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Gendered Personhoods and

the Politics of Pre-Marital Pregnancy Law in Kenya, c. 1940-69[1]

Between 1959 and 1969, Kenyan courts could hear pre-marital pregnancy disputes under two very different sets of law: "customary" laws of pregnancy compensation or the Affiliation Ordinance. "Customary" laws of pregnancy compensation, though varying slightly by region and "ethnic group," enabled African women's guardians to sue men who impregnated but refused to marry them. A man found liable under such laws paid his ex-lover's guardian a sizeable amount of compensation in cash and/or livestock. He also often assumed custody of the child in question, once the child was weaned. The Affiliation Ordinance of 1959, on the other hand, granted all women in Kenya -- African, Asian, and European -- the right to sue the biological fathers of their children for maintenance payments. In providing single mothers with independent legal means to maintain custody and obtain child support, the Affiliation Ordinance marked a profound departure from "customary" laws of pregnancy compensation.

Over the course of the twentieth century, several Africanist anthropologists and legal scholars have sought to explain increases in pre-marital pregnancy and to examine the litigation surrounding such pregnancies. This scholarship has revealed how changing patterns of marriage, education, and employment have contributed to increases in pre-marital pregnancy. It has also illuminated the prominent roles that women have played in bringing pre-marital

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[1] Throughout this paper, I use the term pre-marital pregnancy to refer to instances in which never married women, usually in their teens or twenties, became pregnant. In using "pre-marital," I do not intend to imply that all of these women eventually married.

pregnancy cases to court.[2] Building on the insights of these anthropologists and legal scholars, my presentation explores the reconfiguration of pre-marital pregnancy disputes and discourses that occurred in a specific historical context: late colonial and early post-colonial Kenya.

My analysis reveals how the formulation and application of pre-marital pregnancy laws was powerfully shaped by competing notions of gendered personhood. In using the concept of gendered personhood, I aim to draw attention to the varying jural rights and moral responsibilities assigned to the main protagonists in these cases: namely, single mothers and the men named as the biological fathers of their children.[3] Examination of government correspondence and parliamentary debates demonstrates how local elders, state officials, and politicians evoked particular notions of men's and women's rights and responsibilities to define the content of pregnancy compensation and Affiliation law. Close study of court records suggests how young people and their guardians engaged and, at times, challenged the jural

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[2] Some of the most important works in this vein include Isaac Schapera, "Premarital Pregnancy and Native Opinion: A Note on Social Change", *Africa* 6 (1933): 59-89; John Comaroff and Simon Roberts, "Marriage and Extra-Marital Sexuality: The Dialectics of Legal Change among the Kgatla," *Journal of African Law 21* (1977): 97-l 23; Athaliah Molokomme, "'Children of the Fence': The Maintenance of Extra-Marital Children Under law and Practice in Botswana," Research *Reports*, No. 46 (Leiden: African Studies Centre, 1991); Caroline H. Bledsoe and Barney Cohen, (eds.), Social *Dynamics* of *Adolescent Fertility in Sub-Saharan Africa* (Washington, D.C.: National Academy Press, 1993); and Gwendolyn Mikell, "Pleas for Domestic Relief: Akan Women and Family Courts" in G. Mikell, ed., *African Feminism: The Politics of Survival in Sub-Saharan Africa* (Philadelphia: U. of Pennsylvania Press, 1997), 96-123.

[3] My analytical category of gendered personhood entails a feminist reworking of the concept of person as elaborated by Meyer Fortes, "The Concept of the Person" [1973] in M. Fortes, *Religion, Morality, and the Person: Essays on Tallensi Religion* (Cambridge: Cambridge U. Press, 1987), 251. Fortes' essay is a response and departure from Marcel Mauss' earlier formulation of personhood in, "Une categorie de L'esprit humaine: la notion de la personne, celle de moi," *Journal* of the *Royal Anthropological Institute 68 (1939): 263-82* and translated by W.D. Halls as, "A Category of the Human Mind: The Notion of person; the Notion of Self' in M. Carrithers, S. Collins, and S. Lukes, (eds.), *The Category* of *the Person: Anthropology, Philosophy, History* (Cambridge: Cambridge U. Press, 1985). Also see, J.S. La Fontaine, "Person and Individual: Some Anthropological Reflections" in Carrithers et al., *The Category of the Person, 123-40,* esp. 124; and Michael Jackson and Ivan Karp, "Introduction" in M. Jackson and I. Karp, (eds.), *Personhood and Agency: The Experience of Self and Other in African Cultures* (Uppsala: Acta Universitatis Upsaliensis, 1990), 15-29. For a feminist anthropologist's critique of the purported gender neutrality of the conceptual category of personhood, Henrietta L. Moore, "Embodied Selves: Dialogues between Anthropology and Pyschoanalysis" in *A Passion for Difference: Essays in Anthropology and Gender* (Cambridge: Polity Press, 1994), 28-42. Moore persuasively argues that "the implicit model for the person in much ethnographic writing is, in fact, an adult male." (28)

and moral notions of proper personhood embedded in these laws. Through pre-marital pregnancy law and litigation, various people in late colonial and early post-colonial Kenya articulated and contested gendered rights and responsibilities.

The history of pregnancy compensation law also illuminates much about the shifting concerns that informed state regulation of sexual and procreative relations in Kenya. For most of the colonial period, the social meanings of pre-marital pregnancy in rural areas flowed from age and kinship categories. In central Kenya, as I will discuss, a woman's initiation status powerfully determined the social viability of her pregnancy. At the national political level, however, other discourses dominated discussions of pre-marital pregnancy. In the late 1950s, when pre-marital pregancies became the object of central government concern, white settler politicians initially evoked racial distinctions to define the purview of the Affiliation Ordinance. Ultimately, however, it was discourses of the "modern" and the "traditional" that provided administrators and politicians with the most effective rhetorical tools to define the applicability of pregnancy compensation and Affiliation law. During the 1960s, discourses of the "modern" and "traditional" proved to be exceptionally adept at both masking the continuities and justifying the disjunctures between colonial and post-colonial rule in Africa.

constructing the "customary" law of pregnancy compensation in Meru

The history of pregnancy compensation in Meru District, a rural area located on the northeastern slopes of Mt. Kenya, provides a case study of the formulation of pre-marital pregnancy law in rural Kenya and an exceptionally well-documented instance of the wide-ranging colonial process of the construction of "customary" law. [4] Various scholars have identified how, during the 1920s and 1930s, European male officers and African male elders

[4] By the late 1960s, the only major "ethnic group" in Kenya that did not have an officially-recognized "customary" law for pregnancy compensation or "causing pregnancy of an unmarried girl" was the "Elgeyo, Marakwet, and Tugen." Eugene Cotran, *Restatement* of African Law, Kenya, *volume I: The Law of Marriage and Divorce* (London: Sweet and Maxwell, 1968), 42.

sought to exert control over African women and young men through the formulation and enforcement of "customary" law.[5] The post-World War II development of pregnancy compensation in Meru demonstrates how "customary" law continued, in the late colonial and early post-colonial periods, to be an important site for negotiating gender and generational relations and conflicts.

In Meru, the construction of the "customary" law of pregnancy compensation -- often referred to as "illegal pregnancy" or *kuthukia mwari* ("spoiling a daughter") -- was a protracted process. Prior to the 1940s, the social meanings of pre-marital pregnancy flowed from the age grade system. A woman's status as an initiated or uninitiated person largely determined whether a pregnancy was socially viable or not. During the first decades of colonial in Meru (c. 1910s-1930s), a woman who became pregnant prior to her initiation obtained an abortion, as it was unacceptable for *mukenye* (an uninitiated female person) to conceive a child. In some areas if the pregnancy became public knowledge, the man responsible for the pregnancy would provide the *mukenye*'s father (or male guardian) and his age mates with a bull to consume. No livestock was provided if the woman impregnated was a *ngutu*, an initiated but unmarried female person.[6] But, as female initiation was a pre-nuptial process, with initiates ideally moving

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5 Martin Chanock, "Making Customary Law: Men, Women, and Courts in Colonial Northern Rhodesia," in *African Women and the Law: Historical Perspectives* , M.J. Hay and M. Wright, eds. (Boston, 1982); and *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge: Cambridge U. Press, 1985). For other discussions of the construction of "customary law", see Terence Ranger, "The Invention of Tradition in Colonial Africa," in The *Invention of Tradition,* E. Hobsbawm and T. Ranger, eds. (Cambridge: Cambridge U. Press, 1983); Sally Falk Moore, *Social Facts and Fabrications: "Customary" Law on Kilimanjaro, 78804980* (Cambridge: Cambridge U. Press, 1986); and Mann and Roberts, eds., *Law in Colonial Africa.* For "customary law" in relation to gender and generational control, see Elizabeth Schmidt, *Peasants, Traders and wives: Shona Women in the History* of *Zimbabwe, 1870-7939* (Portsmouth, NH: Heinemann, 1992); and Diana Jeater, *Marriage, Perversion and Power: The Construction of Moral Discourse in Southern Rhodesia, 1894-1930* (Oxford: Oxford U. Press, 1993). More recently, scholars have focused attention on how these subaltern groups of women and young men also engaged colonial courts and law in pursuit of their own interests. Sara Berry, No *Condition is Permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa* (Madison: U. of Wisconsin, 1993); and Thomas V. McClendon, "Tradition and Domestic Struggle in the Courtroom: Customary Law and the Control of Women in Segregation-Era Natal," *The International Journal of African Historical Studies, 28* (1995), *527-61.*

6 Interviews with Margaret Karoki by R. Kithiira and L. Thomas, 5 April 1995, Igoji, b. 1910; and Moses Kithinji by R. Kithiira and L. Thomas, 9 June 1995, Mitunguu, b. 1927.

directly from seclusion to their new marital homes, the possibility of an *ngutu* becoming pregnant was small. This changed during the 1930s and early 1940s when the government undertook campaigns to eradicate abortion by lowering the age of initiation. In transforming female initiation from a pre-nuptial to a pre-pubescent process, these campaigns shortened the period of being a *mukenye* and lengthened that of being a *ngutu?*

In the early 1940s, British officials in Meru began to work with two all-male councils -- the Meru Local Native Council and the *Njuri Ncheke* -- to address the "problem" of pre-marital pregnancy among *ngutu.* The British established Local Native Councils in most districts of colonial Kenya as a highly circumscribed form of African local government, granting them limited statutory powers and responsibility for managing local revenues. The Meru Local Native Council (LNC), like others, was comprised of about two dozen elected and appointed African men and presided over by a British officer who possessed veto power. Colonial officials recognized the *Njuri Ncheke*, comprising a much larger group of African men but including nearly all LNC members, as the supreme indigenous council of Meru and the ultimate authority on "customary" matters in the District. In 1942, V. M. McKeag, the District Commissioner of Meru presented to the LNC his understanding of the pre-marital pregnancy problem among *ngutu.*

> Formerly, a man who put a *mukenye* (unmarried [sic] girl) in the family way had to pay a heifer or its equivalent in goats, but this did not apply in the case of *ngutu* (circumcised girl). Nowadays, *ngutu* live in their fathers' villages as *mukenye* used to do. Young men are taking advantage of this and, with impunity, putting them in the family way without any intention of marrying them.

While not acknowledging that the prevalence of *ngutu* was, in part, a product of ongoing colonial campaigns to combat abortion, McKeag proposed and the LNC approved extending the practice of providing livestock to include cases involving *ngutu.* A man found responsible for

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7 For an analysis of these campaigns which aimed to eradicate abortion, see Lynn M. Thomas, "Imperial Concerns 'and 'Women's Affairs': State Efforts to Regulate Clitoridectomy and Eradicate Abortion in Meru, Kenya, c. 191 O-l 950," *Journal* of *African History 39 (1998): 121-45.*

impregnating and refusing to marry either a *mukenye* or *ngutu* would now be required to "pay" her father's age grade a bull. The child, once born, was to remain in the "village" of the *mukenye's* or *ngutu's* father "as his child.,,8 Like practitioners of "indirect" rule" throughout colonial Africa, McKeag hoped that he could fix a social problem through a slight alteration of "customary" rules rather than by addressing broader processes of political change.

In the eyes of subsequent British officers, at least, these measures proved ineffective. In 1949, another District Commissioner drew the Meru LNC's attention to what he considered a moral outrage; "parents have no control over their daughters who go with young men for weeks at a time and then return pregnant. No attempt appears to be made to see those young men nor does the public condemn this state of affairs." To encourage parents to exert more control over their sons and daughters, the LNC passed a resolution stating that in cases of a *ngutu's* pregnancy, the man responsible would pay a fine to the LNC rather than provide a bull to the father's age grade. In cases of a *mukenye's* pregnancy, the fine to the LNC would be paid by both the *mukenye's* father and the father of the man who had impregnated her.9 With this resolution, pre-marital pregnancy became an offense against the corporate body of the LNC rather than the father's age grade and fathers of *mukenye* were now held responsible for the daughters' sexual behavior. While this fines system proved short-lived, it reveals government officials' frustrated sense that parents and their age mates were not doing enough to protect unmarried daughters from becoming pregnant.

In 1954, the *Njuri Ncheke* introduced the "customary" law of pregnancy compensation. The *Njuri Ncheke* overturned the LNC's 1949 resolution by stating that pre-marital pregnancy

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8 Meru LNC, Minutes, 15 July 1942 and 28-29 Oct. 1942, MCC/LNC/4. In 1940, missionaries at the Chogoria station in southern Meru, illuminating another way in which initiation status related to pre-marital pregnancy, reported that some male mission adherents had impregnated girls "who from missionary influence have not been circumcised" and then refused to marry them. See C. Tomkinson, Acting PC, Central, to DC, Meru, 8 Feb. 1940, KNA/VQ/11/2; and Meru, AR, 1939.

9 Meru LNC, Minutes, 8 Dec. 1949, KNA/PC/CP/2/19.

fines should "be paid to the father of the girl as compensation."[10] Under this new "customary" law guardians -- fathers or, in cases where fathers were dead, brothers -- brought their claims to African Courts, judicial panels comprised of three or more African male elders appointed by British officers.[11] During the early years of the law's existence, the standard amount of pregnancy compensation awarded at the African Court located near Meru town was 300 shillings plus a bull to be consumed by the father and his age mates? This was a sizable sum in an area where a relatively well-paid agricultural laborer only earned 50 shillings per month and a bull could cost anywhere from 100 to 200 shillings.[13] In June 1960, the Meru Law Panel, a group of male elders convened to codify Meru "customary" law, set a standard rate of compensation of 500 shillings plus one bull valued at 200 shillings to apply throughout the District.[14] This codification effort was part of the government-sponsored Restatement, of African Law Project that sought to "ascertain and restate the customary law" on criminal offences and on marriage, divorce, and succession for the "various tribes" in Kenya. Conceived as a means both to make "customary" laws accessible to advocates and magistrates and to harmonize "customary" principles with those of British law, the Restatement Project was an integral element of late colonial and early post-colonial efforts to "modernize" the judicial

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10 *Njuri Ncheke*, Minutes of the Annual Meeting, 12 Oct. 1954, MCC/ADM/15/16/6/vol. III.

11 LNCs initially paid the salaries of African Court elders. After 1958, the central government took over the payment of their salaries. Y.P. Ghai and J.P.W.B. McAuslan, Public Law and Political Change *in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (London: Oxford, 1970), 156-9; Meru, ARs, 1957-58, KNA/DC/MRU/1/1/13 and KNA/DC/MRU/1/1/14.

12 See Kinoru African Court, Civil Cases Nos. 873/56, 427160, and 463/60.

13 Letter written by Casey, Timau to Barbara Castle, MP, London, 1 July 1957, PRO/CO/822/1647.

14 Meru Law Panel, Minutes, 16 June 1960, MCC/ADM/15/16/6/vol. III. In most areas of Meru District, guardians were only eligible to sue for compensation for their daughters' or sisters' first pregnancy. Only in Tharaka could guardians sue for compensation for subsequent pregnancies. For later clarifications of the Meru "customary" law for "causing pregnancy of an unmarried girl," see Special Law Panel Meeting to Record Customary Criminal in Meru District, Minutes, 25 Sept. 1961 MCC/ADM/15/16/6/vol. IV; Meru (including Tharaka) Law Panel, Minutes, 28-30 Nov. 1962, MCC/ADM/15/16/6/vol. IV; and Cotran, *Restatement of African Law, Kenya, volume I, 42.*

system.[15] In codifying "customary" laws, the Restatement Project simultaneously defined and differentiated the "traditional" from the "modern" and incorporated the "traditional" into a "modern" judicial framework.

Through these pronouncements and rulings, British officers and the African men serving on the LNC, the *Njuri Ncheke*, African Courts, and the Meru Law Panel brought pre-marital pregnancy "customs" in Meru in line with the "customary" law of pregnancy compensation that already existed elsewhere in mid-twentieth century Kenya and much of eastern and southern Africa. While in some areas such systems of compensation may have dated back to pre-colonial times, in others, they appear to have been colonial innovations or, as in Meru, reworkings and elaborations of previous practices. In an important article on pre-marital pregnancy published in 1933, Isaac Schapera argued that pregnancy compensation in Botswana was an early twentieth-century response to the spread of pre-marital pregnancy occasioned by the declining influence of initiation ceremonies and older women's censure through song, and the rising impact of labor migrancy, European education, and anti-polygyny measures propagated by church and state officials. According to Schapera, pregnancy compensation stemmed from the belief that the man responsible for the pregnancy should compensate the woman's father "for the damage he has suffered by the seduction of his daughter."[16]

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15 Charles Njonjo, "Forward" in Cotran, Restatement of African *Law, Kenya, volume I, v.* The Restatement Project was funded by a grant from the Colonial Development and Welfare Funds. For a more thorough discussion of African Courts and efforts to "modernize" the Kenyan judiciary, see Lynn M. Thomas, "Regulating Reproduction: State Interventions into Fertility and Sexuality in Rural Kenya, c. 1920-70," Ph.D. dissertation, University of Michigan, 1997, 321-7.

16 Isaac Schapera, "Pre-marital Pregnancy and Native Opinion: A Note on Social Change," *Africa* 6 (1933): 59-89. As early as 1933, colonial officers recorded Kikuyu "customary law" as requiring a man who impregnated an unmarried girl to pay the girl's father compensation of ten goats and four sheep while in southern Africa, pregnancy compensation payments dated back to the early twentieth century. Howard Elphinstone, "Akikuyu, South Nyeri Reserve," 1 March 1933, KNA/Jud/1/1982. For consideration of the applicability of southern African "customary law" to Kenya, see discussions of the "Natal Code of Native Law," KNA/VQ/11/2.

In Meru, the meaning of "compensation" shifted over the development of pre-marital pregnancy law and litigation. As recent scholarship on eating and ritual power in central Kenya suggests, the man's provision of a bull to the woman's guardian and his age grade and their consumption of it contributed to the restoration of local moral economies. By impregnating and refusing to marry single women, men transgressed moral conventions and introduced social impurities. Through the acceptance and consumption of a bull, guardians and their age mates used their political authority to ameliorate such transgressions and impurities. [17] Alternatively, the cash portion of pregnancy compensation settlements paid to guardians was rooted in a logic of individual, not communal, compensation. Similar to the situation discerned by John Comaroff and Simon Roberts in Botswana during the 1960s and 1970s, in Meru, the cash portion of pregnancy compensation appears to have represented "recompense for the guardian in respect of the spoilt marriage prospects of his daughter."[18] Demands for compensation reflected guardians' fears that they would receive smaller amounts of bridewealth for such daughters or sisters when they eventually married or that they would never receive bridewealth as no man would want to marry them. Pregnancy compensation, in effect, amounted to a partial payment of bridewealth.

Fragmentary evidence suggests that, following the passage of the Affiliation Ordinance in 1959, some in Meru began to view the cash exchanged in pre-marital pregnancy cases as maintenance support rather than "damages" payment. Administrative pronouncements regarding the "customary" law of pregnancy compensation in Meru never specified how the cash portion of the settlement should be spent. Yet, in an African Court ruling from 1960,

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17 John Lonsdale, "The Moral Economy of Mau Mau: Wealth, Power, and Civic Virtue in Kikuyu Political Thought" in Bruce Berman and John Lonsdale, Unhappy *Valley,* vol. 2 (London: James Currey, 1992); James H. Smith, "Njama's Supper: The Consumption and Use of Literary Potency by Mau Mau Insurgents in Colonial Kenya," Comparative Studies *in Society and History* 40, 3 (July 1998): 524-48.

18 John L. Comaroff and Simon Roberts, "Marriage and Extra-Marital Sexuality: The Dialectics of Legal Change among the Kgatla," *Journal* of *African Law 21, 1* (1977), *102.* Also see, Anne Griffiths, *In the Shadow* of *Marriage: Gender and Justice in an African Community* (Chicago: U. of Chicago Press, 1977), 109-I 14.

officials stated that the cash "normally paid in such a claim [pregnancy compensation] is intended to serve as a help to the young born."[19] Under this interpretation, plaintiffs were to use the cash portion of pregnancy compensation to support their grandchildren until they had been weaned or were of school-going age and, hence, had been taken to the homes of their biological fathers.[20] In a similar vein, the Meru Law Panel announced in 1961 a reformulation of the "customary" law of *marero*, defined as the "expense" involved "when a child was brought up at its maternal grandmother's home." According to the Panel, men had formerly provided one bull as *marero* when they had retrieved their children from their maternal grandparents' home. Referring to the "increasing expenses" of raising children, the Panel ruled that such men would now be liable to pay 200 shillings per year to the child's maternal grandfather?[21] These shifts towards child support quite possibly represent "customary" responses to the Affiliation Ordinance. Unlike that statutory law, however, these "customary" laws affirmed the position of patriarchs by granting male guardians rather than women themselves the right to sue and collect maintenance.

As developed in Meru, the law of pregnancy compensation reworked the categories of personhood through which people viewed single mothers and the men named as the biological fathers of their children. For most of the 1940s and early 1950s, a man's legal obligation to provide a senior age grade with a bull or pay a fine to the LNC depended upon the woman's

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19 Kinoru African Court, Civil Case No. 427160.

20 In contrast to the above-mentioned minutes of the 1942 LNC meeting indicating that a child born from a pre-marital pregnancy would remain in the "village" of his or her maternal grandfather, the "customary" law of pregnancy compensation as practiced in Meru granted the biological fathers custody of children.

21 "Special Law Panel Meeting to Record Customary Criminal Offences," 25 Sept. 1961, MCC/ADM/15/16/6/vol. IV. In the few cases that I examined in which *marero* was evoked instead of pregnancy compensation, the pregnancy in question was not the woman's first. See Kinoru African Court, Civil Case Nos. 785164, 403166, and 471166. John Comaroff and Simon Roberts (1977) similarly noted that in thecontext of the increasing costs of raising and educating children, some people had begun to interpret the cash portion of pregnancy compensation settlements as maintenance support rather than "damage" payment.

status as a *mukenye* or *ngutu.* But with the introduction of the "customary" law of pregnancy compensation, jural responses to pre-marital pregnancy no longer depended on a woman's initiation status. In collapsing *mukenye* and *ngutu* into "girl," this new law ignored previous moral distinctions within female personhood.[22] It also extended men's obligations. A man held responsible for a pre-marital pregnancy now had to pay a cash settlement to the woman's guardian in addition to providing a bull and eventually taking custody of the child. Through such cash payments, men acknowledged that they had wronged women's guardians.

passing the Affiliation Ordinance

In passing the Affiliation Ordinance in 1959, just four years prior to political independence, the Legislative Council granted all women in Kenya -- irrespective of ethnicity, race, marital, and initiation status -- the right to sue the biological fathers of their children for maintenance. This law challenged existing notions of female personhood by endowing unmarried mothers in pre-marital pregnancy disputes with a legal status independent of their guardians.[23] It also redefined men's responsibilities by granting unmarried mothers custody and compelling men to either provide them with one lump sum maintenance payment of up to 24,000 shillings or monthly payments of up to 200 shillings to cover the costs of raising the child. These monthly payments could extend for up to sixteen years.[24] The Affiliation

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[22] Two years later, the *Njuri Ncheke* and LNC dealt an even more direct blow to female initiation by banning clitoridectomy. See Lynn M. Thomas, "'*Ngaitana* (I will circumcise myself)': The Gender and Generational Politics of the 1956 Ban on Clitoridectomy in Meru, Kenya," Gender and *History* 8 (1996), 338-63.

[23] For earlier discussions of the difficulties of granting African women legal age of majority status, KNA/AG/4/2791.

[24] S.N. Waruhiu, *Affiliation Law in Kenya* (Nairobi: East African Literature Bureau, 1962), 1-9. This pamphlet, prepared by a law lecturer at the Royal College of Nairobi, was to guide litigants in the preparation of their own affiliation cases.

Ordinance appeared to offer women the opportunity to raise children with the financial support of men but without being subject to their control as either daughters, sisters, or wives.

As my repeated efforts to locate the judicial department files relating to the Affiliation Ordinance have failed, much about the history of its formulation remains unclear. In introducing the Affiliation Bill to the Legislative Council, Slade, the chairperson of the committee that drafted it, explained that since 1932, he and other members of the Law Society of Kenya had considered such legislation necessary for Kenya.[25] The formulation of the Bill was probably, in part, inspired by the 1957 passage of the Affiliation Proceedings Act in Britain which consolidated previous legislation on "illegitimacy" and maintenance.[26]

In drafting the Affiliation Bill, the Slade committee had not originally intended for it to apply to African women.[27] They believed that the new law should be restricted to Europeans and Asians as it would be too difficult in "African areas" to define "what is, in fact, a 'single woman'."[28] But by the time the Bill was introduced, the government as well as Slade himself supported extending the Bill to include all racial groups. The Minister for Local Government, Health, and Town Planning explained this reversal of position by stating that after "considerable investigation," the government both realized that "illegitimacy" was a "growing problem in the African community," particularly apparent in cities and towns, and believed that African Courts

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25 Kenya, Legislative *Council Debates* (22 April 1959), 44.

28 The previous legislation repealed in whole or in part by 1957 Act include The Bastardy Laws Acts of 1845 and 1923, The Poor Law Amendment Act of 1844, The Bastardy Laws Amendment Act, 1872, The Affiliation Orders Act of 1914 and 1952, The Age of Marriage Act of 1929, and The Magistrate's Courts Act of 1952. Zambia, Report *on Affiliation and Maintenance Orders Project* (Lusaka: Government Printer, 1988), 28. For the history of "illegitimacy" and maintenance law in the United Kingdom, see Nigel Middleton, *When Family Failed* (London: Victor Gollancz Ltd., 1971); Morris Finer and O.R. MacGregor, "Appendix V: The History of the Obligation to Maintain," Report of *the Commission on One-Parent Families, Parliamentary Papers 1974,* XVI, 85-149; and Pat Thane, "Women and the Poor Law in Victorian Edwardian England," *History Workshop Journal 6* (Autumn 1978), 29-51. For a legal guide to post-1970 affiliation law in Britain, see G.S. Wilkinson, *Affiliation Law and Practice,* 3rd ed., ed. J.F. Josling (London: Oyez Publications, 1971).

27 Kenya, *Legislative Council Debates (22* April 1959), 44.

would be capable of determining which African women were "single women."[29] Other members of the Legislative Council continued to raise concerns about determining African women's marital status. A European female member Hughes queried whether "an African woman who is married under tribal custom [would] be considered as a single woman for the purposes of this Bill?"[30] While European members portrayed marriage among Africans as an ambiguous and unregulated institution, "specially elected" African member Muchara spoke directly to the stereotype of African promiscuity looming beneath their comments. He argued that the Bill should distinguish between single women and prostitutes. Maintaining that "most of these illegitimate children" are born to prostitutes who do not care for them properly, Muchara stated that prostitutes should not be eligible to receive Affiliation payments. Rather, children born to prostitutes should be removed from their care, and placed in the custody of charity organizations such as the Salvation Army Centre which would, in turn, receive monthly maintenance payments from the children's biological fathers.[31] In spite of these questions and proposed qualifications, the Affiliation Ordinance, as passed on April 28, 1959, applied to all Kenyan women, regardless of race or professional status.

The decision to include African women within the provisions of the Ordinance appears to have been an effort to demonstrate the Government's commitment to non-racialism. During the early months of 1959, African political leaders, white settlers, and government officials were locked in a fight over when and how the shift to majority rule should take place. The Legislative Council had been a multi-racial institution since 1958. It was composed of equal numbers of

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[28] Kenya, Legislative *Council Debates (22* April 1959), 42.

[29] Ibid., 42-43

[30] Ibid., 51.

[31] Ibid., 53-7. "Specially elected" African members were elected by the Legislative Council itself rather than in the "qualified franchise" constituency elections of 1957 and March 1958. They were considered to be strongly loyal to the colonial government.

African and European members and a smaller number of Asian members. These numbers were, of course, in no way proportional to the racial composition of the Kenyan population. During the debate and passage of the Affiliation Bill, no "constitutionally elected" African members were present as they were boycotting the Legislative Council to protest the government's refusal to hold constitutional talks prior to the 1960 general election? By reworking the Bill to encompass African women, the Government most likely sought to demonstrate to these boycotting African members their commitment to a non-racial political future. On the day of its passage, "specially elected" African member and Minister for Housing Amalemba applauded the Affiliation Bill as "a step forward towards recognizing the right of everybody, not on racial grounds but as human beings."[33]

In light of the Legislative Council debates over the applicability of the Affiliation Ordinance to African women and, no doubt, viewing it as a radical departure from existing laws of pregnancy compensation, administrative officers were uncertain as to whether the Ordinance should apply in rural areas. Nonetheless, in 1960, the African Courts Officer based in Nairobi prepared a simplified statement of the Ordinance to guide the application of it in the African Courts.[34] In June 1960, the Meru Law Panel stated that Affiliation cases should be first filed

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32 As "constituency elected" African members had called for a boycott of the "Special Elections" to protest the government's inadequate reform efforts, "constituency elected" African members denounced "specially elected" African members as "stooges, quislings, and black Europeans". George Bennet and Carl G. Rosberg, The *Kenyatta* Election: Kenya, *1960-61* (Oxford: Oxford University Press, 1961), IO-17 and 33-35; George Bennett and Alison Smith, "Kenya: From 'White Man's Country' to Kenyatta's State, 19451963," in D.A. Low and Alison Smith, (eds.), History of East *Africa, volume III* (Oxford: Oxford University Press, 1976), 135-45; Bruce Berman, Control *and Crisis in Colonial Kenya: The Dialectic of Domination* (Athens, OH: Ohio University Press, 1990), 399-400; B.A. Ogot, "The Decisive Years, 1956-63" in B.A. Ogot and W.R. Ochieng, (eds.), *Decolonization and Independence in Kenya, 1940-93* (London: James Currey, 1993), 54-61. The second reading of the Affiliation Bill took place on April 22nd, the same day that the Colonial Secretary, Alan Lennox-Boyd outlined, before the House of Commons in London, the British government's conditions for a transfer of power in Kenya and promised that a constitutional conference would be held before the 1960 Kenyan general elections. House of *Commons Debates,* 5th ser., 604 (22 April 1959), cols. 561-8.

33 Kenya, *Legislative Council Debates (22* April 1959), 52-3.

34 Waruhiu, *Affiliation Law in Kenya.*

with the Meru African Appeal Court rather than African Courts and that such cases should also be considered in relation to "customary" law so that "the award made under the Affiliation Ordinance could affect the standard compensation payment which was due under Native Law and Custom and vice versa."[35] This statement sought to preclude the possibility of a woman receiving maintenance payments and her father receiving full compensation according to "customary" law.[36] In an effort to discourage the enforcement of the Affiliation Ordinance in Meru African Courts, the Law Panel also "re-iterated" that the Ordinance was "more particularly suitable for application to the detribalized people in the big towns."[37] In 1962, the Nairobi-based Advisory Committee on African Courts went so far as to recommend that the Affiliation Ordinance be amended to exclude its application in areas "where there was an adequate customary procedure for the upbringing of a fatherless child."[38]

In attempting to restrict application of the Affiliation Ordinance to cities and towns, the Law Panel and Advisory Committee sought to qualify the non-racial character of the Ordinance through intertwined discourses of "modernity" and "tradition," and urban and rural. These discourses elided the "traditional" with the rural. Some European Legislative Council members had initially questioned the wisdom of including African women within the provisions of the Bill by casting African women's marital status as ambiguous and different from that of European

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35 Minutes of the Meru Law Panel Meeting, 16 June 1960, MCC/ADM/15/16/6 /vol. III.

36 In Zimbabwe during the late 1980s and early 1990s, instances of a man first paying "pregnancy compensation" or "damages" to a woman's father under "customary law" and then providing financial support for the child through the woman under the Maintenance Act, were common. Author's observations in Community Courts, Harare and Bulawayo, March-May 1990. On the Maintenance Act in Zimbabwe which only came into effect for African women when they received Legal Age of Majority Status in 1982, see Joan May, *Changing People, Changing Laws* (Gweru: Mambo Press, 1987), 74-81; and Joyce Kazembe, "Methodological Perspectives on Research and Maintenance Law in Zimbabwe," Paper presented at Women and Law in Southern Africa Research Project Seminar on Research Methodology, 12-16 March 1990, Harare, Zimbabwe.

37 Meru Law Panel, Minutes, 16 June 1960, MCC/ADM/15/16/6 /vol. III.

38 The Advisory Committee also suggested an amendment granting custody and care of the child to the father once the child had reached five or six years of age. Advisory Committee on African Courts, Minutes, 20 Aug. 1962, KNA/DC/MRU/2/11/3.

and Asian women. Administrators' opposition to the application of the Affiliation Ordinance in rural areas was similarly grounded in a notion of the particularities of African women's personhood. In arguing that "customary" laws of pregnancy compensation were better suited for rural areas where the vast majority of African women lived, administrators defended a vision of personhood in which African women remained the dependents of African men. The redefinition of African women's legal and social standing implied in the Affiliation Ordinance challenged the patriarchal foundations upon which colonial officials had long to sought to build political order in rural areas. Colonial and early post-colonial administrators ensured that the "modern" notion of female personhood entailed in the Affiliation Ordinance would only be available to European, Asian, and the small minority of African women living in urban areas.

engaging and challenging "customary" personhoods

Examination of pregnancy compensation cases in Meru reveals the ironies of administrative efforts to justify their bifurcated policy of applying "customary" laws of pregnancy compensation in rural areas and reserving the statutory Affiliation Ordinance for urban areas by marking the former as "traditional" and situating the latter as "modern." As discussed earlier, the "customary" law of pregnancy compensation itself was not a relic from the pre-colonial past but rather a colonial response to what British and African officials viewed as the increasing problem of pre-marital pregnancy. In Meru, pregnancy compensation cases were very much a product of broader transformations reconfiguring rural life in post-World World II Kenya. Case records indicate that the young people involved in pregnancy compensation disputes were those who had most eagerly embraced the institutions of "modernity" -- schools, training institutes, maternity wards, government offices, and dance halls -- that dotted rural landscapes. Analysis of pregnancy compensation records and latter-day oral recollections reveal how during the 1950s and 1960s, this emergent group of school-educated young people engaged and

sought to circumvent "customary" notions of proper personhood. Closer examination of one pregnancy compensation case elucidates that African Court hearings were but one moment in a protracted process by which young people and their relatives sought to negotiate or negate the transition from intimate heterosexual relationship to marriage.[39] It also reveals the prominent place held by "modern" institutions, particularly schools and maternity wards, in these young people's efforts to develop intimate relations and demonstrate intentions to marry.

In late January 1967, the Kinoru African Court in Meru heard the pregnancy compensation case brought by Ayub M'lnoti against Francis M'Muthamia. M'lnoti sought 700 shillings in compensation from Francis for impregnating his daughter, Jennifer Kinanu, and then refusing to marry her. M'lnoti testified that after his daughter informed him that she was pregnant by Francis, he sent a group of male elders [*kiama*] to discuss the matter with Francis and his father. According to M'lnoti, Francis first stated that he would wait until the child's birth to "have a look on its appearance" but later accepted responsibility for the pregnancy by giving M'lnoti 200 shillings towards bridewealth. M'lnoti stated that once the child was born, however, Francis denied responsibility. As translated and paraphrased in the court record, Jennifer, testifying on behalf of her father, stated,

> In January 1966, [Francis and I] had sexual intercourse and I was conceived. ... I went and informed [Francis] and he denied to have caused me pregnancy. I went and informed my father that [Francis] had denied. When I went back to school at Gitoro, [Francis] came there to see me ... [and] admitted that he had pregnanted me ... When the child was born in maternity, [Francis] came there to see me. Then he went and said to my parents that the child was not his.

In his own defense, Francis stated that he had sexual intercourse with Jennifer in March and May of 1966, and that in June, Jennifer wrote him a letter informing him that she was pregnant as a result of their May encounter. Francis claimed that he then drafted, and both he and

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39 For a fascinating comparison in which "deflowering" or the loss of virginity rather than pregnancy prompts young women and their kin to use legal means to encourage marriage proposals, see Sueann Caulfield and Martha de Abreu Esteves, "50 Years of Virginity in Rio de Janeiro: Sexual Politics and Gender Roles in Juridical and Popular Discourse, ***1890-I 940," Luso-Brazilian Review 30, 1*** (Summer 1993): 47-74, esp. 55.

Jennifer signed an agreement stating that he would accept responsibility if the child was born nine months from May. Francis stated that when the child was born in October, just five months later, he knew the child was not his. Francis submitted this agreement along with three love letters allegedly written by Jennifer to the Court as evidence. Before the Court, however, Jennifer denied that she ever signed such an agreement or wrote such letters. She pointed out that the letters and agreement were signed Julia, rather than Jennifer, Kinanu.

In its ruling, the Court dismissed the letters, including one with the opening epithet of "dearest innermost super guy," and the agreement as forgeries perpetrated by Francis and two of his friends, stating that the "standardized and fluent English" in which the letters were written could never have been produced by someone like Jennifer who had only achieved a Standard VII education. The Court also noted that nowhere on Jennifer's school certificates did her name appear as Julia. Agreeing with M'lnoti that Francis' earlier payment of 200 shillings towards bridewealth amounted to an admission of responsibility, the Court ruled in favor of M'lnoti, ordering Francis to pay Jennifer's father compensation of 500 shillings, a bull valued at 200 shillings, and court costs.[40]

As suggested by the records of *M'lnoti* vs. *M'Muthamia*, the "modern" institution that figured most prominently in pregnancy compensation cases was the school. During the 1962 census, only 33% of men and 14% of women over the age of 15 years in Meru reported having attended school for one year or more.[41] Of the 45 pregnancy compensation cases with substantial court records examined, one-third of the young men and women specifically stated

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[40] Meru Law Court (hereafter, MLC) Ayub M'lnoti vs. Francis M'Muthamia, Kinoru African Court, Civil Case No. 1376/66. The names of all litigants and witnesses have been changed to protect the identity of the participants. While the proceedings were largely conducted in the Meru language, the court clerk recorded the testimony in English. It is best to consider the records as a close summary of the proceedings rather than a translated transcription.

[41] Kenya Ministry of Finance and Economic Planning, Statistics Division, Kenya *Population Census, 7962 - vol. III: African Population* (Nairobi, 1966), 44-6.

that they had attended school.[42] References to the writing and reading of letters, and jobs requiring literacy skills, however, suggest that a much larger portion of those who appeared in court, particularly of the young men, had attended school. Court records also reveal that many of those who attended school reached relatively advanced levels. Jennifer Kinanu's eight years of schooling placed her in the elite five per cent of women in Meru who had attended school for five years of more while the secondary school education of Francis and his two friends placed them in the less than one per cent of the male population that had had nine or more years of schooling.[43]

Beyond the simple proportions of litigants and witnesses who had attended schools, issues of education suffused pregnancy compensation cases. Some plaintiffs posited their pregnancy compensation cases as efforts to recoup money that they had spent on their daughters' schooling.[44] Such men viewed pre-marital pregnancy as spoiling their prospects for receiving the relatively high bridewealth payments that school-educated daughters usually commanded. Moreover, several interviewees pointed to school education as causing pre-marital pregnancy. Job Kinoti, who had pregnancy compensation cases brought against him in the 1960s, explained that, "these pregnancies .... [were] because of [the] education . . . [we] received. . . . we started seeing things differently. And we started moving freely with the girls."[45] In Kinoti's remarks, the precise relationship between schooling and increased sexual

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42 By substantial court records, I mean those which contained testimony beyond a defendant's admission of responsibility or an ex *parte* decision. Cases which indicated that the woman had attended school included District Court of Kenya, Meru, Civil Case Nos. 246/68; Appeal Magistrate's Court, Meru, Civil Case No. 1 55/64; Kinoru African Court, Civil Case Nos. 133/65, 147/65, 443/66, 517/66, 885/66, 1376166, 4500166, 555/67, 58/67; and lmenti Native Tribunal, Civil Case No. 873156. Those which indicated that the man had attended school include District Court of Kenya, Meru, Civil Case No. 246/68; and Kinoru African Court, Civil Case Nos. 397164, 766164, 123/65, 133/65, 147/65, 1233165, 1312/65, 1909/65, 1988/65, 443/66, 517/66, 1367166, 1376166, and 538167.

43 Kenya, *Kenya Population Census, 7962,* pp. 44-46.

44 Kinoru African Court, Civil Case Nos. 450/66 and 133/65.

45 Interview with Job Kinoti by L. Thomas, 28 June 1995, Kaaga, b. 1947, tape 61, tp 22-23.

liaisons remained unspecified. Naaman M'Mwirichia, another interviewee who was a teacher and government employee during the 1960s, pointed directly to the tendency of school education to erode young people's respect for elders: "If you're from Makerere [University in Uganda] or if you're from Nairobi Hospital or you're from Great Britain or you're from America, when you come it's difficult to see a person who is older than you and to stay with him and ask him about customary ways."[46] According to M'Mwirichia, in encouraging young men to doubt the relevance of local elders' knowledge, school education and work experiences beyond Meru contributed to a rise in pre-marital pregnancies.

Litigants, witnesses, and interviewees also claimed that a prospective spouse's schooling' and closely related socio-economic standing, informed courtship interests and marriage decisions. One young woman testified that the defendant refused to marry her because she was not educated while a defendant in another case claimed that the plaintiff's daughter wanted to marry him because he was a teacher.[47] Several court cases involved accusations of male teachers impregnating their female students.[48] Job Kinoti explained that male teachers were more likely to become involved in such cases as they "are exposed to very young girls."[49] Interviewees who had cases brought against them claimed that young women specifically enticed them or singled them out from a number of lovers because they were

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46 Interview with Naaman M'Mwirichia by R. Kirimi and L. Thomas, 18 September 1995, Kinoru, b. 192?, tape 75, tp 16. Also see, Interview with Michael M'Mwigwika by N. Mworoa and L. Thomas, 15 June 1995, Kangeta, b. 1936, tape 58, tp 15.

47 Kinoru African Court, Civil Case Nos. 1312/65 and 397164. Several court cases involved teachers accused of impregnating their students. Kinoru African Court, Civil Case Nos. 517/66, 443/66, 397/64, 1233165, and 1909165.

48 Kinoru African Court, Civil Case Nos. 517/66, 443166, 397164, 1233/65, and 1909/65.

49 Interview with Job Kinoti, 28 June 1995, tape 61, tp 31.

secondary school students with promising futures or they were from wealthier families.50 These court cases suggest how some plaintiffs viewed young women as evoking the social responsibilities attached to pre-marital paternity to entrap school-educated or salary-earning men in marriage.

As the forged love letters and agreement in the case of *M'Inoti* vs. *M'Muthamia* indicate, letter writing -- a skill learned in schools -- played an important role in many of these cases. Like other letters submitted as evidence, the letters authored by Francis in Jennifer's/Julia's name notified the man of a missed "monthly period", specified the date upon which they had had sexual intercourse resulting in pregnancy, and requested advice on how to proceed with the pregnancy. Women wrote or purportedly wrote most of the letters in the first month of pregnancy and often specified the date of intercourse and conception as falling just one or two days prior to the date on which they usually began menstruating.51 To bolster their cases, plaintiffs submitted letters written by defendants in which they acknowledged paternity. When assessed as authentic, such letters were powerful tools for demonstrating or denying paternity. But as Isabel Hofmeyer has pointed out in her study of the written and the oral in twentieth-century South Africa, in contexts of limited literacy, the written word often appears more malleable than durable.52 In addition to instances of forgery, one defendant claimed that his letter accepting responsibility was simply an effort to "screen" the woman's sincerity.53 Women stated that letters containing admissions of paternity went unsigned, were lost, or were washed

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50 Interviews with Job Kinoti, 28 June 1995, tape 61, tp 29; James Laiboni, 23 July 1995, tape 67, tp 13-4.

51 Also see Kinoru African Court, Civil Case Nos. 2052/65, 766/64, and 1367/66.

52 Isabel Hofmeyer, *"We Spend Our Years as a Tale that is Told": Oral Historical Narrative in a South African Chiefdom* (London, James Currey, 1993), 65.

53 Kinoru African Court, Civil Case Nos. 1376/66, 2052165, 147/65, 1233/65, and 147/65.

accidentally.[54] Court elders also considered literacy skills, particularly those of women, when assessing evidence. In one case, the court interpreted a woman's contradictory testimony on conception and birth dates as trickery since she was literate and, therefore, familiar with dates, months, and years.[55]

Alongside schools, maternity wards figured prominently in pregnancy compensation cases. Testimony regarding visits to maternity clinics and payment of maternity fees was significant to establishing the defendant's prior intentions to accept paternity and/or to marry the woman. Before World War II, few women in Meru attended hospitals, preferring to give birth at home amid meaningful social networks. By the 1960s, however, for the largely school-educated people involved in pregnancy compensation cases, hospital births and visits had become commonplace events as well as defining moments of courtship. Plaintiffs used evidence that a defendant had visited the maternity or paid maternity fees to argue that in so doing, the defendant had accepted paternity and could not subsequently change his mind. In these cases, defendants usually explained their change of mind by arguing that following the child's birth, they realized either by the child's birth date or appearance that he or she was not their offspring.[56] Francis, for instance, argued that while he had tentatively accepted responsibility for the pregnancy and visited Jennifer at the maternity clinic, the child's October, rather than March, birth date revealed that the child was not his progeny. To demonstrate that defendants had made no overtures towards accepting responsibility, plaintiffs would point out that the defendant had not escorted the woman to maternity, visited her there, or paid her fees.[57] One defendant argued that the plaintiffs failure to ask for payment of maternity fees

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54 Kinoru African Court, Civil Case Nos. 131 2/65, 538/67, and 518/67.

55 Appeal Magistrate's Court, Meru, Civil Case No. 155/64.

56 Kinoru African Court, Civil Case Nos. 397/64, 359164, and 443/66.

57 Appeal Magistrate's Court, Meru, Civil Case No. 155/64; lmenti Native Tribunal, Civil Case No. 873/56; Kinoru Africa; Court, Civil Case Nos. 1312165 and 1367166.

cast doubt on the sincerity of his accusation.[58] Court officials also occasionally requested staff at maternity clinics and hospitals to consult clinic cards and birth registers to confirm whether a particular pregnancy was premature, full-term, or overdue.[59]

The centrality of schools and maternity wards within court testimony and proceedings suggest that the young people involved in these "customary" law cases defied the simple labels of "traditional" and "tribal" that administrators assigned to those whom they designated beyond the purview of the Affiliation Ordinance. As the history of the formulation of this "customary" law suggests and people in Meru explained through their recollections, pregnancy compensation law and litigation emerged as a response to changing practices of female initiation and new patternsof education and employment. The young people involved in these cases came from families with the resources and willingness not only to take disputes to African Courts but to send their children to schools and, when pregnant, to maternity wards. In 1950s and 1960s Meru, it was involvement with such institutions that marked young people as members of an emergent middle class.

In addition to suggesting the disjunction between administrators' vision of pregnancy compensation litigants and their social positions within rural communities, court records reveal how young men and women engaged and challenged the notions of gendered personhood that animated the "customary" law of pregnancy compensation. Pregnancy compensation presumed that a man who impregnated an unmarried woman should marry her. If he refused to marry her, then he should provide her guardian and his age mates with cash and livestock to make up for his wrongdoing. Within this scenario, the unmarried mother was simply a dependent, not a wronged party. The "customary" law of pregnancy compensation amounted

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58 Kinoru African Court, Civil Case No. 450/66.

59 Appeal Magistrate's Court, Meru, Civil Case No. 155/64; Kinoru African Court, Civil Case Nos. 147/65 and 632/63.

to an exchange between men over a woman.[60] Court records document how some men refused to accept the terms of this exchange. They also reveal the decisive, if difficult, roles played by single women in prompting these exchanges.

Social negotiations which eventually culminated in pregnancy compensation cases began with a woman realizing that she was pregnant and informing her lover. As men were eager to point out, a woman with more than one lover had to decide which one was responsible or, put more cynically, which one made the "best catch". In first disclosing the pregnancy to a lover rather than her parents, a woman assessed her lover's interest in the pregnancy. At this point, it remained unclear for some young women whether they would carry the pregnancy to term or simply end it in abortion. For instance, one woman testified that she wrote a letter to her lover inquiring whether she "should have a miscarriage" and another woman stated that the defendant requested her "to take medicine to commit abortion".[61] Abortions induced by ingesting poison or inserting sharp objects into the uterus have been a practical, if illegal and dangerous, response to unwanted pregnancies in Meru throughout the twentieth century, at least.[62] Yet, it appears that women who chose to inform their lovers most often hoped that news of the pregnancy would inaugurate marriage negotiations. As interviewee Job Kinoti stated, "initially, the question was not to pay [compensation], it was acceptance in the hope that

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60 For the classic feminist discussion of kinship as an exchange of women between men, Gayle Rubin, "The Traffic in women: Notes on a "Political Economy" of Sex" in Rayna Rapp Reiter, ed., *Toward an Anthropology of Women (New* York: Monthly Review Press, 1975), 157-210.

61 Kinoru African Court, Civil Case No. 147/65 and 862/65.

62 For abortion in Meru during the pre-1950 period, Thomas, "Imperial Concerns and 'Women's Affairs'." While it is notoriously difficult to determine rates of illegal abortion, the large proportion of acute gynecological admissions attributable to abortion at post-colonial Kenyan hospitals suggests that the practice has continued on a significant scale. A study undertaken in the late 1980s found that abortion admissions accounted for 51.6% of all acute gynecological admissions at Chogoria Hospital in southern Meru. V.M. Lema, R.K. Kamau, and K.O. Rogo, "Epidemiology of Abortion in Kenya" (Unpublished Report, Centre for the Study of Adolescence, Nairobi, 1989) cited in Valentino M. Lema and Janet W. Kabeberi-Macharia, *A Review of Abortion in Kenya* (Nairobi: The Centre for the Study of Adolescence, 1992), II.

they will get married."[63] Women only informed their guardians after lovers ignored repeated requests to discuss the matter or refused paternity altogether. In accordance with local standards of appropriate behavior between parents and children, fathers demonstrated little knowledge of their daughters' intimate relationships. One plaintiff stated, in response to the court's question of whether he knew that his daughter had had more than one lover: "I never knew my daughter used to go out with others .... [She] was fully grown. I can only say what my daughter told me."[64] Once guardians had been informed of their daughters' or sisters' pregnancies, they usually sent *kiama,* a group of two or three respected older men from one's own clan, to inform the man and his parents of the accusation, to ascertain whether he accepted responsibility, and, if so, to explore the possibility of marriage. The pregnant woman often accompanied *kiama* to the man's home. If *kiama's efforts* to secure a promise of marriage or a payment of compensation failed, fathers took their disputes to African Courts.

Once in Court, unmarried women, rather than their guardians, shouldered the burden of providing persuasive accounts of where, when, and with whom the decisive sexual encounters took place. In one ruling, court officials explained, "in pregnancy case[s], the best evidence is that of the prosecutrix [the woman] which is supported by *kiama* plus defendant's evidence."[65] African Court officials appear to have approached pregnancy compensation proceedings with the assumption that the defendant was responsible for the pregnancy, unless proven otherwise. For the men being sued, pregnancy compensation cases were difficult to win. Plaintiffs won over three-quarters of them.[66] Pregnancy compensation cases hinged on women's testimony.

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63 Interview with Job Kinoti, 28 June 1995, tape 61, tp 27.

64 Appeal Magistrate's Court, Meru, 165167. While court records contain no reference to daughters informing mothers of their pregnancies, observations of present-day familial relations in Meru suggest that mothers may have often served as intermediaries, informing fathers of their daughter's pregnancy.

65 Kinoru African Court, Civil Case No. 147/65.

66 These figures are based on the 58 cases which I examined at the Meru Law Courts in 1995. Cases which defendants won include Kinoru African Court, Civil Case Nos. 704/63, 517/66, 889/65, 359/64,

In an interview, Job Kinoti described the importance of women's testimony and suggested the difficulties that they faced in providing it: "the girl was asked to give graphic details about what happened and if the girl shied away, she'd lose ... these things ... are supposed to be secret but those who braved the jury, court attendance, and gave details, they won."[67] In a society in which members of adjacent age grades rarely discussed sexual affairs, it must have been uncomfortable, at least, for women to discuss sexual matters in front of parents and members of their parents' age grade.

A common courtroom strategy employed by defendants who denied responsibility for the pregnancy was either to specify another man with whom the woman was sexually involved or to argue that the woman was generally known to be promiscuous. One defendant unsuccessfully tried to pin the pregnancy on a recently deceased man, while court officials denounced as "to[o] much [a] pack of lies" another defendant's claim that his friend had intercepted a letter written by the woman stating that another man had made her pregnant.[68] Court officials appear to have been more easily persuaded by defendants' accounts of women's generally "loose"

1988/65, 1257/66, 200/64, 1909/65, 2052165, 555/67, 147165, 133165; and Appeal Magistrate's Court, Meru, Civil Case Nos. 213/66 and 165167. Cases which plaintiffs won include Kinoru African Court, Civil Case Nos. 739/63, 876/65, 862/65, 583/66, 456/66, 450/66, 443166, 885/65, 427160, 463/60, 397164, 345/64, 1262/65, 2046/65, 1255166, 1376166, 1337166, 693163, 691163, 632163, 198164, 58/67, 1367166, 211 1/65, 2043/65, 766/64, 780164, 791164, 513/63, 544163, 849167, 1376166, 1312165, 133/65, 148/65, 592/65, 538/67; Imenti Native Tribunal, Civil Case No. 873/56; and Appeal Magistrate's Court, Meru, Civil Case Nos. 206/66, 155164, 165167. One of the 58 cases was withdrawn: Appeal Magistrate's Court, Meru, Civil Case No. 5/E/61.

67 Interview with Kinoti, 28 June 1995, tape 61, tp 25. In general, confidence in delivering testimony appears to have been taken as a sign of honesty. For instance, in one ruling, court officials stated that they did not "attach any weight to him [a witness for the defence] because he was shy when giving evidence and he was even reluctance [sic] to state anything." Kinoru African Court, Civil Case No. 862/65. For an insightful discussion of how young women in deflowering cases in late nineteenth- and early twentieth-century Brazil similarly sought to present themselves as victims while accused men sought to portray them as promiscuous, Caulfield and Esteves, "50 Years of Virginity in Rio de Janeiro," 56-7.

68 Appeal Magistrate's Court, Meru, Civil Case No. 254/66; Kinoru African Court, Civil Case No. 443/66. Also see, Appeal Magistrate's Court, Meru, Civil Case No. 165/67; and Kinoru African Court, Civil Case No. 766164.

conduct.69 Statements that a woman was "popular in Igoji market," "having sexual intercourse with various people," "play[ing] sexual intercourse as a prostitute," or being "fucked daily as [the] wife of somebody" all served as the basis for judgments in favor of defendants.79 Assessments of women's sexual experiences also appear to have shaped court officials' willingness to believe women's testimony. In one case, court officials explained that they accepted the testimony of the woman and her friend because they "are not lo[o]se girls."71 In none of the cases examined did plaintiffs ever introduce evidence about defendants' sexual relations with other women, either to call into question the credibility of the defendant's testimony or to suggest that the defendant had a habit of impregnating but refusing to marry women? In commencing from the presumption that the accusations were true, African Court officials enabled women's testimony to powerfully shape court proceedings. But ultimately, by making women's sexual histories the subject of public scrutiny, pregnancy compensation cases placed women in a socially awkward and potentially humiliating position while dramatizing their legal status as dependents.

repealing the Affiliation Ordinance

Between 1959 and 1969, the Affiliation Ordinance provided some single African mothers with a new status and recourse before the law. These new options generated intense political debates in post-colonial Kenya. The Affiliation Ordinance occupied a central place in national

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69 Also see interview with Kinoti, 28 June 1995, tape 61, tp 19 for an account of how defendants "just wanted to show that the girl is some sort of a loose woman."

70 Appeal Magistrate's Court, Meru, Civil Case Nos. 155/64 and 213166; Kinoru African Court, Civil Case Nos. 2052/65 and 211 1/65

71 Kinoru African Court, Civil Case No. 862/65.

72 On the importance of considering the silences, allusions, and indirections within court testimony and records, David William Cohen, "'A Case for the Basoga': Lloyd Fallers and the Construction of an African Legal System" in Mann and Roberts, eds., Law *in Colonial Africa, 239-54.*

discussions of gender relations and sexuality. While I have yet to locate comprehensive figures on the number of African women who filed Affiliation cases, studies of women and law in other post-colonial African contexts reveal that maintenance law has been the element of statutory law most actively engaged by African women. For instance, soon after African women in Zimbabwe attained legal age of majority status at independence in 1980, maintenance cases outnumbered all other types of civil suits heard in Community Courts.78 Similarly, in Ghana during the 1980s, most of the claims filed by women against men in family courts were applications for some kind of child maintenance.[74] By the late 1960s in Kenya, the specter -- if not the reality -- of droves of women filing petitions under the Affiliation Ordinance had raised serious concerns among Kenyan male politicians.

On June 17, 1969, the Kenyan National Assembly repealed the Affiliation Ordinance. Introduced by the Kenyatta government, the repeal Bill received overwhelming support within the all-male Assembly, although it was strongly condemned by women's, welfare, and church organizations. Debate within the National Assembly was marked by much "laughter and joking" and repeated accusations that various participants in the debate, including Attorney General Charles Njonjo, had "personal interests" in favoring repeal.[75] Most members argued that the Ordinance "victimized" men and encouraged promiscuity and prostitution among women. They contended that women abused the Ordinance by using maintenance payments to buy themselves wigs, cosmetics, and mini-skirts rather than to care for their children, and by filing

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[73] May, *Changing People, 74-81;* Kazembe, "Methodological Perspectives." For similar discussions of the importance of pregnancy compensation in Botswana, Anne Griffiths, "Support for Women with Dependent Children: Customary, Common, and Statutory Law in Botswana" in A. Armstrong and W. Ncube, (eds.), *Women and Law in Southern Africa* (Harare: Zimbabwe Publishing House, 1987); Molokomme, "'Children of the Fence"'; and Griffiths, *In the Shadow* of Marriage, 114-6.

[74] Mikell, "Pleas for Domestic Relief."

[75] *National Assembly Debates* (10 June 1969), 978 and 989-90.

affiliation cases for the same child against different men in different courts.[76] J.W. Khaoya, a member from Bungoma South, observed that the objections to the Affiliation Bill raised ten years ago had "been proved justified by experience."[77] Departing from earlier perspectives of the Affiliation Ordinance as a victory for non-racialism, members denounced the Ordinance as a colonial imposition and a "foreign idea." Engaging the categories of "modernization" theory while rejecting its teleological presumptions, they argued for a new law "based on the African tradition?

The few National Assembly members who opposed the repeal Bill argued that while some women had abused the Affiliation Ordinance, it had improved the lives of many children.[79] An opponent of the repeal Bill, member Mbogoh of Embu North, described it as "the most discriminatory legislation that Parliamentarians had ever made against unrepresented people in the House (women)."[80] The Kenya Council of Women, the National Christian Council of Kenya, and the Presbyterian Church, all protested the repeal through public demonstrations and the distribution of anti-repeal literature. Newspaper reports noted that "far more women than usual packed the public galleries" of the Assembly and included among them were representatives of leading women's organizations.[81] While even proponents of the Bill agreed

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76 National Assembly Debates (12 June 1969), 1110 and 1123.

77 "Heckling Greets Affiliation Bill," East *African Standard 11* June 1969. Also see, "Parliament Centre of Attention," *East African Standard* 13 June 1969.

78 National *Assembly* Debates (10 June 1969), 990, 1108, 1127, 1254, and 1259.

79 National *Assembly Debates* (11 June 1969), 1037, 1118, and 1250.

80 "Heckling as M.P. Calls for Law to Legalise Abortion," *East African Standard* 13 June 1969.

81 "Heckling Greets Affiliation Bill," *East African Standard 11* June 1969. For a fascinating discussion of similar debates in Britain surrounding the Bastardy Clauses of the Poor Law Amendment Acts of 1834 and 1844 -- antecedents to the 1957 Affiliation Proceedings Act from which the Kenyan Affiliation Ordinance was derived, U.R.Q. Henriques, "Bastardy and the New Poor Law," *Past and Present* 37 (July 1967), 103-29. The Poor Law Amendment Act of 1834 effectively made it much more difficult for women to charge men with "being the father of an illegitimate" and for parishes to compel men to pay maintenance. According to Henrique, many parliamentarians favored these restrictions because they believed,

that the Affiliation Ordinance, once repealed, would have to be replaced by legislation granting custody of "illegitimate" children either to their biological fathers or the state itself, no such legislation was ever formulated.

In repealing the Ordinance, the National Assembly chose to strengthen men's privileged legal position and to abandon a statutory law that just a decade before had been heralded as a gesture of non-racialism. In 1959, the Affiliation Ordinance symbolized for some African male politicians, at least, that all people in Kenya -- Africans, Europeans, and Asians -- had the right to engage the same "modern" statutory laws. By 1969, this same group viewed the Affiliation Ordinance as an assault on men and "African tradition." These nationalist politicians found in "tradition" a convenient and politically viable tool for denying single mothers certain forms of financial support and social autonomy. Assembly members explicitly recognized the repeal Bill as anti-women. J.M. Shikuku, a member from Butere and a strong supporter of the repeal Bill, stated that the "nice ride" that the Affiliation Ordinance had provided women was now at an end. An opponent of the Bill, S.T. Omar from Mombasa West, declared with confidence that "if there were women M.P.s in this House they would have fought this law tooth and nail."[82]

The public debates over the repeal of the Affiliation Ordinance reveal much about the contested notions of gendered personhood that existed in early post-colonial Kenya. Opponents of the repeal Bill -- including church and women's groups and some male politicians -- believed that unmarried women should have the right to sue for and claim child maintenance as well as retain custody of their children. From this perspective, fathers had an obligation to

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influenced by Malthusian thought, that affiliation and maintenance orders encouraged rather deterred "illegitimate" pregnancies and caused "innocent young men" to fall prey to "scheming prostitutes and husband-hunters." **(110)** The Act of 1834, in shifting the burden of "illegitimacy" more firmly to women and parishes, proved enormously unpopular. In response to public opinion, the Poor Law Amendment Act of 1844 provided women with a more direct procedure for filing maintenance orders against accused men. **(115)** Thus, in contrast to the situation in Kenya nearly one hundred years later, popular opposition to parliamentarians' efforts to whittle away maintenance law in nineteenth-century Britain prompted a legislative retrenchment.

82 "Affiliation Act Repeal Passed by Parliament," East African *Standard* 18 June 1969.

provide financial support for their biological children but not the right to claim custody of them. On the other hand, supporters of the repeal Bill people argued that granting unmarried women such rights was a violation of "African tradition" that only lead to prostitution and irresponsible behavior. According to this position, men should not be held financially responsible for their biological children because women located beyond the purview of male guardians would inevitably abuse this obligation. Similar sexist and, at times, misogynist rhetoric was used in the National Assembly during the 1960s and 1970s to defeat efforts to reform marriage law.63 The jocular and defiant tone of such discussions resonates strongly with Achille Mbembe's analysis of post-colonial power in terms of the politics of the "obscene" and "grotesque." Mbembe identifies "the unconditional subordination of women to the principle of male pleasure" as one of the assumptions underlying the "phallocratic system" of post-colonial politics.64 In repealing the Affiliation Ordinance and failing to replace it with another statutory law on "illegitimate" children, the National Assembly affirmed men's favored legal position and denied single mothers the legal status of "modern" persons.

conclusion

In late colonial and early post-colonial Kenya, historically-specific and contested definitions of gendered personhood enabled some forms of pre-marital pregnancy law and litigation while curtailing others. Definitions of gendered personhood similarly informed and subverted state efforts to ground political hierarchies in distinctions between the "traditional" and the "modern." During the 1940s and 1950s, British officers and African officials in Meru

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83 Lynn M. Thomas, "Contestation, Construction, and Reconstitution: Public Debates Over Marriage Law and Women's Status in Kenya, 1964-79," BA/MA thesis, The Johns Hopkins University, 1989. On the prominence of such rhetoric in Kenyan national political culture more generally, Patricia Stamp, "Mothers of Invention: Women's Agency in the Kenyan State" in Judith Kegan Gardiner, (ed.), Provoking *Agents: Gender and Agency in Theory and Practice* (Chicago: University of Illinois Press, 1995), 69-92.

84 Achille Mbembe, "Provisional Notes on the Postcolony," *Africa 62 (1992): 3-37,* quote from 9.

crafted a “customary” law of pregnancy compensation to combat what they perceived as an increase in pre-marital pregnancies. In reformulating existing practices, this “customary” law situated women’s guardians in addition to guardians’ age grades as the wronged parties in such disputes. It also disregarded the local distinctions within female personhood, between the initiated and uninitiated, that had formerly determined men’s obligations in cases of pre-marital pregnancy. Like “customary” laws fashioned in other colonial contexts, pregnancy compensation ignored the social nuances of female personhood while bolstering older men’s political authority.

When passed in 1959, the Affiliation Ordinance threatened to disrupt the patriarchal foundations upon which colonial administrators had sought to build political order in rural areas. To prevent such disruption, administrators restricted engagement of the Affiliation Ordinance to big towns and cities. In a political context in which “race” could no longer be easily invdked to justify the differential application of laws, administrators relied on discourses which marked rural areas as “traditional” and urban areas as “modern” to deny the vast majority of single African women the opportunity to engage the Affiliation Ordinance. The history of pregnancy compensation litigation in Meru reveals the ironies of these efforts. Not only was “customary” law a recent innovation but the young people involved in African Court disputes were those seeking to gain middle-class status through participation in “modern” institutions.

In 1969, the all-male National Assembly superseded administrators’ efforts to restrict engagement of the Affiliation Ordinance by abolishing it altogether. For most members of the National Assembly, the definition of female personhood embodied in the Ordinance was incompatible with the post-colonial political culture that they sought to forge. By rejecting women’s right to hold men partially responsible for the social consequences of sexual encounters, male politicians flaunted the moralistic tenets of the “modern.” In turn, they embraced a vision of “African tradition” that rejected legal constraints on male prerogatives.