

Law, Pluralism and the Family In Kenya: Beyond Bifurcation of Formal Law and Custom

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Abstract:

Family law in Africa has been characterized by pluralism where customary, religious and state laws co-exist within the same social context. However, this plurality is marked by a false dichotomization of formal law and custom. Under the law/custom dichotomy, people are deemed to be governed by one system of law to the exclusion of all others and to order their family lives within the boundaries of that system. However, this bifurcation runs counter to the reality on the ground, as people's family lives in Africa constantly traverse the boundaries of legal systems. This is particularly true of cohabitation relationships, which defy conventional categorizations of family law systems. This article examines the ways in which prevailing legal policies and judicial attitudes in Kenya have impacted on women's claims to property and maintenance upon breakdown of the cohabitation relationship. The article argues that the bifurcatory approach stems from an erroneous conceptualization of customary law, manifested in a weak form of legal pluralism that does not give effect to people's experience of the intersection of legal orders. In thinking about reform of family law in the African context, there is need for an approach to legal pluralism that pays attention to people's perception of their normative context and how such perception shapes their attitudes and actions. This would help in developing a legal framework that is more in tune with people's lived reality, particularly that of women.