Law, Religion and the Family in Africa

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AFTERWORD: HUMAN RIGHTS AND THE TRIANGLE OF LAW, RELIGION AND FAMILY

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A search of the common denominator in the triangular themes of this year's conference – law, religion and family – would probably yield the vexed relationship between religious cultural norms on family, on the one hand, and formal state law on family, on the other. Beyond the vexed relationship, there is consensus on the centrality of the family unit in society. International human rights law, in its foundational instrument, the Universal Declaration of Human Rights (UDHR) recognises the family as the fundamental unit requiring protection by the State.² The provisions of the UDHR are further enunciated as legally binding State obligations in the International Covenant on Civil and Political Rights (ICCPR),³ and in the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴ The recognition of the family and the accompanying State obligations find further textual expression in regional human rights treaties. The American Convention on Human Rights (ACHR), the European Social Charter and the African Charter on Human and Peoples' Rights (African Charter, or ACHPR) all echo the fundamental nature of the family in society and the State obligations to accord it protection and assistance.⁵

Similarly, religion accords a special place to the family. Religious principles, in most societies, govern significant aspects of family life, such as birth, marriage, divorce, inheritance and property ownership. Importantly, religion views family as the custodian and the theatre for expression and transmission of religious beliefs and practices, hence important for the continued survival of religion. This afterword construes religious and cultural norms as connected, as religious norms often become part of culture and cultural norms are borrowed from religious practices,

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² Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). (UDHR), art 16(3).

³ 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. (ICCPR), art 23(1).

⁴ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976. (ICESCR), art 10.

⁵ See American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) art 17(1); European Social Charter, ETS No. 35, Turin, 18.X.1961.art 16; African Charter on Human and Peoples' Rights (adopted 27 June 1981, *entered into force* Oct. 21, 1986 (1982) 21 ILM 58 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 (ACHPR), art 18.

while for traditional religions, culture and religion are identical.⁶ This afterword, therefore, uses the term “religious cultural legal systems” to refer to religious, customary and traditional practices and beliefs not sanctioned by formal law, but which nonetheless enjoy social power and legitimacy.

The centrality of the family often makes it the classical locale for tension between religious cultural legal systems and formal legal systems within the context of human rights norms. International human rights law has tended to view the family unit as a gendered space which reinforces social power hierarchies, thus running afoul of the human rights foundational concepts of human dignity, equality and non-discrimination. To this end, the human rights discourse has aimed at infusing the family unit with human rights standards to counter religious cultural norms that are inimical to equality. Even then, the contours of the reach of the human rights discourse within the family unit remain contested.

THE FAMILY IN THE AFRICAN HUMAN RIGHTS SYSTEM

As pointed out earlier, the African human rights system accords special recognition to the family and requires States to protect it. The African Charter on Human and Peoples’ rights designates the family as the custodian of African culture.⁷ To that extent, the family is considered as the theatre for expression and transmission of African culture. Acknowledging, the social power hierarchies inherent in cultural norms, the African Charter calls for protection of vulnerable members within the family unit. In relation to women and children, the African Charter invokes international human rights standards, which affirm the right to special protection for the elderly and persons with disabilities.⁸ Undoubtedly then, the African Charter alludes to the tension between the religious cultural norms and human rights standards in relation to the family and addresses it by invoking international human rights standards.

Further affirming the special status of the family, the African Charter imposes on individuals duties towards the family, society and the State.⁹ Individuals are required to “preserve the harmonious development of the family and work for the cohesion and respect of the family”.¹⁰ Drawing on the family’s special role as the custodian of cultural norms, the individual’s duties to the family extend to upholding of cultural norms. By contrast, in the European and Inter-American human rights systems, while the family enjoys recognition, State obligations are primarily focused on non-interference with the family unit.

6 See, generally, Abdulla MR. 2018. “Culture, Religion and Freedom of Religion or Belief”, *The Review of Faith & International Affairs* 16.

7 ACHPR, art 18(2).

8 ACHPR, arts 18(3) and 18(4).

9 ACHPR, art 27(1).

10 ACHPR, art 29(1).

Additional legal instruments set forth further human rights principles in relation to the family. The African Charter on the Rights and Welfare of the Child (ACRWC) addresses the family in the context of the rights of children. It echoes the African Charter's provisions on the fundamental status of the family and State obligations on protection and support.¹¹ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) addresses the family in the context of rights of women in the family unit. To this end, the Maputo Protocol elaborates on Article 18 of the African Charter on protection of rights of women within the family unit. It outlines the rights of women to include: the right to found a family based on free and full consent; equal rights in the family unit in relation to children, property, nationality of the children; and equal rights in separation, divorce and annulment of marriage and dissolution of the property thereof.¹²

THE CLASH BETWEEN RELIGIOUS CULTURAL NORMS AND HUMAN RIGHTS STANDARDS CONCERNING THE FAMILY

Granted that implementation of international human rights law occurs at national level, the human rights standards on the family discussed above find expression in constitutions and national laws of many African states. A number of African constitutions echo these universal human rights standards and extend their reach to private spheres, such as the family, church and clan, and require non-discrimination and equal treatment, thus subordinating religious cultural norms to universal standards. Invariably, the clash between religious cultural norms and human rights standards is pronounced at the national level, making the family unit a tense space. In Kenya, as elsewhere in Africa, the contestations are rife and a major source of tension, especially in certain key areas.

Equality and non-discrimination

Human rights discourse is premised on the concept of human dignity, which requires equality and non-discrimination. In the context of family relations, equality and non-discrimination demands gender equality, as outlined in the Maputo Protocol to include: free and full consent to enter into marriage, equal rights at the time of marriage, during and at dissolution of marriage, equal personal rights to choose a family name, profession and occupation, and equal property rights.¹³ Religious and customary legal systems view patriarchal authority within the

11 African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, *entered into force* Nov. 29, 1999) CAB/LEG/24.9/49 (1990) (African Charter on the Child) art 18(1).

12 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, *entered into force* Nov. 25, 2005) (Maputo Protocol), arts 6 and 7.

13 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, *entered into force* Sep. 3, 1981) 1249 UNTS 13 (CEDAW) art 16 and Maputo Protocol, arts 6 and 7.

family unit as meaningful and consistent with social order. Illustratively, in Kenya, while the Constitution of Kenya, 2010 enshrines the principle of gender equality, it exempts persons professing the Muslim religion from the equality provisions in matters relating inheritance, divorce and marriage.¹⁴

Polygamy

International human rights law construes the shape and meaning of family from a monogamous perspective. Consequently, polygamy is frowned upon, as it is considered inconsistent with human dignity and the gender equality principles enunciated in the treaties on the rights of women at the global level.¹⁵ Religious and cultural norms ground support for polygamy on religious texts and culture. The Maputo Protocol does not outlaw polygamy, rather it obligates states to protect the rights of women in polygamous unions.¹⁶ Instructively, at the national level, the Constitution of Kenya, 2010, allows polygamy,¹⁷ while South Africa has enacted legislation that protects the rights of women in polygamous unions.¹⁸

Individual autonomy

International human rights law is founded on the ideal of individual liberty and autonomy of the person. Religion does not uphold the idea of individual autonomy, rather it conceives liberty as conformity with a supreme law and obedience to a supreme being.¹⁹ Similarly, cultures typically group autonomy in the form of belonging, association and communal pride. Group autonomy is often viewed as masking differences between members of communities or groups resulting in oppression of vulnerable members within the community or group.²⁰ Drawing on this premise, within the family, cultural assertion of group autonomy at the expense of individual autonomy would lead suppression of the rights of women and children in those families. Awake to this possibility, the African Charter while

14 Constitution of Kenya, 2010, art 24(4) ("The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before Kadhi's courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.")

15 UN Human Rights Committee, "General Comment 28 in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies'" (11 March 2000) CCPR/C/21/Rev.1/Add.10 para 24; UN Committee on the Elimination of All Forms of Discrimination against Women, "General Recommendation 21 in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies'" (1994) A/49/38, para 14.

16 Maputo Protocol, art 6.

17 Constitution of Kenya, 2010, Art, 45(4) and the Kenya Marriage Act, 2014.

18 South Africa Recognition of Customary Marriages Act, 1998.

19 Henkin L. 1998. "Religion, Religions, and Human Rights", *Journal of Religious Ethics* 26(2):231-233.

20 Ludsin H. 2020. "International Human Rights Law and Religious and Cultural Law: Breaking the Impasse", *UCLA Journal of Islamic and Near Eastern Law* 18: 47, 58.

domiciling culture within the family unit invokes international human rights law for protection of women and children.²¹

A broader reflection of these controversies can be observed from the African Court on Human and Peoples' Rights 2018 decision in a case against the Republic of Mali.²² The case, brought against Mali by civil society organisations, focused on the Malian Family Code adopted in 2011, which was inconsistent with international human rights standards in relation to the rights of women and children. The Family Code 2011 was argued to be in violation of the Maputo Protocol and the ACRWC in regard to: the minimum age of marriage, the right to consent to marriage, women's rights to inheritance and the State obligation to eliminate traditional practices and conduct harmful to women and girls. The State argued that the provisions of the Family Code 2011 were in tandem with the religious and cultural realities in Mali and pointed out that an earlier Family Code enacted in 2009 in line with international human rights standards had resulted in large scale civil protests.²³ The African Court found the State in violation of the Maputo Protocol and the ACRWC and directed the State to amend the Family Code to bring it in conformity with international human rights law and to carry out public education, sensitisation and awareness on the rights of women and children.²⁴ These contestations are reflected in the themes explored in the conference papers presented.

LAW, RELIGION AND FAMILY VIRTUAL CONFERENCE 2021

The 2021 ACLARS conference fittingly focused on the family. This had particular resonance with prevailing circumstances, as the advent of the Covid-19 pandemic put the family unit at the centre of individual life. With state restrictions on the freedoms of movement, association, assembly and worship and the office front shifting to the home front, the family unit was thrust into the sphere of individual relations.

The chapters in this volume reflect the multi-faceted character of the issues relating to law, religion and family. The papers allude, from the lens of different African countries, to the clash between religious cultural norms and universal human rights standards from the perspective of children's rights, marriage rights of women and displacement as a result of conflict and migration, including the comparative outlook of the regional human rights systems and national laws. The essays represent a collaborative interdisciplinary effort to address contestations on the family from formal state law and religious cultural norms with a view to ensuring stability and harmonious development of the family unit.

²¹ ACHPR, art 18(3).

²² *APDF & The Institute for the Human Rights and Development in Africa v Republic of Mali*, Application No. 046/2016 Judgment (11 May 2018).

²³ *APDF v Mali*, paras 63-67.

²⁴ *APDF v Mali*, para 135.

While many of the contestations on the family unit remain unsettled, the chapters of this book reflect insightful observations and arguments on the clash between “universal” or “modern” values against traditional religious and cultural values. Thus, they raise the age-old question on whether a reconciliation between the two is possible.

CONCLUSION

The question of the contestation between religious and cultural norms and formal state law on the family is not new. Yet too much can be made of the contrasts between these norms, while failing to acknowledge the common ground. As pointed out throughout this volume, both formal state law and religious cultural systems accord the family fundamental status. The ACLARS conference on “Law, Religion and the Family in Africa” presented an opportunity to appreciate and explore the contestations and commonalities in all their nuance. Overall, the chapters in this volume call for repositioning of our view of either the formal legal system or the religious cultural system as superior or inferior, and instead demand a focus on the meaning and impact of the values they convey on the populations whose rights we seek to protect and the cultures whose religious belief we seek to preserve.