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Formal and Substantive Reasoning about Marriage in Kenyan Legal Pluralism: A Three-Dichotomy Analysis [1)]

Shin-ichiro Ishida

Department of Social Anthropology, Tokyo Metropolitan University

I. Introduction

Masaji Chiba (1989, 2002) illustrated that legal pluralism cannot be simplified as a dual construction of state and non-state laws alone. One can observe the accommodation of transplanted laws within both official and unofficial settings, and at the same time, the penetration of indigenous laws into the official state law. Therefore, empirical descriptions of the infrastructure of legal pluralism require more than a single set of dichotomies. Chiba observed the combination of three sets of dichotomies in legal pluralism: (1) legal postulates/legal rules, (2) indigenous/transplanted laws and (3) official/unofficial laws.

However, concerning the first dichotomy of legal postulates and legal rules, there is room for methodological modifications[2)]. This paper postulates that a shortcoming of the dichotomy is its limited applicability to empirical research on dispute processes, since the dichotomy is modelled on the layered structure of official legislation. Thus, this paper proposes replacing the original dichotomy of legal postulates and legal rules with an alternative dichotomy of the formal and substantive ways of legal reasoning, which represent different modes of argument in dispute processes. The cases for analysis in this paper are taken from civil disputes concerning the legal conditions of marriage by the customary law of the Gusii of Western Kenya. [3)]

Modification and Application of Chiba's Theory

Masaji Chiba proposed three dichotomies within his theory of legal pluralism. How can empirical legal research utilise these dichotomies? This paper lays out two major objectives and examines the effectiveness of the three dichotomies for research on legal pluralism.

The first objective is to clarify certain conceptual aspects of the three dichotomies, particularly to provide a practical suggestion on the theoretical issues surrounding the modification of the dichotomy between legal rules and legal postulates. In his paper, published in a Japanese journal, Chiba raised 'two issues to modify my previous

concepts' (Chiba 2003, p. 292, my translation). One of the two issues will be addressed in this paper.

> Two points that I wish to modify in my theory on legal culture are the significance of the dichotomy of legal rules and legal postulates among the three dichotomies, and the concept of law as a social norm (its requirements in particular). With regards to the former, the author acknowledges that my explanations are not sufficient. Among the three dichotomies, the dichotomy between official and unofficial laws and the dichotomy between indigenous and transplanted laws, in addition to the identity postulate of a legal culture, are generally well accepted by readers. In contrast, the dichotomy between legal rules and legal postulates is not as well accepted as the other two dichotomies. Young researchers from Turkey and Tahiti who told me that the former two dichotomies were useful to their research remain silent about the last dichotomy...

The first objective of this paper is to address the modification of the dichotomy between legal rules and legal postulates. Since Chiba has acknowledged that an anthropological approach is indispensable for conceptualising the dichotomy, it seems necessary for legal anthropologists to respond to his invitation.

The second objective of this paper is to apply the three new dichotomies to empirical analysis. Through such an application, the paper attempts to clarify the methods of using Chiba's theory. Since Chiba's concepts are highly abstract and difficult to interpret, some scholars have pointed out that they do not know exactly how to use those analytical tools (Aoki 2002, p. 13).

As explained above, the two major objectives of this paper are first to modify Chiba's three dichotomies, and second, to apply the three new dichotomies obtained by the modification to a set of empirical legal research. In my view, the three-dichotomy theory is most effective when used for analysing dispute processes that are informed by the parties' expression of their claims and legal arguments.

Three-Dichotomy Theory

In order to understand Chiba's theory, one must begin with the precondition that legal systems in all regions and countries are pluralistic, regardless of whether they are Western (Chiba 1989, pp. 4-5, 2002, pp.7-8, Menski 2006, p. 83, see also Merry 1988, pp. 872-873). Pluralistic here means that the legal systems exist as a hybrid. However, a more positive development of the theory is possible if 'pluralistic' is understood as the theory for analysing the complex and dynamic process of *pluralisation* rather than

the pluralistic situation (Menski 2006).

The three dichotomies that constitute the basic theoretical framework of Chiba's theory of legal pluralism are as follows (Chiba 1989, pp. 177-180, 2002, pp. 16-20 & pp. 234-236).

Official and unofficial laws: whether the law is authorised by the public authority of a state.
Transplanted and indigenous laws: whether the law originates in the native culture of a socio–legal entity or in foreign cultures.
Legal rules and legal postulates: the contrast of positive rules with latent values.

Among these three, the dichotomy between official and unofficial laws represents opposite extremes or polarities. An analysis of their polarities allows us to compare the features of the legal system in terms of the *existence* or *lack of* public sanctions. Likewise, the dichotomy between transplanted and indigenous laws represents the opposite extremes for capturing the legal cultural origins of a particular law. In contrast, as explained in detail in subsection 1-3, the dichotomy between legal rules and legal postulates represents the opposite extremes for capturing how social norms in question are formularised. [4)]

In my view, the essence of Chiba's theory of the three dichotomies lies in his attempt to capture social norms, as follows: his three-dimensional structure consists of three sets of opposite extremes, between which social norms flexibly move in a manner that adapts their attributes or places within the integral whole of the legal system in question. For example, the process of how a particular social norm that was categorised as an unofficial law gradually gains the status of an official law may also be characterised as the process by which a social norm formularised within an indigenous law becomes the one formularised within transplanted laws (Examples from this paper support this point). Accordingly, the three dichotomies are useful for capturing the dynamic processes of pluralisation from three-dimensional viewpoints.

According to Chiba, legal pluralism can be observed as 'the combination of three dichotomies' (Chiba 1989, p. 179). My understanding on this point is as described above. However, the connotation of the word 'combination' seems to lead to the perception that Chiba's theory is difficult to understand. For example, Nobuyuki Yasuda once interpreted Chiba's three dichotomies as follows:

> The three dichotomies were formulated in order to understand individual laws from different aspects such as power, culture and norm structures. Relations between the different sets of dichotomies are not clearly defined. However, in

> Asia and other non-Western countries, one may find out an overlapping dual relationship among them: official law as transplanted law as legal rules versus unofficial law as indigenous law as legal postulates (Yasuda 1997, pp. 124-125, my translation).

In the above paragraph, the portion beginning with 'in Asia and other non-Western countries' may invite methodological misunderstandings with regard to the 'combinations'. Chiba himself does not uniformly correlate the other two dichotomies with the official/unofficial dichotomy (Chiba 1986, p. 389, Rouland 1994, pp. 61-62). Chiba thought of cases in which transplanted and indigenous laws are treated in practice as official laws within the state legal system, or in which unofficial laws gradually penetrate into state laws (Chiba 1989, Chapter 7).

Legal Rules and Legal Postulates

With regard to the dichotomy between legal rules and legal postulates at issue, *legal rules* within Chiba's theory are 'the formalised verbal expressions of particular legal regulations', while *legal postulates* are particular values and ideas, which justify, criticise, supplement, revise or form the basis of legal rules. Both concepts can be contrasted with each other (Chiba 1989, p. 178). Furthermore, within state laws that are written and strictly formulated, legal postulates merely play a supplementary role, but more stress is exerted on legal postulates than on legal rules within the realm of religious or customary laws. Thus, the dichotomy between legal rules and legal postulates may be viewed as a methodological concept for comparing the laws by capturing the qualitative characteristics of the formalisation or formality of social norms (Chiba 2002, pp. 18-19, pp. 194-195 & p. 235, 2003, p. 293).

With regard to the dichotomy between legal rules and legal postulates, Chiba acknowledged that modifications are possible in the following sense. 'The relationship between legal rules and legal postulates within the state law of the West almost certainly corresponds to the legal system and the legal principle. On the other hand, non-Western laws, particularly indigenous laws, cannot be sufficiently captured by modern scientific concepts' (Chiba 1996, p. 17, my translation). In other words, Chiba admits that the dichotomy between legal rules and legal postulates originates in the two-layered structure of state laws. It seems that he admits the existence of laws that only encompass legal postulates. In short, Chiba questions whether the dichotomy between legal rules and legal postulates can be uniformly applied to the comparisons of various laws, or whether such a dichotomy as a conceptual tool for comparative analysis.

This paper makes two methodological suggestions. The first is to place the

dichotomy between legal rules and legal postulates within an analysis of the dispute process. An analysis of non-Western laws using the dichotomy may be possible if dispute processes are turned into models where postulates implicitly justify, criticise or supplement explicit rules.

In order to apply the three dichotomies to the dispute process analysis, it is necessary to radicalise the way the dichotomy between legal rules and legal postulates is interpreted. In order to do so, the dichotomy must be observed within the processes by which social norms are formularised; the process that results when the claims or arguments of parties clash until consensus is achieved or the court delivers a judgment. In short, my first suggestion is that we should capture the processes by which legal postulates gradually gain status as legal rules made through adversarial processes.

There is, however, a methodological defect in implementing this first suggestion. To the same extent that there are no written rules in unofficial laws, there may not be any systematic ending point, such as a court judgment, in unofficial dispute resolutions. Therefore, a new dichotomy should be entirely separate from the dichotomy between legal rules and legal postulates found within the temporal sequence that exists from the adversarial stage to the judgment stage. The qualitative characteristics of claim expressions by parties to disputes, which appear prior to the court judgment, are turned into models. This is the initial stage of modifying the dichotomy between legal rules and legal postulates, and of obtaining the new dichotomy.

Accordingly, I propose using the dichotomy between the formal and substantive ways of legal reasoning. If contending parties do not merely put forward their claims to each other by making their interests explicit, but rather express their claims in a formularised manner in some way, the new dichotomy can be used to capture the qualitative characteristics for such formulations. As explained in detail later in section 2, empirical examples of what constitutes marriage in the Gusii community of Kenya demonstrate that formal reasoning includes the views legally defining marriage, based on material indicators such as dowry (bride price) payment[5] or legal documents (submission of relevant information on the national identity cards issued by the Kenyan government). Substantive reasoning refers to the recognition of the legal significance of marriage from practical facts such as cohabitation and spousal support.

I presented this new dichotomy at recent conferences and other research meetings. There, some criticised my distinction between formal reasoning (referring to dowry payments and listing of relevant information on identity cards) and substantive reasoning (referring to cohabitation or spousal support). The basis of these criticisms appears to be that the transactions of dowry payments themselves show the practical aspects of a relationship.

These criticisms are reasonable in a certain respect. Dowry items in East African

local communities are generally paid in instalments and sometimes may be paid over many years. Anthropologically speaking, the gift exchange between parties has a social value by itself because it connects people and serves some communicative purposes, and thus, the value of gifts cannot merely be determined by the price of the gift. However, certain examples in this paper suggest that there are potential problems in the pending or outstanding payments of dowry items. Moreover, the reverse logic leads to an issue in that the non-payment of dowry means the non-existence of a marital relationship.

The formal reasoning of the legal conditions of marriage, in my definition, is to capture a continuous and expanding social relationship by minimising it and explaining it with a singular or limited set of material symbols. This invokes the concepts of Ian Macneil's theory of contract. Following this model, the dichotomy between the formal and substantive ways of legal reasoning characterises the choice between capturing marriage as a contract with the 'discrete contract' model and capturing it with the 'relational contract' model (Macneil 1980).

There may also be other issues in the new dichotomy proposed here. For example, my dichotomy may appear to be significantly different from that of Chiba, namely the dichotomy between legal rules and legal postulates that contrasted explicit rules with implicit values. Second, for example, the contrast between formal reasoning and substantive reasoning may also be too general to constitute a dichotomy. However, with regard to the first issue, Chiba recognised that a dichotomy that allows a comparative analysis of the qualitative characteristics of the formalisation is required. In fact, I attempt to show the validity of the dichotomy between the formal and the substantive ways of legal reasoning through an analysis of how a party's expressions of claims are formularised. In addition, with regard to the second issue, general concepts may be more versatile, and their usefulness is demonstrated within the empirical analysis of this paper.

These are the outlines of my methodological suggestions in this paper. In discussing these issues, however, the following points should be considered. First, Chiba's theory of the three dichotomies is shown as a macromodel for analysing the pluralistic structure of individual legal systems. In addition, there are further socio–legal debates over the 'identity postulate of a legal culture'[6] as a key concept in Chiba's theory. In contrast, this paper is based on a microanalysis with regard to the systematic framework determining a litigant's expression of claims or the contents of their claims. In other words, a macrotheory model concerning individual legal systems is re-evaluated as a microanalysis of individual dispute processes. Accordingly, this paper aims to serve the limited purpose of demonstrating a modified set of the three dichotomies that is best suited to analysing dispute processes. However, this paper does not seek to

perform a critical analysis of Chiba's identity postulate of a legal culture.[7)]

II. Cases and Methodologies

The actual cases used in this paper are drawn from the civil disputes concerning the legal conditions of marriage under the customary law of the Gusii community in Western Kenya. In particular, the focus is on civil disputes determining whether the status as spouses is acknowledged for men and women who have cohabitation relationships but whose dowry items have not been paid.

Under the laws of Kenya, Christian, Muslim and Hindu marriages are recognised under their respective official marriage laws. Apart from these unions, African customary law marriage is also recognised under section 37 of the Marriage Act (Jackson 1988, pp. 51-53). However, despite this codification, the Marriage Act does not contain any specific content that enumerates the procedures constituting a customary law marriage. This lack of specificity is based on the precept that it is impossible to determine what constitutes a customary law marriage. However, the system is not as simple as it seems, and local communities typically do not share a set of detailed rules at the grassroots level.

The litigation cases referred to in this paper share the common feature that the concerned parties dispute the existence or non-existence of a marital relationship in a certain manner. The structure of such characteristics is explained as follows.

1) Within the Gusii community, there is a formalistic view that the payment of dowry by the husband's kin to the wife's in the form of livestock and cash constitutes a customary law marriage. In fact, a few men and women finish the dowry transaction before commencing their cohabitation (Not many men or women establish marriage by submitting an official marriage application).

2) In some cases, one spouse attempts not to provide any socio–economic support to the other spouse. In such cases, the spouse who wishes to avoid providing support often defends his or her position by citing the fact that the marriage application was not submitted, or that a dowry was not paid (Hakansson 1988, pp. 193-194).

3) The spouse who was betrayed, despite his or her perception that a trusting relationship was formed over a long period, typically introduces evidence proving the existence of the marital relationship, or alternatively takes the position that the substantive aspects of the marital relationship are more important than the material or 'legal' evidence of marriage. By taking such actions, the betrayed spouse opposes the formalistic elements of a customary law marriage (formal rules that determine the relationship), such as the payment of dowry or the submission of a marriage application.

For analysing the Gusii marriage cases, I would suggest here using the dichotomy

between formal and substantive ways of legal reasoning as a new model, which may substitute for the dichotomy between legal rules and legal postulates in Chiba's theory. Such a revised dichotomy builds on the previous studies in the field of legal anthropology. Therefore, it is necessary to briefly explain here the theoretical background.

Disputes do not merely reflect the interests of the concerned parties, but also require socio–cultural interpretation and justification. John L. Comaroff and Simon Roberts (1981) analysed certain disputes in this regard, focusing on the communication style and the subject matter of disputes in the Tswana community of southern Africa. They described the dispute processes from the viewpoint of how the parties themselves choose their 'paradigms of argument'. Furthermore, they clarified the way 'Tswana customs and laws' (*mekgwa le melao ya Setswana*) are implemented in practice by a party choosing a 'paradigm of argument' in order to counter the opposing party (Comaroff and Roberts 1981, pp. 84-86, pp. 102-106). When regarded as a legal anthropological methodology for empirical legal research, Comaroff and Roberts' arguments can be summarised as follows: conflicting interests during a dispute are structured within the social context in which the parties' lives are embedded. At the same time, the interests of self-seeking parties must conform to the socio–cultural values or reasonableness in order for them to gain validity. To meet these two requirements, the issue of why and how disputes occur is determined by the social conditions specific to the community in question. The claims by parties are, therefore, characterised by the socio–cultural context within each community.

Developing Chiba's theory from the actor-oriented perspectives shown in this paper is no longer an unexplored endeavour nowadays. Werner Menski (2000, 2006, 2009, 2011), Ihsan Yilmaz (2005) and Prakash Shah (2005, p. 9), for example, carefully read Chiba's papers on legal actors (Chiba 1989, Chapter 8, 1995, 1998, see also Mori 2009), together with Roger Ballard's discussion on 'skilled cultural navigators' [8], to address the 'skilful navigation' of legal pluralism, 'skilled legal navigators' and 'the subjective perspective of the recipient of legal pluralism', respectively. From the perspective of 'a user theory of law', as Laura Nader writes, 'the plaintiff is the life of the law' (Nader 2002, p. 15 and p. 210). In other words, it can be said that the place of legal actors is quite important for democratisation and decolonisation of legal pluralism.

III. Case Analyses

In Kenya, the basic mechanism of the conflicts of interest observable in farming villages (informal dispute resolution) can often be seen in official court trials (official

dispute resolution). These trials occur simply because parties who could not resolve their case at the village meetings bring their case to official courts. From the time when they are brought to the official courts, the disputes arising in these communities are subjected to an entirely different systematic framework. The dispute resolution processes will be different even when the basic structure of the conflicts of interest is similar, because of the way official courts undertake the examination of evidence and the recognition of facts. Accordingly, this paper examines both cases tried by village meetings and those tried by official courts. The analysed cases concern disputes over the legal validity of 'customary law marriage' when dowry items have not been paid.

Orumba Case: Dowry Non-payment and the Identity Card

I attended a *baraza* (Kiswahili: meeting) organised by an administrative chief[9] on 2 October 1999. The meeting began at nine o'clock in the morning. It continued until half past one in the afternoon without any break, and addressed five cases. One of the cases took one hour but was not completely resolved. This case will hereafter be called the 'Orumba Case' (Orumba is the name of a deceased male).

The meeting was occurred between Nyangweso, who claimed to be Orumba's wife (his second wife), and the sons of the first wife (deceased), John and Omboke. Both parties disputed the settlement of Orumba's land property. Orumba, John and Omboke all belong to the same agnatic lineage.[10]

On 2 October, Nyangweso filed the case to the area chief, claiming that she was not even permitted to live on the land that Orumba had left. She claimed that she needed a piece of land so that she could live with her unmarried son.

On the other hand, John and Omboke maintained that Nyangweso was not actually Orumba's wife. They argued that under the Gusii customary law, a couple is married when the groom gives dowry to the bride's relatives in the form of livestock and/or cash. Since the beginning of Nyangweso and Orumba's cohabitation, no such transaction had taken place. Moreover, Nyangweso was already married to another man prior to her cohabitation with Orumba, and had already found someone to live with after separating from Orumba. After moving from one place to another in this way, Nyangweso began to worry about how she could make a living in her old age, and suddenly returned 20 years after her separation from Orumba and attempted to obtain a part of his estate. The primary issue in this case is not the fact that she was absent for 20 years, but that there were no transactions of livestock or cash at the time of marriage.

On 2 October, the chief listened to the claims made by both parties. However, he ordered them to settle the case by meeting once more at their lineage meeting. By this stage, the parties had already held two meetings. The secretary of the meeting, Omwange, held the record of the Orumba case on 17 July and 7 August 1999. The

names of all participants were recorded for both occasions, and the positions of each participant regarding the allocations of the land were listed. According to the trial record, most of the residents who attended the meeting on 17 July took John and Omboke's side, and argued that the land should not be allocated to Nyangweso. The lineage members held another meeting in August and decided to deliver the verdict after that.

On 7 August, the second meeting was held. This time most of the participants took Nyangweso's side and argued that the land should be allocated to her. Some pointed out that the fact that the father of Nyangweso's son was Orumba should be taken into consideration. Others emphasised that the national identity card issued by the government of Kenya listed sufficient facts to prove that Nyangweso was Orumba's wife.

The identity card in fact included Orumba's name within Nyangweso's name. In Kenya, the national identity card name can be amended such that the husband's name becomes a part of the wife's name. However, under the Registration of Persons Act, when a woman changes her name, her husband must accompany her and provide the office with his signature and fingerprint. Some criticise this practice as a discriminatory law against women, but many accept it because there are no other substitutes. This is because unless the husband is required to approve such changes, women can use men's names and claim to be their 'wives' without any proof. In other words, the identity card is regarded as carrying a significant amount of legal weight to the extent of causing such debates on membership in a family, and the elders are also well aware of this fact.

At the meeting, the elders emphasised the importance of the fact that the father of Nyangweso's son was Orumba, and that her name on the identity card included Orumba's name, in addition to the fact that Nyangweso was an elderly woman. In the end, they concluded that the land should be allocated to her as well.

John and Omboke were extremely angered by this decision, and a scuffle broke out between them and the faction supporting Nyangweso. Because of this situation, Nyangweso could not peacefully relocate to the land in question even after the decision had been approved by the elders. Moreover, as already stated, Nyangweso brought the case up to the administrative chief on 2 October, but the case was remanded to the lineage meeting again without any solution. As far as I am aware, the third meeting has not yet been held within the lineage.

According to the lineage elders, the land should not have been allocated to Nyangweso if the customs were strictly followed because there were no dowry transactions. However, they also pointed out the fact that Orumba was the father of Nyangweso's son and that such a fact cannot be ignored either. Thus, the elders had to make an extremely difficult decision.

The essence of the Orumba case can be summarised as follows: John and Omboke (sons of the first wife) could not allow the allocation of land to Nyangweso (a woman who claimed to be their father's wife), who was absent for 20 years and suddenly appeared to make a claim to a part of the land. The sons argued that there was no marriage (under customary law) because dowries had not been paid. On the other hand, Nyangweso sought to be recognized with the status of Orumba's wife and have his estate settled accordingly by putting forward the facts of cohabitation with him and of giving birth to his son. Furthermore, she argued that the fact that she was Orumba's wife was clear from the contents of her identity card. The basic structures of the parties' positions are as follows:

1) **John and Omboke** (denying the allocation of property)
   substantive reasoning **(paradigm 1S)**
      separation: absence of marital relationship
   formal reasoning **(paradigm 1F)**
      non-payment of dowry: absence of marital relationship

2) **Nyangweso** (claiming the allocation of property)
   substantive reasoning **(paradigm 2S)**
      cohabitation/parent–child relationship: existence of marital relationship
   formal reasoning **(paradigm 2F)**
      national identity card: existence of marital relationship

During the first lineage meeting, John and Omboke sought to deny the allocation of property by selecting both paradigms 1S and 1F by arguing the non-existence of a marital relationship. On the other hand, by selecting paradigm 2S, Nyangweso argued that a marital relationship did exist, and thus demanded the allocation of property. However, note that the conflict of opinions changed its character at the second meeting, when Nyangweso brought in paradigm 2F, namely the listing in her identity card, to prove the existence of the marital relationship.

There are two important points here. First, the substantive and formal methods of legal reasoning are paradigms supporting claims by both parties at the second meeting. Parties to the dispute did not agree on the critical issue of whether to deny (1) or grant (2) the allocation of the property. If 1S, 1F, 2S and 2F were not selected as paradigms argued in the case, these factors by themselves would not constitute mutually exclusive or inconsistent relationships. For example, the listings in the identity card, which were used to prove the existence of marriage in this case, could also be used for disproving the existence of marriage in other instances. In such cases, it would not even be used

as proof. Accordingly, the paradigm claiming certain positions only constitutes opposing relationships when selected by the parties concerned.

Second, note that formal and substantive reasoning are related as parallel concepts but not in a cause-and-effect relationship. The former does not arise from the formularisation of the latter. Both arise from the formularisation of a specific relational norm, but in a different shape: What are the characteristics of a marital relationship? Is its legal significance determined by formal indicators such as the payment of dowries or by the listings in the identity card (civil law marriage)? Alternatively, is it determined by the actual contents of the relationship such as cohabitation, the birth of a child, or separation (common law marriage)? Both are significantly different in the way the legal significance is formulated.

Gladys Case: Non-payment of Dowry and the Presumption of Marriage

The analysis of the Orumba case in the previous section was undertaken in the village meetings. The opposition of claims, as witnessed in disputes such as the Orumba case, is often handled by official courts, and decisions are delivered after certain procedures have been performed. How do the courts try these cases, and how are the decisions reached? This section will address these topics.

The case mentioned here will hereafter be called the Gladys case.[11] Gladys died of illness on 17 February 2000, when she was 40 years old. At the court (The Chief Magistrate Court at Kisii), a dispute occurred over where to bury her body. In a manner similar to the Orumba case, a party who claimed to be the spouse of the deceased demanded the allocation of a parcel of land, and the other party attempted to deny any such entitlement by questioning the validity of the marital relationship between the deceased and the claiming party. Therefore, the factual basis of what constitutes a marital relationship became the centre of dispute in this case also.

In brief, a presumption of marriage was recognised in a judgment on 20 March 2000, on the basis of a view that acknowledged a common law marriage, despite the lack of elements clearly constituting a marriage. As demonstrated in the Gladys case, Gusii burial cases often rely on the common law 'presumption of marriage' as the legal basis. 'Presumption of marriage' is the view recognised in a common law marriage that makes a presumption of a marriage between two parties when both parties cohabit with agreement and establish their reputation as a married couple, even without the presentation of any dispositive proof, as far as no opposing proof is presented. Regulation of a formal relationship relies on the legal requirements constituting a customary marriage, such as the payment of a dowry. On the other hand, common law marriage is referred to as the opposing paradigm in that it discredits claims that rely on customary law, from the viewpoint of the substantive reasoning of the marital

relationship through the 'presumption of marriage'.

The record of the Gladys case included a 16-page typewritten document, the judgment and the photocopies of precedents and law books. Ten witnesses for the plaintiff, including an expert witness of Gusii customary law, spoke at the trial. In contrast, for the defendant, only one witness attended the trial. This shows that producing a large quantity of evidence as proof and holding long examination processes were required for the plaintiff to prove the existence of a common law marriage through the 'presumption of marriage'.

Gladys worked as an administrator for the Egerton University Kisii campus and possessed a piece of land under her name, located close to the Kisii campus. The size of the land was 465 square metres. Parties to the Gladys case sought to obtain the right to inherit this land. The reason why the burial location was disputed was that the land would be her father's if she was buried at her parents' home, and it would be the spouse's families' if she was buried by them. In this case, similar to the Orumba case, the marital identity of the deceased became an issue.

Nelson Nyangera, who appeared as an expert witness for the trial, submitted his book entitled '*The making of men and women under Abagusii customary law'* (Nyangera 1999). During the trial, he provided testimony regarding the elements that constitute a customary law marriage by summarising the contents of his book. He referred to page 86 of the book, which points out that 'legalising the elopement into marriage' is possible if the agreement of the wife's parents to accept dowry items is secured immediately before the deceased wife's burial. This is consistent with the testimony he provided in several other similar cases. He maintained that a dowry payment is the crucial constituent element of a customary marriage, while pointing out that the dowry itself can be paid at any time once both parties agree on the transaction.

The plaintiffs were Robert and Paul, who were the brothers of the man who lived with Gladys, and the defendant was Anderson, the father of the deceased. According to the plaintiffs, Gladys had married a man called Fred in 1983. Fred, who was employed as a driver for the Ministry of Livestock, had two sons with Gladys before he died of a traffic accident while working. Gladys had a child from her previous partner, and Robert lived with Gladys after his brother Fred's death 'as his substitute', and they had two sons. In total, Gladys gave birth to five children.

According to the plaintiffs, there was no dowry payment, but Gladys' father, Anderson, had recognised the marital relationship between his daughter and Fred. Both families reached an agreement for the dowry payment of sixty thousand shillings, two cows and two goats, and Fred's family was prepared to pay the dowry at any time. However, Anderson changed his attitude after Gladys' death and refused the dowry. The marital relationship of Gladys and Fred had been widely recognised. The

employee's list at Fred's workplace even listed Gladys as his wife. Moreover, Gladys, as Fred's wife, had buried him, and as his wife, had also received the Ministry of Livestock consolatory money. When Gladys purchased the land in question using her name as the titular, the plaintiff Robert accompanied her as a guardian and even paid a part of the cost. Robert also took Gladys to the hospital immediately before her death, and undertook all the procedures of placing her body in mortuary. Using these facts as evidence, the advocate for the plaintiffs argued that the customary law marriage should be recognised because the payments of dowry had been agreed upon, and because the 'presumption of marriage' between Gladys and Fred by common law was applicable. On the basis of these facts, the advocate argued the plaintiffs' rights to bury Gladys.

On the other hand, Anderson denied the plaintiffs' claims in full and argued that Gladys was not married. He stated that a customary law marriage does not take place without the dowry payment, and that Fred neither paid nor negotiated nor agreed to make such payments. The defendants' lawyer, while maintaining that a customary law marriage did not exist, argued that English common law does not unconditionally apply to Kenya, and precluded the application of a 'presumption of marriage' argument.

In delivering the decision, the magistrate merely adopted the part of Nyangera's testimony that the payment of a dowry constitutes the customary marriage, and did not assign any weight to the arguments that an agreement to receive a dowry by the wife's parents could also constitute the marriage. In the end, the magistrate reached the conclusion that there was no customary marriage between Fred and Gladys because there was no dowry payment. However, the magistrate also concluded that the 'presumption of marriage' was applicable by virtue of the considerable evidence presented by the plaintiffs. In delivering the judgment, this evidence turned out to be the deciding factor in convincing the judge to adopt the 'presumption of marriage'.

The judgment was that Gladys was Fred's wife and that the plaintiffs had the right to bury her. In making the decision, the judge ordered that the plaintiffs pay sixty thousand shillings, four cows and two goats to the defendants via the court. Such an order was based on the conclusion that a customary law marriage could arise from the dowry payment. The facts listed included the cohabitation of Gladys and Fred, their two children and the recognition of Fred's status as Gladys' husband at his workplace. In addition, Gladys received constant support from the brothers prior to her death. On the basis of these facts, the brothers argued that a marital relationship should be presumed.

This case can be summarised as follows: The deceased Gladys' father (Anderson) claimed that his daughter, Gladys, and Fred (also deceased) were not married because there was no dowry payment. On the other hand, Fred's brothers (Robert and Paul) produced facts proving the existence of the marital relationship. The basic opposing

structure of the opinion is as follows.

3) **Anderson** (seeking to deny the allocation of property)
formal reasoning **(paradigm 3F)**
non-payment of dowry: non-existence of marital relationship

4) **Robert and Paul** (claiming the allocation of property)
substantive reasoning **(paradigm 4S)**
cohabitation/parent–child relationship: existence of marital relationship

How was the inherent conflict between paradigms 3F and 4S reconciled by this trial? The court adopted most of the evidence provided by Fred's side (through Robert and Paul) and 'presumed' a marriage to exist between Fred and Gladys, but at the same time, decided that no 'customary law marriage' existed between them because the dowry was not paid. In other words, neither paradigm 3F nor paradigm 4S was denied, and the right to bury Gladys and to inherit her estate was given to the late Fred's side.

The key to understanding this decision is the logic that allows the 'customary law marriage' to exist upon the payment of dowry as the formal reasoning (3F) to be the determinative fact, despite the fact that both the husband and wife were already deceased. In short, Anderson, who argued the non-existence of the marital relationship, lost the case, but paradigm 3F itself (that the non-payment of the dowry is an indicator that a marital relationship does not exist), was not negated. As discussed in subsection 3-1, the paradigm of argument forms the opposing relationship by the selection of parties. Accordingly, there is no a priori conflict between particular paradigms.

The above paragraphs analysed how the claims of the concerned parties are expressed and formularised by utilising the dichotomy between the formal and substantive ways of legal reasoning. In the following paragraphs, another two dichotomies will be added, and the Gladys case will be compared with the Orumba case.

Comparative Analysis

As discussed in section 1, Chiba's analytical tools are quite useful for grasping the complex process of the pluralisation of law. In this paper, I proposed a new dichotomy between the formal and substantive ways of legal reasoning, instead of using the dichotomy between legal rules and legal postulates as Chiba did. The table below shows how the dichotomy between official and unofficial laws, and that between indigenous and transplanted laws can be 'combined', when they are introduced as the analytical concepts for the above case studies.[12)]

Orumba Case: **unofficial** dispute resolution (lineage meeting)
Paradigm 1F **formal reasoning** (non-payment of dowry: non-existence of marriage)
indigenous law (customary law)
Paradigm 2F **formal reasoning** (identity card: existence of marriage)
transplanted law (statutory law)

Gladys Case: **official** dispute resolution (magistrate court)
Paradigm 3F **formal reasoning** (non-payment of dowry: non-existence of marriage)
indigenous law (customary law)
Paradigm 4S **substantive reasoning** (cohabitation/children: existence of marriage)
transplanted law (English common law)

An important observation here is that there is no universal manner in which formal and substantive reasoning can be combined. Formal reasoning can be combined with the indigenous law as well as the transplanted law, and the transplanted law can be combined with substantive reasoning.

Initially, the dichotomy between official and unofficial laws is recognised by contrasting the systematic framework of dispute resolution, whether the case is heard by elders at a village meeting or by the official state court. In addition, in this scenario, the indigenous law may obtain the status of the official law as African customary law during the dispute resolution processes at the court. The above paradigms 1F and 3F are similar in the way that the indigenous law is used so that the concerned parties can express their claims. However, they are different in the manner in which the latter gains the status as the official law by the court. In other words, there is a qualitative difference between paradigms 1F and 3F within the dichotomy between official and unofficial laws.

Next, the dichotomy between indigenous and transplanted laws is similar to Chiba's definition in that his theory examines whether such a dichotomy originates in the local culture of the society in question. In both Orumba case and Gladys case, there was a conflict between the expression of claims by indigenous laws and that by transplanted laws. They are different, on the other hand, in the way the dichotomy between transplanted and indigenous laws is combined with the dichotomy between formal and substantive reasoning. For example, the transplanted law in the Orumba case was used as the paradigm for expressing the party's claims through formal reasoning (paradigm 2F). In contrast, the transplanted law in the Gladys case was used as the paradigm for expressing the party's claim through substantive reasoning (paradigm 4S).

In summary, the dichotomy between indigenous and transplanted laws and that between formal and substantive reasoning are combined throughout the processes of

parties formularising their expression of claims.

IV. Conclusion

As previously stated, there is as yet no standard by which marriage may be formally defined in the Gusii community in Kenya, where currently various forms of 'marriage' are recognised as customary law marriages, other than the civil marriage under the state law. This paper has analysed cases in which disputes over the legal conditions of a customary law marriage in the Gusii community were heard at a village meeting and the official court.

With regard to the Orumba case, as analysed in subsection 3-1, the conflict was between two types of arguments, each based on the formal reasoning of how marriage may be defined. With regard to the Gladys case, there was a conflict between the formal and substantive ways of legal reasoning. In each type of conflict, the party expressing their claims by the formal reasoning regarding relationships relied on the customary law as a paradigm to support their claims. Because of this approach, the customary law the parties referred to led to an extremely formalistic view of the 'law'. The argument that a customary law marriage is a legal relationship constituted by a dowry payment is by itself a paradigm that supports a certain claim.

This paper attempted to extract the characteristic features of the parties' expression of claims to observe the combinations of the three dichotomies, namely the dichotomy between official and unofficial laws, the dichotomy between transplanted and indigenous laws and the dichotomy between formal and substantive ways of legal reasoning. In this sense, the analysis presented in subsection 3-3 corresponds to the conclusion of this paper as empirical research. I understand that the combinations of dichotomies show an actual example of the contemporary dynamics of Kenyan legal pluralism.

Chiba uses the dichotomy between legal rules and legal postulates in order to compare the qualitative characteristics of legal formalisation. However, this dichotomy is modelled on the dual structure of state law and is difficult to apply to unwritten laws. In this paper, I have proposed a new dichotomy for capturing the characteristics of formularising the party's expression of claims, a dichotomy useful for the structural analysis of dispute processes at the microlevel, not the dichotomy for structural analysis of laws at the macrolevel. This paper then explored the dichotomy between formal and substantive ways of legal reasoning. In summary, the expression of claims by parties or legal actors is the driving force of the dispute process. Therefore, a way of understanding the plural system at the empirical level is possible by capturing the way parties formulate the expression of their claims from various angles. This

dichotomy is the operative concept for clarifying how the parties formularise the expression of their claims within the conflicting and pluralising phases of the dispute processes.

Note

1) An earlier version of this paper first appeared in Japanese at a Japanese journal, *Hosyakaigaku* (*Sociology of Law*) 64, in September 2006, and later presented in English at a conference, *Towards a General Theory of Legal Culture in a Global Context: Chiba Memorial Symposium*, at the School of Oriental and African Studies, University of London on 26 March 2012. It benefitted from comments from the anonymous reviewers of the journal and the participants of the conference, and has been revised with additions for publication here.

2) Internationally known works of Werner Menski (2006) and Ihsan Yilmaz (2005) also address the modification of Chiba's three-dichotomy theory in their respective ways. It may sound paradoxical, but one of the great advantages of Chiba's theory lies in its theoretical non-self-sufficiency, which always invites other scholars to expand the field with more sophisticated models.

3) The Gusii or *Abagusii* are Bantu-speaking people, inhabiting the south–western highlands of Kenya. Because of the mild climate and abundant rainfall, their land is quite rich in agricultural production. The name 'Kisii' is of a colonial terminology. The people were referred to as the Kisii in the colonial period, and even nowadays, their largest town and administrative districts retain their colonial names. Previous anthropological works on the customary marriage laws of the Gusii include Mayer 1950, Hakkanson 1988, Matsuzono 1988, Shadle 1999 and Ishida 2002.

4) Chiba's dichotomy of legal rules and postulates was first given using a different terminology for the dichotomy, framing it as between *positive rules* and *postulative values* (Chiba 1986, p. 393).

5) I refer to brideprice or bridewealth as 'dowry' in this paper, according to the common English terminology in Kenya. In other words, it represents a sum of marriage gifts given to a bride's parents and/or brothers by the agnatic kin of the bridegroom.

6) Interestingly, there is a slight but important difference between the English and Japanese terminologies. The concept of the identity *postulate* of a legal culture is translated as the identity *principle* in Chiba's papers published in the Japanese language.

7) Ishida (2009) discussed Chiba's concept of the identity postulate of a legal culture. See also Takeshi Tsunoda's review on the concept (Tsunoda 2009).

8) Roger Ballard, "Introduction: The emergence of Desh Pardesh", in Roger Ballard ed. *Desh Pardesh: The South Asian presence in Britain*, London: Hurst, p. 31.

9) Administrative chief is a government-appointed officer who is in charge of law and order in his village or 'location' (administrative unit). Chiefs are appointed from among middle-aged villagers, men and women. They are not necessarily experts in customary laws or local traditions, but are well educated enough to speak and write the English language, which is often required in paper work.

10) Lineage is a kin group comprised of relatives whose family genealogy can be traced back.

11) Chief Magistrate's Court at Kisii, Civil Case No. 124 of 2000.

12) I observe that the dichotomy between indigenous and transplanted laws is indispensable in the Kenyan context. This observation of mine is different from that of Yilmaz (2005: 25), who noted that Chiba's 'third dichotomy (indigenous law versus received law) is not really a separate dichotomy'.

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Abstract

This paper aims to apply the empirical research on dispute processes to Masaji Chiba's theory on legal pluralism. The task requires a partial modification of Chiba's three-dichotomy theory, especially of his first dichotomy between legal rules and legal postulates. The original dichotomy is for comparing the qualitative characteristics of legal formalisation, but modelled on the dual structure of state law. In this paper, I propose an alternative dichotomy for capturing the characteristics of formularising the party's arguments. This paper then explored the dichotomy between formal and substantive ways of legal reasoning. In this paper, I will analyse cases of family disputes observed in Kenyan official and unofficial forums using a revised version of the three-dichotomy theory. The actual cases used in this paper are drawn from the civil disputes concerning the legal conditions of marriage under the customary law of the Gusii community of Kenya.

Key words

legal pluralism, customary law, marriage, Kenya, Masaji Chiba