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Traversing Gender and Colonial Madness: Same-Sex Relationships, Customary Law and Change in Tanzania, 1890–1990¹

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Introduction

The main aim of this paper is to shed light upon woman-to-woman marriage, which I view here as a system that radically disrupt[ed] male domination and allowed women to traverse gender barriers in order to rectify reproductive, social and economic problems. The paper examines the institution within the framework of colonial and post-colonial judicial systems and in the context of African customary law. It is argued here that colonial authorities took several ineffective measures to abolish the practice and even the post-colonial state seems to have taken an even more ambivalent attitude towards the practice, especially as far as rights of the children are concerned. The matter as we shall see was even complicated when the authorities held that this marriage was not a form of customary marriage and even went ahead to order divorce decrees.

Woman-to-woman marriage is a predominantly African institution. This form of marriage is an unfamiliar subject to most people outside Africa and even Africans themselves. It is only vaguely understood by historians and social scientists. It remains relatively obscure, and in family studies discourse, the topic is pushed to the extreme margins by an historical fixation on western nuclear families as a universal ideal (Njambi & O'Brien 1998).

While this type of marriage occurred in different forms, debates have emerged on whether the marrying woman attains a transformed status or not. Also, the idea of same sex relationships has spurred discussion of the sexuality of women in such marriages. A few texts imply that there may be sexual involvement in these marriages, Herskovits (1937), for example, suggested that Dahomey woman-

woman marriages sometimes involved sexual relations between the women. Blackwood (1984) argues that lesbian behaviour cannot be ruled out while others consider the marriage a non-sexual institution. Evans-Pritchard (1951) observed that woman-to-woman marriage occurs among the Nuer where a female is barren. The barren woman will take a wife, hence becoming a cultural man, and also arranges for what Ramet calls a 'progenitor' for the wife so that 'she' becomes a father (Ramet 1990). Similar forms of marriage are mentioned by Gluckman (1970) among the Zulu of Natal and Uchendu for the Igbo of Southern Nigeria, Uchendu relates that his own mother married several wives (Uchendo 1965). Among the Lovedu, Krige invariably uses the term 'female husbands' to describe women who raise the bride-wealth. She *inter alia* suggests that a female husband can be a woman headman who marries another headman of a district (Krige 1974).

The practice of woman-to-woman marriage among the Nandi of Kenya, as it has been described by Oboler (1980), is another interesting case. According to this writer, a Nandi woman with no sons can use the cattle belonging to her 'house' to marry a wife of her own. Therefore, the Nandi woman who takes a wife is fundamentally recorded as a man, a situation that is quite unique with other cases of woman-to-woman marriage on the African continent. The woman ceases to have sexual intercourse with a man and even dresses like a man and so on.

Several authors have studied the Kuria and attempted to address the issue of woman-to-woman marriage. However, a lack of a properly historical approach to the subject has allowed speculation on the role of these marriages in Kuria society. Rwezaura, for example, claims it was a 'pre-capitalist tradition' in the region (Rwezaura 1985), while Bonavia and Baker who worked as officials in Musoma District in colonial Tanganyika call it an old custom. Bonavia held it was abolished by common consent in 1927 (cited in Alsaker 1995). However the practice arose long before the colonial period and increased in popularity towards the end of the twentieth century. Scholars of the Kuria like Rwezaura, (op cit.) and Tobisson (1986) have themselves tended to neglect the subject and more specifically the sexual praxis involved in this type of marriage. The authors have identified the marriage as woman-to-woman marriage i.e daughter-in-law marriage which is correct in describing a conventional marriage but wrong in this context.

The Abakuria on whom this study focuses are an agro-pastoral society straddling the Kenyan and Tanzanian border. They inhabit the vast districts of Musoma, Mara and Serengeti. Centuries of geographical isolation had permitted the indigenous growth of a culture and social organisation different in striking aspects from those of nearby communities and from the general cultural patterns of the East African people (Chacha 1998).

Woman-to-Woman Marriage and House Property System in Late Pre-colonial Tanzania

For most of the communities in pre-colonial Tanzania, ownership of important resources was communal. Even where families and individuals had rights to use a particular piece of land, their rights were not conceived of as absolute in the terms of current private property rights regimes. These resources were used according to collective communal rules. No single source controlled the resources and access to them was limited to an identifiable community with set rules on the way those resources are to be managed. Non-members of the community were excluded from accessing the resource. Collective arrangements usually made at the community level regulated access to and use of such resources.

Family life among most of the communities in Tanzania was (and still is) organised along patriarchal lines whereby the male is the head of the household. Succession to property was through the male lineage whose duty it was to ensure that all members of the family had access to the property. Studies carried out in eastern and southern Africa have revealed that the basis for the male inheriting property was the fact that men stayed within the family unlike women who, when married, left their domiciles of origin and joined their husbands' families. The desire to keep family wealth within the community dictated that it be held by the man. As we shall see these family structure and inheritance procedures tended to complicate the rights of barren and sonless women in Tanzania.

Procedurally, the relationship was formed in the same way as a conventional marriage, being usually preceded by the transfer of cattle from the 'house' of the female husband to the bride's father. The bride-wealth for this marriage was usually higher than the ordinary marriages, however, this fact differ from Ruel's (1959:109) findings though this may have been due to difference in time of research. The main aim of woman to woman marriage was to serve a son for the 'house' to which the young woman was sociologically married. This 'house' would be represented by the old woman who could not bear a son for it in her marriage.

The Abakuria had a saying that *inyumba etana moona wi kirisia ne ntobu*, i.e., 'a sonless house is a poor house', and therefore, must have a wife married for it in order to raise seed and ensure its prosperity. Such marriage occurred at a time when it was obvious that a particular wife had failed to bear a son and she was of course past child-bearing age or if she had failed to get a male child in her marriage. The husband of the old lady normally gave the requisite marriage cattle or if he was deceased, this would be obtained from his estate.

It is important to mention here that, the girls who were married into woman to woman were not 'normal' girls but were either those who became pregnant before circumcision (*amakumena*) or those that conceived before formal marriage (*ubuisseke ubusigenche*). However, as we shall see, the girls married into the marriage kept a changing. After the married woman has been brought into the homestead,

a male consort (*umutvari*) was normally appointed to enter her hut and raise seed for the house of the female husband (Rwezaura 1985:145). According to the Kuria custom the *umutvari* was not a husband and did not have any rights concerning the children born following his association with their mother, nor do the children themselves inherit from his property. *Umutvari* was ordinarily appointed from the lineage of the husband of the marrying woman or any other close relative. He was only allowed to enter to the house of the woman late in the evening and leave very early the following morning, he was not allowed by tradition to make any decision concerning the life of the woman. In some Kuria clans, the (*abatvari* pl) were never respected, they often came from poor background or unsuccessful families. However, they had a saying that justified their activities and satisfied their ego '*moteti atana mokagi, bonswi mboreo bakorara*' i.e. there isn't any foolish married man, all sleep on the right side of the bed.

The purpose of the woman to woman marriage was to ensure the posterity of a household represented by each wife. As in other societies, the ideology of procreation and personal immortality was strong among the Abakuria and each wife would not be happy until she has had own son. However, possession of a son by a Kuria wife was not merely a matter of life after death, it also concerned the economics of production, resource control and social security during old age (Tobisson 1986: 176–80). The Kuria economic system with the polygamous household provided sufficient incentive for the occurrence of the woman-to-woman marriage, the basic aim being to protect the resource of the particular house by procuring for it a son who inherited its property – Rwezaura argues that the Kuria law of succession was most unfavourable to sonless widows. As soon as her husband died, she became part of his estate and liable to be inherited by her late husband's relatives. However, if she was past child bearing the woman to woman marriage became a viable solution to her dilemma.

As noted by Huber, 'the availability of cattle which have been obtained either by a woman's own efforts, or as bride wealth of her daughter, is the indispensable condition and an immediate incentive for a sonless wife to "marry"' (Huber 1969:764). Also, a son stood in place of a protector for his old mother and if her husband was dead or if he was cohabiting with young co-wives. Having a son was so significant to a Kuria wife that had she failed to bear one in her second marriage, Kuria law permitted her to take one of her sons born in a previous marriage into her new marriage where he will be counted as belonging to her new house. According to Rwezaura, Kuria law also provided that when a wife failed to bear son in her second marriage she would be allowed to return to her first husband – which in effect meant to the protection of her sons. A Kuria wife therefore, counted on a son to provide her during the old age, to procure grandchildren who would ensure the prosperity of her house and a daughter who will help her in housework and so on. As already noted, resources and property were

very significant part of a marriage so that therefore, woman to woman marriage could be discussed in the context of the 'house property system' (Rwezaura 1985: 20; Tobbison 1986:182). Where each maternal 'house' essentially and ideally functioned as an independent and self contained units as far needs and availability of marriage-cattle were concerned. Such a marriage was primarily a mean of coping with reproductive, social or economic problems caused by an 'imbalance' in human or material composition of a maternal 'house' as an operative part of a two-generation agnatic family. The 'house property system' finds expression in the way the Abakuria referred to the practice, in terms of the problems it was intended to solve. For instance, people would explain the woman to woman marriage by reference to the fact that 'a sonless house is a poor house'. Thus to 'marry' would be referred to as giving cattle on behalf of the poor house in order 'to prop the house up' – a similar phrase is used by the Kipsigis who claim that a sonless woman marry to 'strengthen the wooden pillars of the house' (Peristiany 1939: 81).

A woman who had not conceived within a year after her marriage and who feared that she was barren, did everything to make sure she got pregnant. At first measure; she would visit sacred places or magician or follow advice of local mid-wives' on dietary practices, which would increase her fertility. If these measures proved unsuccessful, other women would always pressure her in a popular euphoria, '*taichaba wiibore*' i.e. 'go aside and have a child', meaning that woman could as well have a baby outside her established marriage. This was often considered normal in Kuria society and in fact Tobisson (1986: 180) found out from one of her informants who she had asked about this, she answered 'who will ask which bulls had impregnated a cow?'

The woman marriage improved the 'married' women's image and personhood in many respects: for one, and obviously, the woman's social status changed completely, she no longer would be regarded as an outcast or barren but now she had 'resurrected her house'. According to a Kuria saying, *arooba irigoti* meaning the woman has 'joined a body with the head', or '*arichokia moe*', she has 'brought forth her house'. Such a woman was empowered by the society to make many decisions regarding her 'house' was under her care and she would raise her own *iribicho* (a herd of cattle). She would be regarded as the senior-most woman in her village, and she would be approached in face of conflicts occurring among other women. Finally, when she got into old age, she would be honoured into being initiated into an elder-hood ceremony known as *isubo yu umukungu*. This was an elaborate ceremony that took about three days and it was normally sanctioned by the *inchaama* or Kuria council of elders. Therefore, this was the tone and practice of the woman-to-woman marriages in Bukuria, during the precolonial years, however, there were a few changes that occurred in the late nineteenth century and affected this marital relation.

In the 1890s the Abakuria, like other East African communities were faced with drought and famine which rendered farming and animal production precarious and hazardous occupations. (Chacha 1999:56) Equally, the legal implications of the woman to woman marriage changed significantly to the tunes of these changes. A decade of natural catastrophe opened when rinder-pest entered Western Kenya and Northern Tanganyika. Bukuria was struck by the epidemic in unprecedented proportions (Ilfie 1979:10). Kuria oral traditions commemorate these events clearly. It tells of cattle, sheep and goat skeletons strewn in great quantities. (Cf. Maroa 1989:4-16)

During this time, the position of poor woman and girls was especially precarious. Food became so scarce that people were forced to eat discarded ox hides and the goats skins that they wore for clothing into a devastating meal. The destruction was so crippling that the children and grandchildren of survivors continued to recount the storm of the famine called *gitura mabo* 'roasted skin' (Cf. Schmidt 1992:152). This famine was so harsh that women made certain kind of cry known as *ekerarati* as they saw their children and die one by one. Marriages were rarely conducted, owing to lack of livestock for bridewealth. Families experiencing famine during this period had no choice but to barter their women and children for food. (Wakefield 1870). While poor men suffered through the mortgage of their futures, female household members were literally pawned to the rich women of the Mbungu and Warutu in Northern Tanganyika (Chacha 1999:39).

Likewise, the Bukira clan which was least hit by the nineteenth century famines, received many women refugees whom they turned into wives. However, the number was too high that some women ended up getting into the woman to woman marriage. These pawned females would be redeemed at a later date with cattle or some other form of wealth. Otherwise, the future of the women or girls lay in the hands of the Bukira women bearing male children for them. As the Kuria were being hit by famine at the close of the Nineteenth century, to the Maasai (Kuria neighbours) the condition was worse since it coincided with the 'ilaikipiak war and the rinderpest epizootic' (Bernstein 1996:1-11). The result was a complete disaster for a number of the Maasai. Contemporary observers estimate that they had lost 95 percent of their cattle (Cf. Sharpe 1983; Kholmann 1894). This made their pastoral life impossible for years and many Maasai women took refuge with agricultural neighbours in order to survive. Those came to Bukuria were known as *abatebia*, then came in caravans of between thirty to sixty women. They brought with them beads and other valuables.

According to oral narratives, these women never went back to Maasai land instead they were married into woman to woman in Bukira, men wouldn't normally take these women as wives since this would cause conflicts with Maasai. Kirsten writes about a wealthy widow known as Masoborroa Waitebe who moved

from Bukira and settled in Nyabasi with her cattle and 'married' the Maasai woman but she later sent a message to the Maasai accusing them of being lazy, she was in turn raided and killed by the Maasai spies (Kjerland 1995:123).

The Abahirimasero clan of Bukira who inhabit the present-day Ikerege, are thought to have been the off-springs of this woman. Many similar incidences took place between the Kuria women and the Maasai especially during the period of drought and famine. To substantiate this claim, the colonial administrators were struck by the physical similarity between the Maasai and the Abakuria. Marx Weis for example, repeatedly points to how Maasai ornaments, dress and weapons were found among the Abakuria (Weiss 1910).

In fact, the degree to which the Abakuria warriors resembled the Maasai morans is clear from the photos Weiss took in 1904 while in Bukuria. Also, Baker claims that the Abangirabe (clan of the Kuria) pierced ears and facially resembled the Maasai. Therefore, and perhaps, it may have been through *inter alia* woman-to-woman marriage relationship with the Maasai that the Abakuria tended to physically resemble the Maasai and not through political assimilation as claimed by many Kuria scholars.

Colonial 'Madness' and the Rejection of Woman-to-Woman Marriage

Bukuria became part of the German colony following the Anglo-German agreement of 1890 according to which a border-line skirted the northern slopes of Mt. Kilimanjaro and ran further in a straight line to a point on the eastern shore of Lake Victoria and, therefore, through Bukuria. The prime manifestation of the colonial presence in Bukuria when the German officials arrived at Shirati during the early years was therefore the sporadic collection of taxes by the appointed chiefs.

Ostensibly, taxation was introduced in order to meet the cost of colonial administration, but it was also used effectively to push people into labour. The construction of the railway for example opened the country to more intensive European domination, enabling the international economy to absorb indigenous economies and restructuring them to meet its needs (Iliffe 1979:135). Malcom Ruel gives a vivid account of how the Germans conquered the people on their arrival in Bukuria:

the River Mara at Bokenye, where they were received peacefully. Spurred perhaps by the Abakenye, they attacked and raided the neighbouring province of Busweta and then moved to Shirati. From thereat various times they raided the Abatimbaru, Abanyabasi, Abakira and the Renchoka clans of the Abakuria (Ruel 1959).

In their initial stage the colonial administrators opposed the Kuria's apparently 'irrational fondness' of their herds. They argued that the Kuria spent too much

time discussing, stealing, and guarding so many 'unproductive' animals, they saw that Kuria large herds would hurt agricultural yields, they were grouped as part of the 'cattle complex peoples'. Therefore, formulated some policy towards cattle industry, this they did through directly and indirectly induced changes, the direct induced ones comprised actions like the control of cattle numbers and their movements and marketing.

Indirect induced changes were aimed at breaking the hegemonic position of cattle by *inter alia* monetising bride-price, increasing taxation, destocking, and forced cattle sale. In pursuit of this objective, the colonialist sought to promote crop production while undermining the pastoral component of the Kuria economy. Ironically, by making the agriculture more profitable while undermining the pastoral component, the policy enabled the Kuria to acquire more cattle, instead of marketing their stock for example, they preferred to retain their stock by deriving the necessary cash income from the sale of crops and wage employment. One man declared in the British court why he was opposed to destocking and other cattle reduction measures:

Our cattle are our mother, our father, and our children. Would you make me kill my mother because she was old? Would you make me slaughter some of my children because they are many? The answer is no. And neither do I expect you to sell your mother for cash when you want a new blanket or slaughter a son when you have a wedding. Do you castrate your children? (Winnington-Ingram 1959:90).

Such are the sentiments that typified the meaning of pastoral life to the Kuria social relations in colonial period, and for that reason, the Kuria were not ready to abandon this mode of production. As a result of these conditions bride-price, in began to raise steadily even allowing more and women marriages to be conducted forcing the colonial government to interfere more strongly with the Kuria marital relationships beginning with regulation of bride-wealth and then woman to woman marriage whose bride-price were higher than ordinary marriages.

The Germans and later the British recognized that there were organized communities in Tanzania who had their own law-like rules of family order, of property, of crime, of government, and so on, which, while not written down, were generally known and conformed to by the local groups to which they were pertinent. Colonial governments wanted the taxes they imposed to be paid, the labor they recruited to be obedient, the roads kept in repair, and they wanted to suppress all collective violence. They often counted on 'traditional authorities' in the countryside to maintain the requisite order. But those princes, chiefs, and clan leaders were not to exceed the authority delegated to them. The scope of that authority was greatly limited and altered by the colonial presence, and they helped

the settlers they invited into the colonies to acquire property as well. The laws that governed this kind of property were entirely different from the 'customary law' that applied to the African population. Those elements of local systems of normative order that were left to local communities to manage in their own 'traditional' way, came to be known as 'customary law'.

To understand the impact of the changing woman to woman marriage within this framework of the customary law and colonialism, one has to look at colonialism as a system of subjugating cultures and knowledge that were not familiar to the colonizers. In instances where the cultures and knowledge systems could not be as easily subjugated through law, the colonial masters sought to redefine the institutions of enforcement of customary law such marriage. In redefining and refashioning this institution, certain sections of the community such as women were left out. The marginalisation of women and customary law is thus symptomatic of global developments towards monolithic trends of thought and intolerance for different systems that did not fit neatly into the so-called modern way of thought.

In fact, the colonial state acted as an autonomous entity-separated from the rest of the society as it were interventionist in character and authoritarian. (Ghai & McArslan 1970). According to Ghai the creation of the colonial state was intended to 'subordinate all groups and classes in the colonized society'. So that in fact, these powers according to Fitzpatrick (1980) were used to integrate the overall colonial social formation by tying the traditional mode of production and the capitalist mode together into an operational whole'. Similar law and state operated in a coercive manner to integrate Kuria customary law into world system.

In fact, in the illustration of the structural effect of colonialism on the substance, practice and institutions of customary law in Africa, Mahmood Mamdani suggests that 'customary law' was largely a construct of colonialism, and it was therefore, a colonial authorities conspiracy to freeze 'customary law' into narrowly defined areas minus its autonomous logic (Jeppe, S. See Bibliography for URL). When we consider that the state and law are closely connected spheres. The contraction and weakening of the African state also witnesses growing claims for more recognition of cultural difference and its inscription into law.

Generally, and just like any other institution, early colonial officials completely misunderstood the woman-to-woman marriage practice's among Africans, Lugard for example, referring to a similar practice is most Africa, noted that:

... the custom of orderly women procuring young girls whom they go through a marriages ceremony appears to be prevalent among tribes with widely different origins and customs. The purchase money as misnamed 'dowry' and the woman husband becomes absolute owner of the girl (Lugard 1965:385).

Lugard must have thought that such relationship were forms of slavery. With regard to the functions of the relationships, Lugard noted that:

...in some cases it may be that the purchaser who wishes to assure herself of a 'wife' who will tend her in her old age, but the more usual reason is in order to claim for adultery and to gain possession of the children of such intercourse who by nature custom are property of 'husbands' who has paid dowry (Ibid).

In Tanganyika, similar views were held. For example, in 1927 the Acting District Officer, W.J. Bonavia, summoned an assembly of all North Mara Chiefs and ordered them to endorse the abolition of the practice. Having done that he then recorded that since the custom had been abolished, it would be helpful to the future colonial officials to understand its basic characteristics and further assist in bringing the custom to a final end. In the opinion of Bonavia,

the custom permitted wealthy spinsters or widows who wished to obtain children to contract marriages with young girls whom they farmed out to chosen men for intercourse, all progeny from such intercourse was the property of the old woman. Secondly, it was the custom for husbands whose wives were barren to invite their wives to buy 'wives'. Again the wives farmed out their girl wives and obtained progeny, thereby, which became the property of the husband (Bonavia 1935).

Some years later Baker described the practice in similar terms, noting that:

...until quite recently, it was the practice for a rich widow who was too old to attract men herself to marry a young girl whose work it was to look after her. Such were in fact slaves and took lovers in accordance with the orders of their female husband. If any children were born to the young girls, they were considered as the children of the widow and her deceased husband and used his name as their patronymic (Baker 1935:113-4).

Both colonial social anthropologists and government officials thus shared a common, though mistaken, belief concerning the nature of woman-to-woman marriage in Africa. Some thought that it was a type of homosexual relationship, while others saw it as a kind of slavery with an incipient element of prostitution. In either case the woman-to-woman marriage was considered as immoral practice which was to be discouraged and where possible abolished altogether. Christian missions viewed the practice as being opposed to basic Christian ideas on marriage and at all costs to be avoided by Christians. This negative attitude and

ignorance of most Kuria institutions as explained above, made the people consistently refer to the Europeans as mad men particularly in Tarime District.

During the colonial period in Tanganyika, state intervention in the practice of woman to woman marriage was concretely expressed in the abolition of the custom starting from 1927. Like a number of other colonial attempts to regulate Kuria social relations using law, the measure was not successful. The state succeeded, however, in turning the custom into a clandestine relationship. Indeed some officials, such as Baker, (1935:113–4) even believed that it had been abandoned by the people. It is important to bear in mind this point because in the years following independence, many Kuria litigants tended to deny the existence of such relationships whenever it seemed advantageous to do so.

When considering the post-colonial state regulation of woman to woman marriage involved the transfer of property and like conventional marriages, gave rights to disputes over property rights between parties and involved children whose welfare the state was anxious to regulate. One would therefore conclude that the regulation of woman to woman marriage by the state was entirely to be expected, particularly as more disputes came out to court for adjudication.

In conclusion then, colonial occupation and the penetration of capitalist economy brought about a number of changes which profoundly affected marriage in general and the family in Bukuria. The creation of an alternative means of acquiring wealth, the acceptance of the European money as a universal means of exchange, and tax payment; and above all the creation of labour reserves, altered seriously the concept of marriage and especially that of the woman to woman marriage. However, it worked at the advantage of the women who amassed a lot of wealth in the absence of men who had taken wage labour outside Bukuria. The situation in the colonial Bukuria therefore was at best described as a 'society of women and children'.

The Post Colonial State and Woman-to-Woman Marriage: A Legal Dilemma

The independent African states inherited a dual legal system where the general law or state law co-existed with customary laws of the various ethnic groups. In some African countries customary law was reduced into codes. This process was geared towards bringing 'native' law at par with the general law which was predictable since it was written. Even where states recognized customary law as valid, there were concerted efforts at bringing all laws at par with the general law.

Issues over the right of the children borne of the woman to woman family to education particularly, was challenging since the government thought that the relationship lacked the head responsible for the education of the children. Yet, the male consorts or *abatwari* were not keen and as a matter of principle not bound by law to assume such roles, their duties were limited to biological reproduction. The newly independent government therefore, held views that the fe-

male-husbands were unable or unwilling to educate their children, therefore, continued to discourage the practice.

Similarly, post independence therefore, saw continued efforts in the unsuccessful regulation of the woman to woman marriage alongside this, Christian churches especially the Seventh-day Adventist Church (SDA), in North Mara for example decreed that all families whose such marriages were contracted, all members would be struck off their church membership although some church members preferred not to adhere to church policies at the expense of the extinction of their 'houses' and went ahead to contract the marriage.

A major factor which militated against the marriage was the development of formal education. After the 1960s there was a push for education in most districts in Kenya, facilities were expanded drastically to meet the needs of both sexes, both woman to woman relationships and early marriages were therefore, abolished by the school administration. This was particularly reinforced by the education officers in those areas that were considered vulnerable: Musoma and North Mara Districts. However, soon, it was discovered from the ministry of agriculture annual reports that bride-wealth in Bukuria were sharply increasing and the immediate reason for this was obviously thought that both women and children were extensively marrying. The trend can be shown in tabular form below:

Year	Bride-wealth in Cattle
1913-1920	10-15
1921-1927	20-25
1928-1960	25-35
1961-1971	26-50

Source: Lexander and Chacha (1979: 14).

To reinforce this, the traditional *inchaama* (council of elders) administered an oath in which the Abakuria swore never to receive bridewealth of less than 26 head of cattle. The African Local Council was forced to approve this recommendation (Rwezaura:100). It is interesting also, to note here that women especially those from Nyabasi, Ngureme and Butimbaru had accumulated cattle and were paying bride-wealth to marry women as were permitted by the tradition to do so. However, normally it could be agreed that Kuria being a polygamous society, there was competition for the resources from the head of the household, therefore a woman who had more girls than the other fellow wives and that her house

to have access to portable wealth after the death of the household head would decide to marry.

The post-colonial state while recognizing the importance of regulating woman to woman marriages and its incidents, was somewhat ambivalent about how it should do it. If court decisions and the law can be relied upon to assess the mode of state regulation of this relationship, it seems to correct to say that ignorance of the nature of the relationship prevailed and outlived the colonial period. Was it a marriage between two women, as earlier colonial scholars and official had supposed? Or was it a unique and ingenious pre-capitalist social relationship which functioned to protect a sonless wife and ensured that the property she had helped to accumulate was usefully spent in ways which had long term benefits to her? Was it arrangement which rectified a 'biological' accident while at the same time rescuing a 'poor house' from social and meta-physical extinction? Or was it a form of prostitution and slavery? The woman to woman marriage relationship, having undergone rapid transformation in the era of capitalist penetration, tended to elude any form of casual attempt to understand its pre-capitalist characteristics and functions. As Rwezaura beautifully points out:

Moreover, the new ruling class of the independence era were just as intolerant of practices they considered backward and out of step with 'civilised' living. These factors tended to influence the form of state intervention in woman to woman marriage during the period following independence (Rwezaura 1985).

In 1963, the Customary Law Declaration panel did not consider woman to woman marriage as one form of customary marriages. It was doubtful that its exclusion from the declaration order was accidental or based on the belief that the custom had become obsolete. However, it was manifest that the Declaration Order was intended implicitly to abolish the custom. I will use some support from court cases used by Rwezaura in his dissertation titled: 'Kuria Family Law and Change' quoting for example a 1965 case where one Nimrod Logue, visited Tarime Township in Kuria to carry out research on 'the former customary law' (the pre-Codification law) among the Kuria and other peoples of the district. He came across a case (Rwezaura 1985) in which a young woman had sued her 'woman husband' for divorce. In that case a young Nyangi was married to the house of Mugaya d/o Monanka and the latter had appointed a male consort named Siongo to act as the genitor of Nyangi's children.

But ten years later according to Rwezaura, a misunderstanding led to the institution of a divorce suit at a local primary court. According to Logue, the primary court magistrate refused to recognize the relationship, saying that a marriage between two women was illegal. He nonetheless ordered a divorce decree

on the ground that Siongo did not love the petitioner (the appointed consort). On appeal, the district court overturned the lower court's decision holding that as no marriage had taken place there could be no divorce (Logue 1965: 56).

According to Logue's interview with the two magistrates who heard the case, the main reason why they refused to recognise the relationship was that the Declaration Order had abolished the woman to woman practice. Logue thought, however, that the two judicial officers, might also have thought that the custom was 'old-fashion' and decided not to enforce it. Logue's work thus presents some evidence on the views and approach of courts in the district during the period following the coming into force of the Declaration Order. Whether indeed the magistrates believed that they were bound by the Order to refuse recognition of the custom, or they were concerned to discourage it, both views are consistent with our understanding of the policy of state intervention in woman to woman marriage practices after the colonial era.

From 1963 to the passing of Law of Marriage Act in 1971, Tarime courts held the view that woman to woman marriage was not legal. For instance in 1968, Juliana Muhochi married to Robi Magwi, petitioned for the dissolution of her relationship with her at a primary court in Tarime district (Rwezaura 1985). Her main complaint was that she did not want to continue being married to a 'fellow woman'. The primary court held her favour that 'a marriage between two women (was) against the law of nature and should be dissolved' (Ibid).

In a different case, in which a legal point involving woman to woman marriage was raised, appears to have been reported 1971. It involved parties belonging to the Ngurueme Kuria clan of the Abakuria who also practice such a form of marriage. There was evidence to the effect that a woman named Patiri Magesa was married to the house of Keresa's mother and had two children before that relationship was legally terminated in accordance with Nguruimi law.

This time the claim involved the custody of the children. Kirisia, the plaintiff, sued for custody and further claimed that he was the husband of Patiri. In support of her case the defendant Patiri stated that she had never been married to the plaintiff but she was his mother's wife and that in any case the relationship had been terminated already. The court held that 'since no marriage between plaintiff had taken place, and that the ladies are now divorced, no such question could arise'.

The case of Gati Getoka v. Matinde Kimune shed additional light on the court's understanding of the relationship, and on the parties' rather tactical approach to the issues. In 1967 Matinde Kimune gave thirty-five head of cattle, three goats and forty-five shillings to Gati Getoka, being bride-wealth for marriage of the latter's daughter named Robi, to her sonless house. Both parties belonged to Kuria, of Musoma district, who also practice woman to woman marriage. After three years of marriage, Robi had not been able to give birth to a child, which failure turn caused misunderstanding between her and her hus-

band'. There was no evident whether a consort had been appointed for her. Matinde Kimune's petition for divorce was dismissed by the Kiagata primary court on the ground that there was no sufficient reason for dissolving the marriage. On appeal, the Musoma district court held that although it agreed with the lower court's findings of facts and its reasoning, it was held that 'such a customary union...has meaning, if any, if only it persists by mutual consent, and it cannot be suited against a rebellious party. Here the respondent (i.e. female husband) seeks to terminate it and ...Courts should readily accede'. The High Court accordingly dissolved the relationship (Rwezaura 1985).

This decision reveals that the primary court thought the 'marrying woman' was being difficult and was not giving her 'wife' sufficient time to conceive. This view was shared by the district court yet unlike the law court considered itself obliged to make a more definite intervention by disclosing the relationship. The High Court did not express its opinion as to whether the relationship was or was not slavish, not did it even decide the issue relating to the legal status of the relationship. And in ordering the refund of the bride-wealth the appellate judge simply relied on the opinion of the assessors. By 1978 the majority of High Court judges at Mwanza registry were unanimous in holding that woman to woman marriage was not a marriage at all and should not be so treated. In spite of the notoriety, this form of marriage was not recognized by the Law of Marriage Act, hence it was not a marriage at all.

Although the above mentioned decisions of the courts were considered in holding that woman to woman marriage was not a marriage, there were marked disagreements to its incidents, particularly in respect of rights to children. For example, a case involving a man named Mchele Marwa brought a claim at a local primary court for two children born during the desertion of his barren wife's 'wife'. There was evidence showing that in 1957 Mchele Marwa's wife, called Nyasanda, married a girl named Robi was pregnant by him (marwa). Thereafter, Robi returned to her parents but was brought back later when Nyasanda added to Robi's father some more cattle. On returning, Robi was not assigned another consort, but she soon became pregnant and had three children by unknown men. In 1968 Robi again escaped and went to cohabit with a man called Daniel Saraya in Musoma district. She was discovered five years later by Mchele Marwa, having in the meantime given birth to two children. It is these two children, born during Robi's desertion, who became a bone of contention.

Both the primary and district courts arrived at different decisions on the case. The primary court magistrate held that Daniel Saraya was the lawful husband of Robi and as such was entitled to the two children, while the assessors held that Nyasanda had a right to one child and the other belonged to Daniel Saraya. As a result of this difference of opinion, the case was sent to the District court for the review. At the same time, Mchele Marwa appealed to the District court where

it was held that ‘the relationship of ‘married woman’ between the respondent (i.e. Marwa and Robi) amounted to a valid marriage and that since such a marriage had not been dissolved, the children born to Robi were born in wedlock and belonged to the respondent by virtue of the provisions of (Rule) 175 of the law of Person”. Danel Saraya then appealed to the High Court against this decision.

In considering the appeal, Magistrate Maganga dealt with three main issues. The first was whether Mchele Marwa, not being Robi’s husband, had a legal right to calm the children. The second was whether the custom of

a woman marrying another woman is recognized under the Local Customary Law Declaration and, if so, what rights does such a relationship confer to the ‘marrying’ woman and/or her husband in respect of such ‘wife’ and her children, during the subsistence of such relationship’ (emphasis by Court).

The first issue was disposed of easily on the basis that Kuria law, which governed the parties, permitted a father-in-law to make such claim. On the second issue, the appellate judge held that the Customary Law (Declaration) Order did not

...provide for a marriage between a woman and another woman. Thus, although the practice of a woman marrying another woman might have been recognized among the members of the Wasimbiti tribe, it was abolished by the Declaration The practice therefore ceased to be binding among the members of that tribe as of the date the Declaration came into force in (Tarime) district and as such it cannot be adjusted by courts.

The appellate court, however, did not say that the practice was either illegal or unlawful. It merely expressed the view that courts would not assume jurisdiction on the matter simply because such a custom was not recognized by law and therefore not enforceable in a court of law. According to magistrate Maganga, the only remedy for people who still recognized customs concerning such marriages ‘to have disputes arising from such customs settled within their tribal councils, if such councils exist(ed). They (could) not resort to the courts for remedy since such customs (were) not recognized in the Declaration.’ Having held as above, the appellate judge did not dismiss the case or even require parties to go to their ‘tribal councils’ for settlement. Instead he went on to decide the appeal on the basis that woman to woman marriage was civil contract between the mother-in-law (i.e. Marwa’s wife) and Robi’s mother. According to Maganga whatever was given to Robi’s father was not bride-wealth but a consideration for a contract in which Nyasanda was

...to have Robi children which she could regard as 'belonging' to her either as her own children. When she assigned Robi to her stepson, the stepson became Robi's husband. But when she paid additional cattle after the death of her stepson and decided not to assign Robi to any other man, she thereby renewed the contract between her and Robi's father to have Robi to help her and produce children for her. Such a relationship cannot be turned 'marriage'.

The above decisions, in my view, represent the current judicial understanding of woman to woman marriage. It is clear from these and other decisions that most of the judges and magistrates believe that woman to woman marriage is a physical and sexual relationship between two women. But as noted by Huber (1969:764), the term 'women-marriage' does not adequately express the meaning of the custom. 'There is no suggestion in the view of the people, in the terminology or in the wedding ritual itself that a woman assumes the role of a husband in relation to another woman'. Yet judicial officers have understood the relationship differently and it seems to me that this has to some extent influenced their attitude to the relationship.

In a more serious tone, the judge further pealed to 'authorities that be, and those who purport to champion the female cause to wake up to the indignity of these marriages'. Lugakingira no doubt represents the out spoken thinking on this point while Mfalila takes a more pragmatic stand on the matter. In his view, the 'custom has a lot of common sense in it for it safeguards the interests of women who are unable to have children of their own.' Mfalila in fact, states that although it is an error for anyone to call the custom a 'marriage', courts should both abolish 'this centuries old custom of the Wazanaki', but should be 'preserved until, as the liberation of women catches more fire, it will itself die of natural causes'.

The preceding discussion shows, therefore, that the post-colonial state unsure what policy to adopt towards woman to woman marriage. It was not explicitly abolished nor was it legally recognised. The judicial officers were also uncertain as to how to treat the woman to woman marriage. Some thought it was rather like slavery while others saw it as ancient custom which was to be preserved until the women were liberated. Underlying all this official ambivalence was the problem of understanding what the relationship entailed and the more so when it was undergoing such rapid transformation. We turn now to examine the nature of this transformation.

The Challenge of the Millennium: Woman-to-Woman Marriage and Its Dilemma

Today in modern Tanzania, the constitution permits the application of customary law to personal matters and to the devolution of property. However, the

constitution contains no provision for gender as a basis for non-discrimination and as a result, even gender-biased practices are held as valid and constitutional. Women's access to economic resources in Kenya are consequently largely defined by customary laws. Inheritance is usually along the male lineage-hence, women do not inherit family property. An additional complication in the Tanzania situation is the growing number of woman-woman who found families outside of both the formal or customary legal regimes. When such unions terminate, the woman is usually left with no access to any household property nor to entitlement to maintenance from her partner or his family.

Although in Tanzania, codification has significantly modified customary practices. Customary laws are, nevertheless, held to apply to the African population unless the contrary is proved. Inconsistencies in statutory interventions leave women in Tanzania vulnerable when a marriage terminates – women are not provided with full access to household property. The Law of Marriage Act (1971), while, for example, prohibiting the alienation of the matrimonial home without the consent of the other spouse, paradoxically provides that the wife loses this right if the marriage terminates either by divorce or death. Tanzanian courts have, in order to provide the wife with some access to matrimonial assets upon divorce, used the reasoning that marriage is an economic venture. Similar to the situation facing Kenyan women, Tanzanian women do not inherit where there are male heirs. Women's access to household property and to land under inheritance laws are therefore severely constrained, underlining the urgency of the need to revisit gender in the current on-going revision of land tenure in this country.

In addition the issue of women and land ownership touches traditions and customary law. These are shaped by tribal customs and traditions which often create barriers for women to equal rights of access to land, property ownership and inheritance. History shows that Tanzanian women have been deprived of their rights to acquire, hold and own land the same as women in most other African societies (Tesha, <http://tanzania.fes-international.de/Activities/Docs/landuse.html>). In Tanzania, constitutionally, the land is owned by the state. Individuals can only acquire rights of occupancy.

However, the right of occupancies is acquired mainly through family transfer or through direct allocation from a state agency or by monetary transaction. In practice land ownership through family transfer is the major known way used by the Tanzanian rural people. About 90 percent of land acquisition in rural areas takes place under customary law or through inheritance. Most rural women settle on and use land which they get through family ties. Under customary laws women and girls are never beneficiaries of this type of acquisition (Chanok 1985). The acquisition and ownership of land is a monopoly of male members of a family. Such a system deprives women who are the main users of land, accounting for about 85 percent of all land users of the right to own land. The National Land

Policy of 1995 recognizes the existence of discrimination of women in matters related to access and ownership of land. It asserts the right of every citizen to have access to and to own land. It declares land to be a constitutional right. The Land Policy of 1995 was the basis for the new land legislations, namely the Land Act No. 4 of 1999 and the Village Land Act, No. 5 of 1999 (Tesha, op cit).

Woman to woman marriage is being transformed on a significant and recent development in the economic position of women. As more women who are divorced or widowed begin to establish their own homesteads away from the living lands of their former husbands or their natal homes. As they begin to acquire and accommodate inheritable property, there is the need for heirs and other dependants also. Under normal circumstances, woman to woman marriage were conducted to give sonless woman a child, but it is clear that other motives have been added. According to Kirsten women's motives appears to be no different from those of men, she states that 'female marriages have been on the increase and this has caused tension over women in Nyabasi' Kirsten Therefore, there are many other reasons why men as well as women find advantages to woman to woman marriage in contemporary Kuria society. One important reason, is the fact that a wife married to this marriage becomes a significant asset for the husband in forms of labour. She remains in her female husbands' husband (if there is any) until she loses access to it when the son (born of the marriage) establishes his own household.

As a result of harsh economic condition, today, it has been possible for a wife married to a female husband to be without a specific appointed male consort (*umutwari*) in which case, she enters into sexual relationship with lovers who may be anonymous. Such a consort is said to assume the rights of a husband in some respects (which shouldn't be the case) while disregarding a husband's responsibilities in others. He has no obligation to help the women in agricultural work, in maintaining the hut, in building granaries, and so on. In her interview in Tanzania, one woman described her consort to Tobisson:

He buys meat and divides it between the wives on his own homestead but gives me nothing. When my children are ill, he does not contribute a cent to the dispensary fees or medicine. Yet guards me jealously and does not permit any man to cross my doorstep (Tobisson 178).

While a male consort is often referred by the mother-in-law of the young woman as 'a son of the house' implying that he is free to come and go as he pleases and may be provided with food beyond usual quality and quantity. More often however, there are cases where the behaviour of consorts renders them undesirable especially when they seem to demand more than the lady can afford, or when they keep on nagging, in fact the Ngoreme (Kuria clan of Tanzania) have em-

bodied their deeds and nature in a series of audio recording that describes them as troublesome, the song goes:

‘Abatwari baana ehgere,
 Abatwari baana amangana,
 Abatwari baana amakono,
 Abatwari baana iking’etyo,
 Hata ninyoora na agasuhu,
 Taang’a ekabuti yaane ngeende,
 Taang’a banga yaane ngeende...(Abatwari, recordings, 1999).

Translated as:

The consorts have problems,
 They are indeed interesting,
 They are often amusing,
 Even with small misunderstandings [with their women],
 They keep get out of their way, they get annoyed,
 Saying: give me my coat, I want to leave [your house];
 Give me my sword, I want to leave....

In Tanzanian courts especially those in Ngureme, have ruled out that the consort has no right to the children decreeing that if the marriage between the two ladies will still subsisting, some rights of inheritance might eventually benefit the plaintiff, but for the ladies who are divorced, no such questions could arise.

Woman to woman marriages are today mainly contracted by independent women who have accumulated wealth and who seek to protect their wealth against male relatives. According to Ruwezaura such women take on the role of men and should be looked upon as ‘female husbands’. Although wealth accumulation by women may be a factor accounting for the increased occurrence of woman to woman marriages, one should be careful not to underestimate the possibility of Kuria women accumulating and controlling their wealth in their own right. Tobisson also asserts that the practices is disrupted by the increasing dependence on consumer goods in the area.

As a result of accumulation of cattle, in many areas such as Kurutiange, Masurura, Ikerege, and some parts of Bwirege on the Kenyan side, and also due to increased cattle rustling, there is an established practice of the homestead head temporarily, placing a wife and her dependant children to a safer destination with cattle dividends to assist in the rearing and supervision of the herds. It is under this circumstances that a wife decides to ‘marry’ a woman as an asset to supervise the cattle in the same way as would apply to her. Likewise, women whose son have married and established their own homesteads away from home

and her daughters already married, find herself lonely, she may decide to contract to woman to woman marriage to add a female into her 'house'.

Among other changes, it appears also that family heads in Bukuria have been more inclined to let their wives 'marry', even when the wives are young enough to stand the chance of having sons before passing child-bearing age, or whom they have sons already. The reason for this as already indicated may be because of the need for female labour accompanying the increased market-orientation of agricultural production.

And although, the AIDS disease has not been so pervasive in Bukuria, there is fear especially of females accepting to be married into woman to woman, more so especially considering the notion of appointing male consorts to the married lady by the female husbands, seems to be disappearing since the females who accept this marriages are now selecting their own choice of lovers on the basis of mutual attraction and understanding. They now choose not necessarily from the relatives of the female husband as it was during the pre-colonial times, but now from anywhere. Furthermore, the most important aspect of this marriage is the ability of the lady to get pregnant and have children.

Even until today the Tanzanian law still does not recognize the existence of the woman to woman marriage, however, it is held and protected by the local authorities embedded in the Chiefs Act. Powers are appended to the Kuria chiefs allowing them to solve all sorts of disputes arising in the process of transactions and practice of the marriage.

Conclusion

Everything has been said concerning the significance of the woman to woman marriage and the objectives for contracting such marriages. However, one is often mistaken to assume that the social and economic changes that have occurred in consequence of colonial and post-colonial policies and measures have made the practice obsolete or even that it has been disrupted to any noticeable extent. In this paper, I have argued that the practice has become increasingly widespread over the years accompanying such changes. We have seen how during the colonial and later periods of state regulations of the marriage was exercised, first in the form of abolition, and after the colonial era, by limited recognition of it. Common to both periods, however, was the government's general ignorance of what the relationship really involved.

What is most interesting are the changes in different forms in which the marriage has been taken. Initially it was a marriage that was intended to give a sonless wife a son and, also to give barren women an opportunity of raising up a family but today, especially as a result of accumulation of wealth by women in general, we have noticed that the marriage has been contracted for various reasons including: cheap labour, house property system, security and many others.

Note

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