Law, Religion and the Family in Africa

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FOREWORD: THE FAMILY WITHIN THE KENYAN LEGAL SYSTEM

INTRODUCTION

I am honoured to have been invited to speak to you this afternoon on the Kenyan legal system and the manner of regulation and protection of the family. The theme of your conference is law, religion and the family, and as a judge, I am called upon to examine the intersection of these institutions against a human rights prism. In doing so, I will consider it against the human rights regime that is an integral part of our legal system pursuant to the provisions of the Constitution of Kenya, 2010,¹ but also, even prior to the promulgation of the Constitution, to the ratification by Kenya of various international conventions that have a bearing on the family.

WHAT IS A FAMILY?

When we hear the term “family”, I suspect we all know, or assume we know, precisely what the term means. It is a universal concept, with the family forming the basic unit of any society. What the family denotes may differ from society to society, but to most people what initially came to mind is the traditional Western family model of a man and a woman, married to each other under civil law or religious rites, and their biological or legally adopted children. Under this conception of family, a child born outside the marriage suffers the stigma of illegitimacy, with all the legal and social consequences the term implies.

In other social contexts, and certainly in Kenya’s traditional cultural settings and in Islam, where polygamy is permitted, the family denotes a man and his wife or wives, and their children. In many of our traditional arrangements, it also includes the wider, extended family. With the concept of what constitutes a family in mind, I want to start with the constitutional provisions relating to the family in Kenya, and then examine the background and context that have led to those provisions.

We define the Kenyan family in Article 45(1) of the Constitution of Kenya 2010, which provides that: “The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.”² In Article 45(2), the people of Kenya assert the right of “every adult” to “marry a person of the opposite sex, based on the free consent of the parties”.³ I should observe that this definition excludes same-sex unions and civil partnerships and the family units that result from such unions, which have been accorded legal recognition in a number of countries around the world. Another important provision in the Constitution of Kenya is Article 45(3), which provides that: “Parties to a marriage are entitled to equal rights at the time of the marriage, during the

1 Constitution of Kenya, 2010.

2 Constitution of Kenya, 2010, art 45(1).

3 Constitution of Kenya, 2010, art 45(2).

marriage and at the dissolution of the marriage.”⁴ Finally, at Article 45(4), the Constitution mandates Parliament to enact legislation that recognises “(a) marriages concluded under any tradition or system of religious, personal or family law; and (b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution”.⁵

As a signatory to international conventions, Kenya is bound to protect and safeguard the right to a family. The African Charter on Human and Peoples’ Rights (ACHPR) states that “the family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.”⁶ The Charter also imposes on the state the “duty to assist the family which is the custodian of morals and traditional values recognized by the community”.⁷ The central place of the family is also recognised in the International Covenant on Civil and Political Rights (ICCPR) which defines the family in the following terms: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”⁸ Drawing from international and domestic law, the state thus has an express duty to protect and safeguard the family unit, which, in the words of the African Charter, following the ICCPR, is the “natural unit and basis of society” and is the “custodian of morals and traditional values”.⁹

In an ideal world, the family and the society that the cumulative family units form would operate seamlessly. It would be guided by love and the values and principles that the culture or religion that the society subscribe to dictate. The reality, however, is that the family is beset with and wrecked by problems: between the spouses when the marriage breaks down, with regard to the care and custody of children and in relation to the distribution of property on death. It would be expected that culture and religious beliefs should significantly moderate relations within the family and reduce the conflicts within. However, cultural and religious norms develop within a context, and while these norms may work for and benefit individuals within the family or a section of society, they may end up being oppressive of and harmful to another. There is therefore a need to develop laws to regulate relationships in the family unit. Laws, then, must be formulated so as to protect and render justice for all within the family unit and society, and at times, such laws may, of necessity, conflict with cultural and religious norms. I want to now briefly examine these cultural and religious norms, and how the law has sought to ameliorate their negative consequences on the family.

4 Constitution of Kenya, 2010, art 45(3).

5 Constitution of Kenya, 2010, art 45(4).

6 African Charter on Human and Peoples’ Rights, African [Banjul] Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, art 18(1).

7 ACHPR, art 18(2).

8 International Covenant on Civil and Political Rights, International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, art 23(1).

9 ACHPR, art 18(1-2).

RELIGION, FAMILY AND THE LAW

The Preamble to the Constitution of Kenya recognises and expresses pride in the “ethnic, cultural and religious diversity of Kenya”.¹⁰ This is an important provision, given that Kenya comprises some 42 ethnic groups. The major world religions are represented in Kenya, and include, amongst others, adherents of indigenous religions, Christians, Muslims, Hindus, and Sikhs. Each of these groups have their respective rules and norms for regulating family relations. Because of the cultural and religious diversity, laws regulating family relations in Kenya do not apply across the board.

For those who profess the Christian religion, there exists a tension between Christian and cultural norms, as well as the laws that govern marital relations. For those who profess the Islamic faith, matters of marriage, divorce and succession are governed by Islamic law. Those who adhere to indigenous religions and culture may opt for customary law. While religious and customary norms may be appropriate within the cultural contexts in which they were formulated, looked at through a human rights prism, many fall short. This is particularly so with respect to the rights and status of women, and with respect to the rights of children.

RECONCILING DISPARATE ETHNIC AND TRIBAL CONTEXTS UNDER THE LAW

Under most customary laws in Kenya, women were relegated to an inferior status. They were not entitled to inherit, were subjected to gender-based violence, and on the death of a spouse or in the event of dissolution of marriage, were not entitled to any property. In other words, the laws governing family relations in Kenya’s cultural settings were discriminatory against women. Of greater concern is that the said laws were discriminatory and violative of the rights of girls. Marriages of girls as young as 13 years, sometimes less, were allowed. Female genital mutilation was practised, and is still practised, in many communities. Opportunities for education of women and girls were limited, if not non-existent. We have come from a place where religion and culture did not recognise the place and critical role of women. Laws related to marriage, property, succession and care and custody of children were discriminatory.

Ironically, while the family is the place in which there should be the greatest safety and protection, it is also the location of the greatest violation and disregard of women’s rights. Not unexpectedly, such violations tend to weaken the family and society in general. It is a truism that societies that respect the rights of women achieve greater development. Women can be agents of change, and to achieve development, it is necessary to protect their rights and accord them all opportunities on an equal basis with men.

¹⁰ Constitution of Kenya 2010, preamble.

I believe that to safeguard the interests of the family and by extension society, a state must properly order the legislation and principles that govern five areas: (1) marriage and divorce, (2) matrimonial property, (3) succession and inheritance, (4) care and custody of children, and (5) social protection. In recognition of this, there have been fundamental constitutional and legislative changes to ameliorate the situation of women and protect the rights of children, particularly girls. Some legislative changes predated the 2010 Constitution, while others have been enacted subsequently.

THE ELIMINATION OF DISCRIMINATION WITHIN THE FAMILY CONTEXT

I will consider first the critical constitutional enactments which, while directed at ensuring removal of discriminatory practices and protecting the rights of women and girls, advance the interests of the family, always bearing in mind that women are a fundamental pillar of the family and society.

I have already alluded to Article 45 of the Constitution of Kenya, 2010, which specifically defines the family. Article 27 contains express equality and non-discrimination provisions, providing that “Every person is equal before the law and has the right to equal protection and equal benefit of the law” and that “Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres”.¹¹ Article 27(4) and (5) prohibit the state or any person from discriminating, directly or indirectly, against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.¹²

These provisions are critical in relation to the rights of women and the family. They are further bolstered by provisions governing ownership and entitlement to property contained in Article 40 of the Constitution, which protects the right of “every person”, both men and women, to acquire and own property of any description anywhere in Kenya.¹³ Article 60, which contains the principles of land policy, provides at Article 60(1)(f) that land shall be held, used and managed in a manner that ensures equitable access to land, security of land rights and “elimination of gender discrimination in law, customs and practices related to land and property”.¹⁴

Why, you may ask, are the principles of non-discrimination and equitable ownership of property so important to the family in Kenya? Statistics will show that many families in Kenya, particularly in many rural areas and informal settlements, are female-headed. The main economic activity in large parts of the country is

¹¹ Constitution of Kenya, 2010, art 27.

¹² Constitution of Kenya, 2010, art 27(4-5).

¹³ Constitution of Kenya, 2010, art 40.

¹⁴ Constitution of Kenya, 2010, art 60(1)(f).

subsistence farming. Without a right to own or inherit land, women are often confined to the margins of society. Indeed, poverty amongst women in Kenya is endemic.

The constitutional provisions on equality are essential, because of the existence of discriminatory laws on marriage and divorce, and on inheritance. In relation to marriage and divorce, and partly as a consequence of Kenya's colonial history, there were four recognised systems of marriage, each with its specific legislation and rules. Africans were required to contract marriage under customary law or under the African Christian Marriage and Divorce Act;¹⁵ there was also specific legislation to govern marriage between Muslims and Hindus, respectively, and separate legislation to govern civil marriages under the former Marriage Act.

Following the promulgation of the Constitution of Kenya 2010, there have been commendable efforts to harmonise and consolidate the different regimes that governed marriage and division of property upon divorce. The Marriage Act of 2014 has the object of amending and consolidating the various laws relating to marriage and divorce.¹⁶ It makes provision for marriages contracted under different systems in tandem with Article 45(4) of the Constitution.¹⁷ It recognises marriages celebrated in accordance with the rites of a Christian denomination, as well as customary rites relating to any of the communities in Kenya, including Hindu rites as well as Islamic and civil law. The Marriage Act also recognises polygamy under customary and Islamic law.

However, because of the application of customary and religious norms to disputes arising within the family unit, discrimination still exists. For example, at the dissolution of marriage, both customary and religious rules tend to favour men. Under Islamic law, only husbands have the right to initiate divorce (by *talaq*). This gives a man unilateral power to divorce his wife without giving any reason, whereas the woman must assign good reasons to obtain a divorce.

Even under statute law, women face challenges in their quest for fair division of matrimonial property following the dissolution of marriage. While Article 45 of the Constitution guarantees equality of the parties to a marriage,¹⁸ the reality tends to be different when it comes to determining the actual shares of the parties to property acquired during marriage. Legislation and jurisprudence require that in order to obtain a share of matrimonial property, a party must prove that he or she made a contribution to its acquisition.

The problem with this is that the manner in which division of responsibilities within the home is done, which is a result of societal and cultural practices that prevail at the inception of a marriage, during its subsistence and at its dissolution, puts

15 African Christian Marriage and Divorce Act, Cap. 151, revised edition 2012 [2010].

16 Marriage Act [No. 14 of 2014].

17 Constitution of Kenya, 2010, art 45(4).

18 Constitution of Kenya, 2010, art 45.

women at a disadvantage. Even though women have a right to own property, in most communities, property is registered in the name of the husband. Often, a wife's income is subsumed by her husband and any properties acquired and investments made are mostly registered in a man's name. Women's financial contribution is often directed to providing for and sustaining the home, while their spouses invest in capital assets. Women make non-monetary contributions, determined by cultural and societal practices, that impose on them the duties of childcare and running of the home. Such contributions may not be taken into account during division of property at the dissolution of a marriage, or they may be inadequately valued. We can also not forget that women's earning capacity is often diminished when they perform their reproductive roles in carrying, bearing and nurturing children.

The Matrimonial Property Act 2013 requires that upon dissolution of a marriage, property shall be divided between the spouses depending on their contribution towards its acquisition.¹⁹ In practice, however, its implementation is not straight forward. The Matrimonial Property Act at Section 2 defines contribution to include domestic work, childcare, companionship, management of family business and farm work.²⁰ The inclusion of this non-financial contribution of parties was important as courts had previously not agreed on whether they could be taken into account in the distribution of matrimonial property.

What is problematic, however, is that the Act does not give any guidance on how such contribution is to be quantified during division of matrimonial property at the dissolution of a marriage. Determination of the value of such contributions is left to the discretion of the court. At times, courts insist that there should be proof of contribution by way of financial records, yet women are usually tasked to take care of groceries and day-to-day expenses which do not amount to one-off bulk expenditure that can be easily identified by way of records or the valuation of the properties themselves. Equality in relation to matrimonial property is thus yet to be achieved, and determination of the issue depends a lot on the discretion of the court.

A further challenge for women is the definition of matrimonial property in the Act, which is that it is the matrimonial home or homes and the household goods and effects within. It also includes any other immovable and movable property jointly owned and acquired during the marriage. Section 6(2) of the Act expressly excludes trust property, including property held under customary law, from this classification.²¹ This exclusion of trust property impacts women's property rights significantly. The reason for this is that in most cultures, especially in rural setting, when a woman is married, she leaves her home and joins her husband in his homestead. Such homesteads form part of ancestral land. Upon dissolution of the marriage, the wife usually has no means of claiming an interest in the ancestral home and leaves with nothing, despite the fact that crops, livestock and household effects in the home have been largely acquired through her efforts. Dissolution

¹⁹ Matrimonial Property Act [No. 49 of 2013].

²⁰ Matrimonial Property Act, s 2.

²¹ Matrimonial Property Act, s 6(2).

of marriage in such circumstances renders women destitute. Since, in most cases, women are the primary care givers for children, the chances of generational poverty being passed on to their children are high.

SUCCESSION AND INHERITANCE

Another area of concern in relation to protection of women which has a significant impact on the family relates to the right to inherit property. Under our customary laws, women had no right to inherit property from their fathers. Property passed from father to son. Only unmarried daughters had a right to use and occupy their father's land. The children of such daughters had no right to inherit the land that their mothers used and occupied.

The Law of Succession Act which came into force in 1981 changed this position.²² However, the Act also contains several provisions that perpetuate discrimination against women in matters of inheritance. For instance, the Act exempts certain areas, predominantly occupied by pastoralist communities, from application of the intestacy rules. Consequently, where a person in these areas dies without a will, such property is subject to customary law and practices which exclude women from inheritance. The Act also gives priority to fathers over mothers and brothers over sisters by expressly granting males within the family precedence with respect to inheritance of the estate of a deceased child or sibling who dies intestate and who leaves no surviving spouse or children. The Act also discriminates against widows by providing that they lose their life interest in the property inherited from a deceased spouse upon remarriage, a provision that does not apply to widowers.

Then there are the challenges that result from lingering resistance to the equality provisions in the Constitution and statute. Even though the Constitution and the Law of Succession now specifically recognise the right of women to inherit property on an equal basis with men, the reality is that it is often an uphill task to achieve this. The cultural belief that only men are entitled to inherit is deeply embedded in the psyche of many men, and sometimes even women. Brothers often turn against their sisters on the premise that once they get married, they belong elsewhere. The argument is made that if women are allowed to inherit property from their parents, they will benefit twice, thus putting men at a perceived disadvantage.

The consequence of this perception and practice is that women are left at the mercy of their spouses, viewed as men's property and as a means of production. They are unable to end their marriages as a separated or divorced woman has no place in society. For many women, remaining in an often abusive marriage, to her detriment and that of her children, is the only option, a result of discriminatory inheritance practices that leave women with no option except to marry and remain in marriage, even where those unions are abusive. The discriminatory cultural and religious norms and their influence in practice on marriage and inheritance leave women vulnerable to violence within the family, which is what I now turn to consider.

22 Law of Succession Act, Cap. 160 [No. 14 of 1972].

GENDER-BASED VIOLENCE WITHIN THE FAMILY: THE ROLE OF LAW AND RELIGION

The National Gender and Equality Commission has described gender-based violence as one of the most widespread and socially tolerated forms of human rights violations in Kenya.²³ It cuts across class, ethnicity, and religious affiliations. It has a profoundly negative social and economic impact on families and communities, including immeasurable costs on survivors and their families. This societal ill has seen a monumental rise since the onset of the Covid-19 pandemic. In Kenya, we witnessed an unprecedented rise in violence within the home, with an increase in the number of women killed or maimed at the hands of their spouses. We have also seen an increased number of children who were defiled, and an even larger number of girls who became pregnant.

It is useful, in considering violation of women's and children's rights within the home, and gender and sexual violence in the family, to reflect on the role of religion, and what religious organisations and leaders can do to prevent or reduce gender-based violence or the conditions that give rise to it. As observed earlier, because of their economic status, many women are not able to leave their spouses, for their economic survival and their ability to look after their children depend on their remaining with their spouses.

However, there is a reluctance by women to leave abusive family settings, even when they are financially able to, a result of religious teachings on the family. Many Christians often refer to the book of Malachi 2:16 in which the Bible tells believers that "God hates divorce".²⁴ While the scripture is often quoted to discourage women from leaving difficult or abusive marital situations, many who quote the verse forget that the scripture, from Malachi 2:13-16 is an injunction from God to men to be faithful, and not to deal treacherously with their wives.²⁵ By emphasising the sanctity of marriage even in the face of infidelity and violence, religion and religious leaders can have an extremely negative impact on the family.

The state has sought to protect families by enacting legislation intended to protect women and children in abusive family settings. It recognises that violence in the home can be devastating and have dire consequences. In 2015, Parliament enacted the Protection from Domestic Violence Act, 2015, which provides for protection of spouses and children.²⁶ It contains a wide definition of abuse to include harmful cultural practises such as child marriage, forced marriage and wife inheritance, female genital mutilation, virginity testing and widow cleansing. Economic, emotional and psychological abuse, which were not previously considered as abuse, are also recognised. This definition is a key gain for women and children who suffer

23 See, for example, National Gender and Equality Commission. 2016. *The Status of Sexual and Gender Based Violence (SGBV) Policies and Laws in Kenya*. Nairobi: NGECC. See other reports at the organisations's website at: <https://www.ngeckenya.org/>

24 Bible. Malachi 2:16.

25 Bible. Malachi 2:13-16.

26 Protection from Domestic Violence Act [No. 2 of 2015].

abuse in previously undocumented forms. Reliefs provided in the Act for victims of abuse include provision of access to protection orders by courts and police being held accountable to prevent domestic violence.

PROTECTION OF THE RIGHTS OF CHILDREN

Fundamental to a properly functioning family and society is the protection of children, whose vulnerability is recognised under the Constitution of Kenya and Kenyan law. It cannot be gainsaid that where the law does not adequately protect children, dysfunctional families and failed societies follow. It has been documented that it is the abused children of the present who sometimes become the abusive and violent adults of the future. I have already addressed the law and its failures in relation to women. I need not emphasise that a failure to address the rights and welfare of women inevitably leads to a failure to address the needs of children.

The Constitution of Kenya contains specific provisions with respect to the rights of children. Article 53 guarantees various rights to children, chief amongst which is the right to parental care and protection.²⁷ Such care and protection is the equal responsibility of the mother and father, whether they are married to each other or not. One of the unfortunate legacies of colonial rule was the law relating to bastardy and illegitimacy, the premise behind which was that a child born outside marriage had no right to support from the father. The Affiliation Act, which sought to address this, was repealed in 1969. Even after the Children Act was passed in 2002, a child born outside marriage was the sole responsibility of the mother, unless the father and mother entered into a “parental responsibility” agreement.²⁸ This provision was declared unconstitutional following the promulgation of the 2010 Constitution. Even so, anecdotal evidence suggests that many still consider that parental responsibility primarily vests in the mother, and often, men are celebrated for performing token parental duties. Indeed, a lot of men are practically dragged, kicking and screaming, before the courts to enforce child maintenance orders.

I would say that, to a large extent, the state has done what it is required to do, in terms of legislation, in regulating relations within the family in the area of marriage, divorce, care and protection of children, and succession and inheritance. What is required implementation of the laws and their acceptance by society. Unfortunately, many perceive legislation that advances equality and non-discrimination against women as detrimental to the rights of men. They fail to see that advancement of women advances the interest of the family. As the moral voice of society in Kenya and large parts of Africa where many describe themselves as adherents of one religion or another, religious leaders and institutions can play a significant role in advancing the good of the family by speaking out in favour of protection and advancement of the rights of women. That is, of course, if they fully accept and believe that the interests of the family cannot be advanced where there is oppression and subjugation of one gender.

²⁷ Constitution of Kenya, 2010, art 53.

²⁸ Children Act, Cap. 141 [No. 8 of 2001].

WHOLE AND HEALTHY FAMILIES: SOCIAL PROTECTION AND RELIGIOUS INSTITUTIONS

What I have discussed above relates to the steps that the state has taken, through constitutional and legislative changes, to safeguard and advance the rights of the family. It has done this with regard to regulating relations between and within the family. What it has not adequately done, however, is to take steps with regard to its own role in protecting the family.

The state has the obligation under Article 43 of the Constitution of Kenya to ensure that all citizens have adequate health care, housing, education and sanitation.²⁹ It has the duty, under Article 21, to take legislative and policy measures to ensure the progressive realisation of the social economic rights guaranteed under Article 43.³⁰ It also has the duty, under Article 20, to observe, promote, respect and fulfil the rights in the Bill of Rights.³¹ However, even prior to these constitutional enactments, the state had these responsibilities pursuant to international covenants to which it was a party. It is also important to note that social protection is a public good which the State has a responsibility to provide to its citizens.

The reality, however, is that the state has largely failed to meet these obligations, as a result of which religious institutions have come in to fill the gap. This has been particularly so in the area of education and health, and in times of calamity. The contribution of religious institutions in these areas has been invaluable. In many parts of the country, religious institutions have had the only presence where education and health services are concerned. This is indeed a very positive contribution by religious institutions.

However, there has been a very negative facet of the involvement of religious leaders and institutions in these areas. Indeed, some of the things that the church advocates, when looked at through a human rights prism, are negative and have had deleterious effects on the family. This is particularly so in the area of women's health and reproductive rights. Because some religious institutions and leaders are opposed to inclusion of reproductive health education for girls and provision of reproductive health services for women, many women and girls are ignorant about their sexuality and reproductive health.

Basic things like menstruation and pregnancy are still shrouded in mystery because religious institutions frown on their being included in curricula for schools, yet it is in these formative years that young people, particularly girls, need to understand their bodies. I have heard anecdotal evidence that some girls are taught that menstrual pain, for instance, which may be a result of endometriosis or hormonal problems that could be medically treated, is "normal". They are taught that God "cursed" Eve, and therefore women and girls just have to bear their reproductive lot as a "punishment" for the sin of the First Woman. As a result of religious

²⁹ Constitution of Kenya, 2010, art 43.

³⁰ Constitution of Kenya, 2010, art 21.

³¹ Constitution of Kenya, 2010, art 20.

teachings about reproduction and women's role in it, women suffer, and sometimes die, due to ignorance that could have been addressed through frank, open and non-judgmental education about sexuality and reproduction. Religious leaders can do a great deal to enhance the good of the family by recognising the need for better reproductive health education for girls and women, even as they continue to fill the gap left by state failure to ensure social protection for the family.

CONCLUSION

Despite the various challenges observed above, the lived reality is that most family units benefit from the common bond that is fostered by religious and cultural congregations. Religion and religious institutions continue to play a major role in influencing and impacting society. The challenge is to ensure that the impact is positive and remains aligned to the human rights provisions in respect of every member of the family. In particular, religious leaders and institutions can play a significant role in advancing the interests of the family, and of society, by protecting the rights of women through their teachings and practices. In matters of social protection, religious institutions have had a positive and significant role. However, the propagation and perpetuation of beliefs and practices that discriminate against women detract from the very positive role that religious leaders and institutions play in advancing the interests of the family.

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