether a marriage exists.⁹⁹ Additionally, a court may order the registration of a customary marriage in response to an application made to the court.¹⁰⁰

Certain marriages run the risk of remaining either unregistered or impossible to register. These include customary marriages, polygynous Islamic marriages, and cohabitation relationships.

⁹² Civil Union Act 17 of 2005, §§ 8(1), 13 (S. Afr.).

⁹³ Recognition of Customary Marriages Act 120 of 1998, §§ 2(1), (3) (S. Afr.).

⁹⁴ *Id.* at § 3(1).

⁹⁵ *Id.* at § 6.

⁹⁶ Marriage Act 25 of 1961, § 29A (S. Afr.); Civil Union Act 17 of 2005, §§ 8(1), 12 (S. Afr.).

⁹⁷ Recognition of Customary Marriages Act 120 of 1998, § 4(3)(a) (S. Afr.).

⁹⁸ *Id.* at § 4(3)(b).

⁹⁹ *Id.* at § 4(5)(a). The act does not specify what constitutes a “sufficient interest.”

¹⁰⁰ *Id.* at § 4(7).

The laws of South Africa currently provide strong protections to spouses in all types of marriages. Absent a prenuptial agreement, all marriages other than polygynous customary marriages fall under the community property regime, which grants each spouse ownership in half the joint estate,¹⁰¹ and thus protects their access to the joint estate upon divorce or death of a spouse. If one spouse fears that his or her interest in the joint estate is at risk due to the actions of the other spouse, they may petition a court to immediately divide the joint estate in equal shares or in any other form the court deems just.¹⁰² A husband in a customary marriage seeking to marry another wife must petition a court to approve a written contract regulating the future matrimonial property of his multiple marriages.¹⁰³ The court approval, in theory, should ensure protection of the rights of all parties.

Upon divorce, parties with prenuptial agreements placing them out of the community property regime are still protected by the Matrimonial Property Act's accrual system, unless the prenuptial agreement also excludes the accrual system. Under the accrual system, if one spouse's estate has a smaller accrual than the estate of the other spouse, the spouse with the smaller accrual has a claim against the other spouse equal to half the difference between the accrual of both estates.¹⁰⁴ Additionally, spouses in marriages entered into prior to the commencement of the Matrimonial Property Act, in which the wife is subject to marital power, may opt in to the accrual system.¹⁰⁵ If both community and the accrual system are excluded because the marriage predated the law or because they are polygynous customary marriages, courts may transfer assets from one party to another as they deem just,¹⁰⁶ taking into account any contract provision, court order, or customary law as necessary.

Upon death of a spouse, if the marriage was in community property, the surviving spouse already owns half the joint estate, and the other half of the joint estate (the decedent's estate) devolves either by will or in accordance with the law. Absent a will, a surviving spouse will inherit the entire decedent's estate in the absence of surviving descendants,¹⁰⁷ or a share of the decedent's estate if there are surviving descendants.¹⁰⁸

Surviving spouses of all marriages entered into after 1990 are also protected by statutory maintenance rights, regardless of whether the estate devolved pursuant to a testamentary instrument or intestate succession. Pursuant to the Maintenance of Surviving Spouses Act, any surviving spouse has an actionable claim against the estate of the deceased for

¹⁰¹ Matrimonial Property Act 88 of 1984, § 15 (S. Afr.); Recognition of Customary Marriages Act 120 of 1998, § 6 (S. Afr.).

¹⁰² *Id.* at § 20(1).

¹⁰³ Recognition of Customary Marriages Act 120 of 1998, § 7(6) (S. Afr.).

¹⁰⁴ Matrimonial Property Act 88 of 1984, § 3(1) (S. Afr.).

¹⁰⁵ *Id.* at § 7(1).

¹⁰⁶ Divorce Act 70 of 1979, § 25(3)(b) (S. Afr.); Recognition of Customary Marriages Act 120 of 1998, § 8(4)(b) (S. Afr.).

¹⁰⁷ Intestate Succession Act 81 of 1987, § 1(1)(a) (S. Afr.).

¹⁰⁸ *Id.* at § 1(1)(c)(ii); DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, REPUBLIC OF SOUTH AFRICA, Master of the High Court: Intestate Succession, http://www.justice.gov.za/master/m_deseased/deceased_intestate.html; Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, § 2(2)(a) (S. Afr.).

the provision of his or her reasonable maintenance until death or remarriage.¹⁰⁹ The reasonable maintenance takes into account whether the surviving spouse can provide from his or her “own means,” which includes any benefit accruing pursuant to the Matrimonial Property Act and Intestate Succession Act, and earnings.¹¹⁰ Thus, if the property received upon the death of a spouse, combined with the surviving spouse’s own property, is insufficient to support the surviving spouse, the surviving spouse may claim maintenance against the remaining estate of the deceased.

Whereas under past regimes wives had relatively weak or no protections in accessing property during and after marriage, especially in customary law marriages, they now benefit tremendously from entering legally-recognized marriages, rather than informal unions. While courts do grant rights to women in unregistered marriages, the burden is on the woman to prove the existence of the marriage. In at least some cases, courts have refused to recognize the validity of marriages that were unregistered.¹¹¹

Unlike the other marriages recognized by law, the burden in customary marriages falls on spouses to initiate registration. This leaves a great deal of opportunity for marriages to remain unregistered. Unsurprisingly, it is women who face resistance to registering their customary marriages. Among the factors inhibiting registration are: the unwillingness of husbands to register their marriages, the difficulty getting all parties to appear before the registering officer to sign the documents, and that registering officers will refuse to register the marriage if the husband is absent.¹¹² Although the registering officer could register the marriage if presented with enough evidence of the existence of such marriage, it is often difficult for women seeking to register the marriage alone to muster the resources to obtain adequate proof.¹¹³ Where customary marriages remain unregistered, women do not benefit from statutory rights to property and maintenance. Instead, they are subject to whatever norms their local communities apply, which often leaves them with little to no access to property upon divorce or death of a spouse.¹¹⁴

Although the Marriage Act recognizes Islamic law marriages, it does not grant legal recognition to polygynous marriages. Thus, any wife beyond the first wife is at risk of losing all property rights upon the dissolution of marriage due to divorce or death. Various courts have extended existing statutory provisions to the junior wives in an Islamic polygynous marriage, so these wives do not remain without protection.¹¹⁵ However, obtaining these protections requires expensive court procedures and the

¹⁰⁹ Maintenance of Surviving Spouses Act 27 of 1990, § 2(1) (S. Afr.).

¹¹⁰ *Id.* at §§ 2(1), 1.

¹¹¹ Singh v. Ramparsad & Others [2007]; Tshatela and another v Qendwana and others [2001] JOL 7672 (Tk).

¹¹² WOMEN’S LEGAL CENTER, RECOGNITION OF CUSTOMARY MARRIAGES 13 (2011), <http://winafrica.org/wp-content/uploads/2012/01/RMCA-report-final.pdf>.

¹¹³ *Id.* at 15.

¹¹⁴ WOMEN’S LEGAL CENTRE, KNOW YOUR RIGHTS: WOMEN’S PROPERTY RIGHTS UNDER CUSTOMARY LAW 9 (2010) (“In the past, under customary law women were prohibited from owning property within marriage...”).

¹¹⁵ Megan Harrington-Johnson, *Muslim Marriages and Divorce*, 40 DEREBUS 93 (2015), <http://www.saflii.org/za/journals/DEREBUS/2015/93.html>.

additional burden of proving a marriage existed. The Muslim Marriages Bill¹¹⁶ seeks to create state-level enforcement of the rights and obligations present under Islamic law, and permits a man to take multiple wives. This bill is controversial and has not been enacted.

Additionally, although approximately 60% of couples cohabit, the law offers no protections for these types of unregistered domestic partnerships.¹¹⁷ In relationships where one party is the sole breadwinner and the other stays at home, the stay at home party has few rights upon the breakdown of the relationship, even as they may have contributed to the household and supported their partner's career. Even where both parties work and generate income, one party likely has lesser access to property. Predominantly, in heterosexual relationships, the party with lesser access is a woman.¹¹⁸ During these informal relationships, this party is not protected by legal consent requirements before the other party is able to alienate property. Upon the dissolution of the relationship, they lose rights to property that is not explicitly in their name, and have no maintenance rights. Upon death, there is no right to the intestate estate, as they are neither a surviving spouse nor a descendant. Although the Domestic Partnership Bill, which seeks to grant legal recognition to these types of domestic partnerships, has been proposed, it has yet to be enacted.

D. Gendered Dimensions of Divorce Registration

The Divorce Act governs the dissolution of marriages registered pursuant to the Marriage Act and the Civil Union Act. The Recognition of Customary Marriages Act provides for the process of dissolution of customary marriages. Though the grounds for divorce differ under each act, the available grounds within each act are the same as between spouses.¹¹⁹ That is, the legislation does not substantively discriminate with respect to the grounds for divorce available to men and women.

The requirement that all divorces be completed in court raises problems of access for spouses seeking to dissolve any of the types of marriages made legal in South Africa. Unlike many of its neighbors, South Africa provides that customary marriages may *only* be dissolved upon a court-issued decree of divorce.¹²⁰ Thus, any registered marriage can only be formally dissolved in a formal court. Otherwise, the act of seeking a divorce and

¹¹⁶ Muslim Marriages Bill, GN 37 of GG 33946 (21 Jan. 2011), http://www.gov.za/sites/www.gov.za/files/33946_gen37.pdf.

¹¹⁷ Natasha Meintjes, *Bill's Delay Leaves Partners at Risk*, NATIONAL (Aug. 29, 2014), <http://mg.co.za/article/2014-08-29-bills-delay-leaves-partners-at-risk>.

¹¹⁸ *Id.*

¹¹⁹ Pursuant to the Divorce Act, courts may grant a decree of divorce if the marriage is (1) irretrievably broken down, which is achieved if the court is satisfied that "the marriage relationship...has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them," or (2) if one party to the marriage suffers from mental illness and is a patient or prisoner, or it the party suffers from continuous unconsciousness for at least six (6) months with no reasonable prospect of recovery. Divorce Act 70 of 1979, §§ 4(1), 5 (S. Afr.). Under the Recognition of Customary Marriages Act, customary marriages may only be dissolved on the ground of irretrievable breakdown. Recognition of Customary Marriages Act 120 of 1998, § 8 (S. Afr.).

¹²⁰ *Id.* at § 8(1).

registering it does not appear to have any gendered effects as evident from the face of the legislation.

VI. Rwanda

A. Legal Systems and Laws Reviewed

Rwanda is a mixed civil law and customary law system. Rwanda's civil law is influenced by both German and Belgian civil law systems, from the country's time under German and later Belgian rule.

The laws reviewed include the Constitution of Rwanda and various sections of Book I of the Civil Code. As a civil law nation, Rwanda's laws are compiled into a set of codes, which may be supplemented or amended by later laws. Beginning in the latter half of the 1990s, Rwanda implemented a number of law reforms, some of which were aimed at improving the rights of women. Rights pertaining to marriage are largely contained in Law No. 22/99 of 12/11/1999 to supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Successions (the "Succession Law"),¹²¹ which governs matters of marriage and succession.

B. Types of Marriages Recognized

The Constitution of Rwanda specifies that only civil, monogamous marriages are recognized by law.¹²² Customary marriages, polygynous marriages, and otherwise informal marriages (cohabitation relationships) are thus not accorded legal status. The civil code sets the minimum age of marriage for both men and women at 21, although the Minister of Justice or his or her delegate may dispense with this requirement for serious reasons.¹²³ The code does not specify what these reasons might be. A woman seeking to remarry must either wait 300 days from the date of the dissolution of her prior marriage, or produce a certificate attesting to the fact that she is not pregnant.¹²⁴ The code does not provide an analogous waiting period for a man seeking to remarry.

A bill governing persons and family was passed by the Senate in October, 2015 and reportedly affords legal recognition for unions of cohabitation, but is pending adoption. The text of the bill remains unavailable and has not been reviewed for this report.

¹²¹ Law No. 22/99 of 12/11/1999 to supplement Book I of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Successions, Nov. 15, 1999 (Rwanda) [hereinafter "Succession Law"].

¹²² CONST. OF THE REP. OF RWANDA art. 26 (2003).

¹²³ Code Civil: Les Personnes, Loi No 42/1988 du 27 Octobre 1988 Portant Creation du Titre Preliminaire et Livre Premier du Code Civil, art. 171 (Rwanda) [hereinafter "Code Civil: Les Personnes"], https://s3.amazonaws.com/landesa_production/resource/959/Rwanda_Civil-code_1988_FRENCH.pdf?AWSAccessKeyId=AKIAICR3ICC22CMP7DPA&Expires=1457309702&Signature=8THLMYH%2FrXuEMHwtoJaepiIEyWU%3D.

¹²⁴ *Id.* at art. 176.

C. Gendered Dimensions of Marriage Registration

A couple seeking to register their marriage must appear in person before the civil servant responsible for registering the marriage, along with a representative from each family and two witnesses.¹²⁵

Because the laws only recognized civilly-registered, monogamous marriages, they exclude informal marriages (i.e., long-term, cohabitation relationships), as well as customary and polygynous marriages.

The law protects spousal rights to property in registered marriages. The Succession Law permits spouses to choose between three different property regimes: community of property, limited community of acquests, and separation of property.¹²⁶ If no regime is chosen, the marriage is deemed to be community of property.¹²⁷ The law also protects a person's interest in his or her spouse's property by prohibiting persons from effectively disinheriting their spouses and children. Regardless of the matrimonial regime, a spouse's consent is required before the donation of immovable property.¹²⁸ In addition, the right to donate one's assets is restricted to 1/3 if the donor has no children, and to 1/5 if the donor has any children.¹²⁹

The Civil Code also provides that both spouses have the obligation to maintain and educate their children.¹³⁰ Each spouse has an actionable claim if the other spouse fails to fulfill this obligation.¹³¹

Upon divorce, in community property regimes, property is divided equally between spouses. In limited community of acquests, only property designated as community property or property jointly acquired will be divided equally between the spouses. Under separation of property, only property jointly acquired will be divided between the spouses. Otherwise, each spouse retains his or her own personal property. Additionally, if no advantages have accrued to either spouse during marriage, or if the stipulated terms of the marriage contract do not adequately provide for the spouse who obtained a favorable ruling, the court may award alimony to that successful party.¹³²

Upon death of one spouse, in community property and limited community of acquest regimes, the surviving spouse retains ownership over half the community property. The

¹²⁵ *Id.* at art. 184.

¹²⁶ Succession Law, *supra* note 121, at art. 2. Under community of property, spouses have joint ownership over movable, immovable, present, and future property, although personal items such as jewelry and tools are kept separate in the division of joint assets. *Id.* at arts. 3, 6. Under limited community of acquests, spouses choose, at the time of marriage, which of their property will be considered community property. All other property is kept separate. *Id.* at art. 8. Under separation of property, property acquired separately is kept separate. *Id.* at art. 11.

¹²⁷ *Id.*

¹²⁸ *Id.* at art. 21.

¹²⁹ *Id.* at art. 31.

¹³⁰ Code Civil: Les Personnes, *supra* note 123, at art. 197.

¹³¹ *Id.*

¹³² Code Civil: Les Personnes, *supra* note 123, at art. 282.

other half is the decedent's estate, which does not go to the surviving spouse, but rather to surviving children or other heirs, although the surviving spouse will administer the estate for as long as the surviving children are minors.¹³³ Similarly, with respect to any separate property, the decedent's estate devolves to his or her heirs, which list does not include the surviving spouse.¹³⁴

Many couples in Rwanda cohabit and live as though they are married, while failing to obtain a registered marriage. Some couples avoid civil marriages because of the costs associating with formal marriage, including the tradition of giving expensive gifts. In addition, some men seek to avoid a formal marriage to avoid the obligations attendant thereto. Research suggests that a motivating factor for these men is the preference to avoid relationships that grant rights to women. On the other hand, women face economic and social pressures, including poverty and illegitimate pregnancy, to agree to these informal unions, even though they are not in their best interests. The Rwandan government has attempted to reduce the number of unregistered marriages by performing mass marriages at the local level, yet these unregistered marriages persist.¹³⁵

Additionally, although polygyny is illegal and subject to criminal penalties, forms of it continue. Men may formally marry their first wives, and then enter informal relationships with other wives. The result is that only the first wife benefits from statutory protections. The junior wives all run the risk of losing all property and maintenance rights upon the dissolution of their relationships or the death of their husband. In some cases, men do not formally marry any one of their informal wives, and all their wives lack statutory protections. In some cases, junior wives are at greatest risk from the legally-recognized first wife. The legal wife has rights to her husband's property and to consent to certain transfers of property. Thus, any property set aside for, cultivated by, or improved upon by the junior wife, risks accruing for the benefit of the legal wife. Additionally, any informal wives risk being driven away from the marital land upon their husband's death.¹³⁶

Rwanda's public policy goals are not compatible with polygyny, but additional forms of protection could be implemented for the unrecognized wives and children in informal polygamous relationships. South Africa's laws provide some examples of how this may be done.

The bill governing persons and family appears to address some of these concerns, but only partially. Article 159 of the bill would recognize cohabitation and grant couples in a cohabiting union equal rights to property they acquired together. The bill does not apparently amend the Succession Law, and thus would not grant these cohabiting couples rights in succession. Article 160 would allow a man in an informal polygynous marriage to legalize one of his marriages in a monogamous marriage. The other wives would

¹³³ *Id.* at art. 70.

¹³⁴ *Id.* at art. 66.

¹³⁵ Aparna Polavarapu, *Procuring Meaningful Land Rights for the Women of Rwanda*, 14 *Yale Hum. Rts. & Dev. L.J.* 105,143-144 (2011).

¹³⁶ *Id.* at 145-148.

remain unmarried, but would have rights to any property they acquired together with their husband. It is unclear that they would obtain any rights to the community property if they could not prove they were involved in the acquisition of such property.¹³⁷ Thus, even under this potential new law, women in customary marriages and unrecognized wives in polygynous relationships may remain without legal protection. Women in cohabiting unions, although treated better, do not appear to gain inheritance protections under the bill.

D. Gendered Dimensions of Divorce Registration

The law on divorce registration and grounds for divorce is gender neutral on its face. However, the lengthy procedure and difficulty accessing courts may prevent or discourage parties from seeking a formal divorce.

The Civil Code provides that each spouse has the right to petition for divorce if the other party commits an offense that brings serious dishonor, adultery, excessive violence or serious injury against the petitioning spouse, refusing to contribute to the upkeep of the household, abandoning the marital home for at least 12 months, and de facto separation for at least three (3) years.¹³⁸ Spouses who have been married for at least five (5) years may also petition for divorce by mutual consent.¹³⁹

Divorces are obtained through the courts, and though the code does not specify whether the courts forward documents to be registered, official documentation will likely be retained with the courts. As with the populations in neighboring nations, Rwandans who lack financial or community resources face obstacles to accessing courts, which may prevent them from pursuing a formal divorce. Thus, even if the marriage was registered, wives may not be able to exercise the rights granted to them upon divorce due to an inability to go to court.

¹³⁷ UNITED NATIONS FOOD AND AGRICULTURE ORGANIZATION, Gender and Land Rights Database: Rwanda, http://www.fao.org/gender-landrights-database/country-profiles/countries-list/national-legal-framework/womens-property-and-use-rights-in-personal-laws/en/?country_iso3=RWA (last visited Mar. 4, 2016).

¹³⁸ *Id.* at art. 237.

¹³⁹ *Id.* at art. 258.

VII. Burkina Faso

A. Legal Systems and Laws Reviewed

Burkina Faso is a mixed civil law and customary law system. The country's civil law is a legacy of its time as a French colony.

Laws reviewed include the Code of Family and Persons (*Code des Personnes et de la Famille*), which contains the provisions governing family law, and the Penal Code, which sets out marriage-related crimes. The Code of Family and Persons was enacted wholesale in 1989 to replace the French colonial law.¹⁴⁰

B. Types of Marriages Recognized

The only marriages recognized by Burkina Faso are civil marriages performed before a state official. Article 273 of the Code of Family and Persons specifies that marriages are those celebrated before a civil registrar,¹⁴¹ and article 233 makes clear that any marriages not provided for in the code, including customary and religious marriages, are not recognized by law.¹⁴²

Although customary and religious marriages are not legally recognized, the law does permit polygynous marriages, provided that prior to the completion of the first marriage, the spouses make a declaration that the marriage may become polygynous.¹⁴³

The minimum age of marriage for girls is 17, and 20 for boys, although the code does permit courts to dispense the minimum age and allow marriages of girls at least 15 years of age and boys at least 18 years of age.¹⁴⁴

All marriages must be entered into with the free consent of both spouses,¹⁴⁵ a requirement that is backed up by the Penal Code, which punishes any person who forces another person into marriage with imprisonment from 6 months to 2 years.¹⁴⁶ The punishment is increased to 3 years imprisonment if the victim is a "minor", which for purposes of this provision appears to mean girls under the age of 13.¹⁴⁷

¹⁴⁰ Abd-el Kader Boye, Kathleen Hill, Stephen Isaacs, and Deborah Gordis, *Marriage Law and Practice in the Sahel*, 22 *Studies in Family Planning* 343, 344-5 (1991).

¹⁴¹ Zatu an VII 13 du 16 Novembre 1989 Portant Institution et Application d'un Code des Personnes et de la Famille au Burkina Faso, art. 273 [hereinafter *Code des Personnes et de la Famille*].

¹⁴² *Id.* at art. 233.

¹⁴³ *Id.* at arts. 257-8.

¹⁴⁴ *Id.* at art. 238.

¹⁴⁵ *Id.* at art. 234.

¹⁴⁶ Loi No. 043/96/ADP du 13 Novembre 1996 portant Code Pénal, art. 376 (Burkina Faso) [hereinafter *Code Pénal*].

¹⁴⁷ *Id.* at art. 376. The provision itself states that the punishment is imprisonment for 3 years if the victim is a minor. The following sentence states that the maximum punishment is incurred if the victim is a girl under the age of 13, implying that for purposes of this provision, a minor is a girl under the age of 13. The original language, in relevant part, states, "La peine est un emprisonnement de un à trois ans si la victime est mineure. Le maximum de la peine est encouru si la victime est une fille mineure de moins de treize

A woman who is divorced, widowed, or has had her marriage annulled must wait 300 days before contracting a second marriage, with some exceptions.¹⁴⁸ There does not appear to be a parallel provision for men.

C. Gendered Dimensions of Marriage Registration

A couple seeking to register their marriage must appear in person before the civil servant responsible for registering the marriage.¹⁴⁹

Because the laws only recognized civilly-registered marriages, they exclude customary and religious marriages, the former being particularly common in Burkina Faso. Parties to unregistered marriages are unable to benefit from laws protecting rights to freely enter marriage, to property during and at the dissolution of marriage, and to be protected from child marriage.

The default marital regime in registered monogamous marriages is community property, pursuant to which both spouses have equal rights to property.¹⁵⁰ Under this regime, all property is presumed common unless one spouse justifies its classification as that spouse's exclusive personal property, although property owned prior to the marriage is deemed personal property.¹⁵¹ Community property protects spousal and children's rights during and after marriage. For example, creditors cannot seize the wages and salaries of a spouse if obligations were incurred for the benefit of the household or the children's education. Spousal consent is required before property can be alienated or certain financial obligations contracted.¹⁵² Because property and income tends to mostly be held by men, the community property regime is an important legal means of allowing women access to marital property, to the extent they are able to benefit from or utilize the law.

Spouses in a monogamous marriage may opt for a separate property regime, and polygynous marriages are automatically slotted into separate property regimes. Parties are also permitted to delineate their rights under a marriage contract. These two regimes, separation of property and marriage contract, have the potential to offer much less protection for women in marriage because they do not guarantee as many spousal rights.

Regardless of marital regime, surviving spouses are granted rights to inherit a share of the decedent spouse's intestate estate. A surviving spouse in a monogamous marriage is entitled to anywhere from a quarter share to the entire intestate estate, depending on whether there are other legally recognized heirs surviving.¹⁵³ Wives under polygynous

ans.?" *Id.*

¹⁴⁸ Code des Personnes et de la Famille, *supra* note 141, at art. 246.

¹⁴⁹ *Id.* at art. 252.

¹⁵⁰ *Id.* at art. 252.

¹⁵¹ *Id.* at arts. 319-20.

¹⁵² *Id.* at art. 331.

¹⁵³ *Id.* at arts. 742-4.

marriage are also guaranteed inheritance rights, but the wives must divide up the widow's share of the intestate estate.¹⁵⁴

Though the law only recognizes civil marriages, customary marriages, religious marriages, and civil partnerships are common, leaving spouses in those marriages, particularly women, without legal protection. Even if women seek civil registration, men often refuse to pursue such registration.¹⁵⁵ In Islamic marriages, although women should gain some rights under the Qur'an, in practice those rights are not granted. Customary law continues to be an important force in most marriages, especially in rural areas. As in many countries, customary law in Burkina Faso typically sets up men as heads of household, with women gaining access to property only through their fathers and husbands. Women are thus unable to outright inherit property under customary law. Widows may protect their rights through the practice of levirate, or widow inheritance, which involves marrying a surviving male member of their deceased husband's family. Otherwise, widows may find themselves run off the marital property.

In addition to denying women property protections provided by statutory law, unregistered marriages allow community members to evade important marriage protections. The law providing for a minimum age of marriage and a lack of coercion to enter marriage only applies to civil marriages. Thus, any unregistered unions are not subject to those restrictions, and persons forcing a party into marriage escape criminal liability.

D. Gendered Dimensions of Divorce Registration

Both the Code of Family and Persons and the Penal Code have been updated to create more gender-neutral divorce provisions. To the extent there are negative gendered dimensions, these may be more likely to exist outside the law, in the form of obstacles to access to court. In addition, mandatory waiting periods before divorce can be initiated may discourage formal divorce registration.

Couples may jointly request a divorce, in which case they do not need to provide a reason for divorcing, or each spouse may sue for divorce.¹⁵⁶ Divorce by mutual consent may not be requested within the first two years of marriage.¹⁵⁷ Under divorce by mutual consent, spouses may present a plan for division of property and care of children.¹⁵⁸

The new Code of Family and Persons also grants both husbands and wives the same rights to seek a contentious divorce.¹⁵⁹ In addition, provisions of the Penal Code now create equal liability for men and women who commit adultery or abandonment.¹⁶⁰

¹⁵⁴ *Id.* at art. 745.

¹⁵⁵ MUSAWAH, HOME TRUTHS: A GLOBAL REPORT ON EQUALITY IN THE MUSLIM FAMILY 6-7, available at <http://www.musawah.org/home-truths-global-report-equality-muslim-family-english>.

¹⁵⁶ Code des Personnes et de la Famille, *supra* note 141, at art. 354-5.

¹⁵⁷ *Id.* at art. 358.

¹⁵⁸ *Id.* at art. 361.

¹⁵⁹ *Id.* at art. 367. A spouse may seek a divorce if marital life has become intolerable due to adultery, excess, or severe abuse or insults; when family life and child safety is compromised; in the case of spousal

Though the laws have been updated to create more equal rights to divorce, women may find themselves unable to benefit from the law due to external factors such as lack of access to civil courts, and women's lack of knowledge of the law or their rights. In addition, the 2-year waiting period before a divorce by mutual consent can be registered may also encourage couples to proceed with informal separation rather than waiting for a formal divorce. In this case, women, who are less likely to otherwise have access to land and other assets, more severely suffer the loss of statutory rights granted upon formal divorce.

absence affirmed by a judicial declaration; in the case of separation continuing for at least three years; and in the case of impotence or sterility. *Id.*

¹⁶⁰ Code Pénal, *supra* note 146, at arts. 418-420, 406.

VIII. Morocco

A. Legal System and Laws Reviewed

The Moroccan legal system primarily reflects both the French-influenced civil law and Islamic law traditions. 99% of the population is Arab-Berber, and 99% of the population practices Islam.¹⁶¹ As of 2010, there were an estimated 6,000 Jews in Morocco,¹⁶² and separate personal laws are applicable to the Jewish population. Additionally, customary law continues to survive for some of the tribal populations.

As a civil law system, Morocco's laws are compiled in its codes. The family laws were updated in 1994 with a goal of improving women's rights. These laws are contained within a single Family Code, also referred to as the Moudawana. This report reviews the Moudawana,¹⁶³ the Constitution, and other relevant portions of the Civil Code.

The Moudawana governs all Moroccans except for Jewish Moroccans, who are governed by the Hebraic Moroccan Family Law, which could not be located.

B. Types of Marriages Recognized

The Moudawana provides for civilly-registered marriages, but reflects the elements of marriages conducted under Islamic law. The Moudawana permits polygamy but prohibits certain interfaith marriages. Jewish marriages are provided for in the Hebraic Moroccan Family Law.

Because of the use of marriage contracts under Islamic law, parties seeking to avoid the Islamic law consequences to their marriage could contract for different rights and obligations. Given the high percentage of Muslims in Morocco, it is likely that many participate in the Islamic law marriages anticipated by the Code, although further research would need to be conducted to confirm whether this is true.

The Moudawana specifies that marriage is a contract requiring adequate offer and acceptance¹⁶⁴ and that the minimum age of marriage is 18 years unless otherwise authorized by a Family Affairs Judge.¹⁶⁵ The code also contemplates the payment of a dowry (the *sadaq*), the amount of which is specified in the marriage contract.¹⁶⁶ If the

¹⁶¹ UNITED STATES CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK: MOROCCO, <https://www.cia.gov/library/publications/the-world-factbook/geos/mo.html> (last visited Mar. 1, 2016).

¹⁶² *Id.*

¹⁶³ The Moroccan Family Code (Moudawana) of Feb. 5, 2004 (English translation of original Arabic) [hereinafter "Moudawana, English"], <http://www.hrea.org/programs/gender-equality-and-womens-empowerment/moudawana/>; Code de La Famille: La Moudawana [Family Code: Moudawana] (Morocco) (Original French) [hereinafter "Moudawana, French"], <http://www.consulatdumaroc.ca/forms/codefamillefr.pdf>. Where possible, the English translation is cited because it is translated from the controlling Arabic version of the Moudawana.

¹⁶⁴ Moudawana, English, *supra* note 163, at art. 11.

¹⁶⁵ *Id.* at arts. 19-20.

¹⁶⁶ *Id.* at arts. 26-27.

marriage contract is silent as to dowry, the spouses have the right to fix the amount.¹⁶⁷ If the spouses cannot agree, a court will fix the amount after considering the “social background” of each spouse.¹⁶⁸

Polygyny is permitted, subject to certain restrictions. Polygyny is not permitted if there is a risk of inequity among the wives,¹⁶⁹ and in any case is only permitted by courts if there is an “exception and objective justification” and the husband has sufficient resources to provide for each family and guarantee “maintenance rights, accommodation and equality in all aspects of life.”¹⁷⁰ A wife may prevent her husband from converting their marriage into a polygamous one by stipulating in her marriage contract that her husband may not contract marriages with other women.¹⁷¹

The Moudawana restricts interfaith marriages. A Muslim woman may not marry a non-Muslim man, and a Muslim man may not marry a non-Muslim woman unless she is Christian or Jewish.¹⁷²

C. Gendered Dimensions of Marriage Registration

Women in unregistered marriages risk losing many of the rights granted by Moroccan law.

Marriages are concluded in Family Court. Parties must apply to register the marriage, and upon receipt of appropriate documentation, a Family Affairs Judge authorizes two (2) public notaries to draw up a marriage contract.¹⁷³ A marriage contract is proof of marriage, and to enter into the contract, parties must make the offer and acceptance before the two public notaries, who attest to the offer and acceptance via a notarized statement.¹⁷⁴

An unregistered marriage may obtain some recognition if the marriage was not been registered for reasons of *force majeure*.¹⁷⁵ The Preamble to the Moudawana specifies that the reasoning behind this provision was to protect a child’s right to acknowledgement of paternity.¹⁷⁶ However, other marriages remain unregistered because the parties choose not to or are unable to obtain the funds or familial approval to perform a marriage.

¹⁶⁷ *Id.* at art. 27.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at art. 40.

¹⁷⁰ *Id.* at art. 41

¹⁷¹ *Id.* at arts. 19-20.

¹⁷² *Id.* at art. 42.

¹⁷³ *Id.* at art. 65.

¹⁷⁴ *Id.* at art. 13.

¹⁷⁵ *Id.* at art. 16. *Force majeure* refers to severe, unforeseeable circumstances and acts of God, such as a natural disaster. The exact circumstances that qualify as *force majeure* varies from system to system, but the term requires some degree of severity of circumstances and lack of control by the parties involved.

¹⁷⁶ *Id.* at preamble.

In Morocco, both unregistered tribal marriages (operating under customary law) and urfi marriages create vulnerabilities for women who are unable to benefit from legal protections from the Moudawana.

Wives are still not on entirely equal footing with husbands, but they gain a number of rights from being in legally registered marriages that they would not otherwise have. The Moudawana introduces the right to insert a monogamy clause into a marriage contract, a requirement of judicial approval for divorce by repudiation, the right to divorce for mutual consent and irreconcilable differences, and the right for a wife to be considered a joint head of household rather than simply subservient to her husband.¹⁷⁷ Still, many of these reforms depend on judicial support, and women continue to struggle to assert their rights.¹⁷⁸

During marriage, no spouse may unjustly evict the other spouse from the marital home.¹⁷⁹ The law does not specify what constitutes appropriate justification for spousal eviction. Each spouse owes financial maintenance to each other and to their children.¹⁸⁰ A wife may assert her right to maintenance by seeking a divorce. If a wife is seeking to divorce her husband because he has failed to maintain her, the court may award maintenance, provided that the husband has the financial means to do so.¹⁸¹ However, if such maintenance is paid, the court does not grant the wife's petition for divorce.¹⁸²

Rights vary depending on the type of divorce, and the Moudawana focuses primarily on what property the wife may receive upon divorce. This reflects Islamic law and also the reality that traditionally, property was largely owned by men. For divorces by mutual consent, the code does not specify what rights are owed the parties. In the case of *khol*, a woman does not receive property. Instead she has paid compensation for the divorce. However, if this woman cannot maintain her children, the obligation to maintain the children falls to the father.¹⁸³ For the other available grounds, if reconciliation is impossible, the court, taking into account certain additional factors as set forth in the code, fixes an amount to be paid by the husband to the wife, which amount includes: any dowry yet to be paid, maintenance for *iddat*, and a Consolation Gift based on the length of the marriage, financial means of the husband, reasons for repudiation, and the extent to which the husband has abused his repudiation right.¹⁸⁴ The court also determines the amount of maintenance owed to dependent children, taking into consideration the standard of living and educational situation prior to divorce.¹⁸⁵

¹⁷⁷ MOUNIRA M. CHARRAD, FAMILY LAW REFORMS IN THE ARAB WORLD: TUNISIA AND MORROCCO 7-8 (UNDESA 2012), <http://www.un.org/esa/socdev/family/docs/egm12/PAPER-CHARRAD.pdf>.

¹⁷⁸ *Id.* at 9.

¹⁷⁹ *Id.* at art. 53.

¹⁸⁰ *Id.* at arts. 187, 189, 163, 164.

¹⁸¹ *Id.* at art. 102.

¹⁸² *Id.*

¹⁸³ *Id.* at art. 119.

¹⁸⁴ *Id.* at art. 84, 97, 113.

¹⁸⁵ *Id.* at art. 85, 97, 113.

Upon the death of a spouse, the surviving spouse's rights continue to reflect traditional Islamic beliefs. The surviving spouse will either inherit pursuant to a will or, in the absence of a will, the surviving spouse will receive a fixed share, the size of which is not specified by the code.¹⁸⁶

An unregistered or unrecognized marriage would leave a spouse with few rights under either the civil code or under Islamic law. Islamic law is often better for women than many customary systems of law, which exclude women from owning property or receiving as many rights upon divorce. Thus, women in unregistered customary marriages or unregistered marriages deemed unacceptable under Islamic law stand to lose the most.

Although the laws reflect the practices of Arab and Muslim populations of the country, there are a number of indigenous tribes as well, some of which have expressed no desire to register marriages.¹⁸⁷ *Urfi* marriages, on the other hand, are unofficial marriages, typically among young Muslim couples that lack funds or parental consent.¹⁸⁸ Others suggest that some parties who choose *urf*i marriages are fundamentalists who reject the state.¹⁸⁹ Though conversation about *urf*i marriages generally refers to the phenomenon in Europe, they are also a phenomenon in other Islamic countries, including Morocco.¹⁹⁰ In these cases, women are particularly at risk of losing their rights. If either party walks away from the marriage, there is no recourse for the remaining party. If there are children, the woman is at greater risk because of how she and her child will be viewed by society. Additionally, if there is a child, her husband is not automatically responsible for maintaining the child, and she will have to assert paternity in court.

The lack of protections for these unofficial or unregistered marriages, though likely arising from the moral prescriptions of Islamic law, leaves many women (and sometimes children) unprotected from the rights guaranteed during and after marriage, and out of the scope of the gender-equality reforms being implemented by Morocco.

D. Gendered Dimensions of Divorce Registration

Divorce is obtained through the courts, and is thus registered at the conclusion of the proceedings. Much like the marriage contract, the divorce must be certified by two (2) public notaries.¹⁹¹

To the extent divorces have gender-discriminatory effects, it is due to the substantive provisions providing different rights to seek divorce to men and women, rather than the

¹⁸⁶ There are six possible recipients of fixed shares, and after those shares are distributed, the remainder of the estate devolves to another set of heirs that does not include the surviving spouse. *Id.* at arts. 335-338.

¹⁸⁷ Khadeeja al-Fathi, *Moroccan Tribes Refuse to Register Marriages*, AL ARABIYA NEWS (Sep. 21, 2008), <https://www.alarabiya.net/articles/2008/09/21/56975.html>.

¹⁸⁸ *Landmark Paternity Case Highlights Dangers of Urfi Marriages*, IRIN NEWS (Jun. 5, 2006), <http://www.irinnews.org/report/26954/egypt-landmark-paternity-case-highlights-dangers-urfi-marriage>

¹⁸⁹ al-Fathi, *supra* note 187.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at art. 138.

registration itself. In addition, because divorce must be obtained in the courts, parties facing obstacles to access may be discouraged from going through formal divorce proceedings.

Divorce may be sought by either spouse for irreconcilable differences;¹⁹² by the wife for failure of the husband to respect the conditions of the marriage contract, harm, non-maintenance, absence, latent defect, and abstinence and abandonment;¹⁹³ by mutual consent;¹⁹⁴ or in exchange for compensation (*khol*) paid by the wife, as specified in the marital contract.¹⁹⁵ In addition, a wife may seek a divorce if she objects to her husband's taking an additional wife, a husband may exercise a right of repudiation, and a wife may exercise a right of repudiation that has been assigned to her by her husband. If the court approves any of these divorces, it authorizes the certification and validation of the divorce. Payments from the husband to the wife upon divorce are detailed in Section C above.

By encouraging courts to set payments from the husband to the wife for all forms of divorce other than *khol*, the Moudawana seeks to implement some favorable provisions for divorced wives, even as they have fewer rights to actually seek divorce. The key concern for many of these couples may actually pertain to whether they are able to overcome distance, financial concerns, and loss of time and income to pursue a divorce in court. On the other hand, as a predominantly Islamic society, informal separations may be frowned upon enough to encourage separating couples to do what they can to seek formal divorce. Further field research should question the extent to which lack of access prevents formal divorce.

¹⁹² *Id.* at arts. 94-97.

¹⁹³ *Id.* at art. 98.

¹⁹⁴ *Id.* at art. 114.

¹⁹⁵ *Id.* at art. 115.

IX. Conclusion

Laws pertaining to marriage and divorce registration in Africa are important sites of opportunity for women to obtain otherwise unavailable rights to property, maintenance, and freedom from coerced or child marriage. However, where marriages laws do not recognize certain types of marriages, by failing to allow them to be registered, women in those marriages lose out on these rights. Registered marriages also grant rights to spouses upon divorce, but these rights are only available to the extent a divorce is registered pursuant to law. To the extent the laws provide differential grounds for divorce for men and women, both men and women may experience discrimination. This discrimination tends to be more severe for women because of their already relatively weaker economic and social position. In addition, for most marriages in the countries reviewed, obtaining a formal divorce requires visiting a formal court. Problems of access preventing people from visiting court can discourage couples from seeking a formal divorce and exercising the rights they are otherwise promised under statutory law.

A. Marriage

Women lose statutory legal protections when their marriages are not registered. Among the statutory protections lost are those that ensure for both parties property rights during and after marriage, spousal maintenance rights, and child maintenance rights. In addition, registration helps authorities ensure that marriages are entered into with the free and full consent of both spouses and that both spouses meet the minimum age of marriage. Although the legal protections are usually designed to protect both spouses, women are the ones in need of the protection most. Most property flows through and is controlled by men, societal bias continues to favor men, and child marriage and forced marriage typically victimizes the girl child, although male children may also be subject to it.

The laws can be the reason behind a failure to register a marriage when: (1) the laws do not recognize a certain type of marriage (and thus those marriages go unregistered), in spite of the fact that these marriages are common in-country, and (2) the laws recognize a type of marriage, but place the burden of registration on the parties, increasing the likelihood that the marriages will go unregistered. In some cases, countries can remedy this problem by simply affirmatively recognizing these types of marriages or long-term relationships. In other cases, a country's public policy goals dictate against such recognition, requiring other creative measures to protect women in these relationships.

A classification of the types of marriages that are most excluded by the countries reviewed, as well as potential solutions to protect women in those marriages, is available in Appendix I attached hereto.

B. Divorce

Women in registered marriages are denied the opportunity to exercise their legal rights when they are unable to register a divorce. In the countries reviewed, though the written

law on divorce registration is gender neutral on its face, the requirement that registration be completed in court serves as a roadblock for those who do not have adequate financial or community resources to access courts. In addition, in some countries, women and men have different grounds for divorce, which may serve to unfairly prevent spouses of one sex or another from equally seeking a divorce.

Problems of access to courts have been documented in numerous countries in Africa and worldwide, but must be confirmed with follow up research. Typically, accessing a court requires accessing transportation to reach court, having the financial wherewithal to lose multiple days away from income-generating activities, and lining up childcare (typically only an issue for mothers), among other things. The most vulnerable populations, especially those who suffer from poverty or live in rural areas, find these obstacles insurmountable. Unfortunately, women in more agricultural, rural areas, where customary norms denying property rights to women are more entrenched, are the ones who are most likely overcome by these obstacles to access and most in need of court intervention.