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Liz Guantai
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THE POSITION OF AFRICAN WOMEN WITHIN THE REALM OF CULTURE, PATRIARCHY AND THE LAW: A CASE OF KENYA

Liz Guantai

Lawyer and Global Champion for Women Economic Empowerment,
Nairobi, Kenya.

ABSTRACT

The world is on a quest to achieve United Nations Sustainable Development Goal 5 (SDG5), which seeks to promote gender equality and empowerment of women and girls. Women have been oppressed overtime in most societies. Statistics continue to project increasing rates of various acts of gender based violence such as domestic violence, sexual violence, cultural and economic abuse and so on. These acts of abuse are accelerated by several factors pertinent to our social systems such as culture, patriarchy and the Law. Using Kenya as a case study, this paper examines how these three factors contribute to differential gender treatment. The purpose is to inform on the extent to which the welfare of African women has been compromised by the law, culture and patriarchy, to find relevant long-term solutions to curb further degradation of women in Africa and subsequently, achieve SDG5.

ISSUES

The following issues shall be discussed in this paper:

1. Culture
2. Women and politics
3. Family Law (marriage and divorce)
4. Property ownership
5. Domestic violence
6. Female genital mutilation (FGM)
7. Sexual inequality

INTRODUCTION

Culture largely defines behaviour and practices of any African society. The do's and don'ts of the female gender are to a large extent, dictated and directed by the practices of society during a particular period, either adopting what was done from time immemorial or the current norm. This has created stereotypes that are gendered in nature, such as to adversely affect the human, economic, civil and political rights of women. For instance, few women opt to vie for elective positions in government because of the misguided perception that such opportunities are reserved for their male counterparts, who were traditionally the chiefs and clan elders. Customs and practices of the people are subsequently considered as one of the sources of Law, which is created by enacting of statutes by the same male-dominated Parliament. Loopholes in legislation have in some cases, failed to protect women from gender based violence or provide adequate justice in family disputes.

However, progress has been witnessed by amendment of legislation and enactment of statutes that curb barbaric cultural practices and uphold the welfare of women in various situations that previously were gender discriminatory and oppressive.

1. CULTURE HAS CREATED A PRISON ENVIRONMENT FOR WOMEN

Culture and tradition greatly influence the family system in Kenya. Our society is patriarchal and is known for its history of oppressing women. Many women surrender their power and human rights and remain prisoners of the society (Engels, 1972).

Feminists and women empowerment activists have contested that women are yet to get the credit they deserve for their important role in the family and society. According to Cain, " *...the category 'woman' has not so much been wrongly defined by men, as it has been ignored and undervalued. Yes, women are nurturing. Yes, women value personal relationships. These attributes are to be valued*" (Cain, 1990, p.836).

An African saying goes, " *The place of a woman is in the Kitchen.*" This is the conventional role of the woman; to be a good wife, to take care of the children, to be caring, forgiving and sacrificing (Kabira & Muthoni, 1994). Most men will propose that good wives are the ones who hold families together, are not ambitious or interested in politics, are hardworking and submissive. They should stay at home to love, obey and care for their husbands. Even when husbands are unfaithful, it is because their wives have neglected them. At work, they refuse to apply for positions because it is not feminine to look ambitious. A woman should only be seen and not heard.(Kabira & Muthoni, 1994).

2. WOMEN AND POLITICS

All kinds of contradictory statements are given when a woman shows an interest in politics. We hear women being told:

- "You are divorced. You cannot maintain a household, much less a Constituency."
- "You are married, steer clear of politics."
- "You have not gone to school; your opinion is not relevant."
- "You are educated; you do not understand our women at the grassroots."

It is unfortunate that such cultural idiosyncrasies are assimilated into our mindsets so much as to influence how both men and women exercise their voting rights.

Radical feminists agree that women are subject to male political domination, as Catherine A. MacKinnon (1989) puts it, " *The state is male jurisprudentially: meaning that it adopts the standpoint of male power on the relation between law and society... those who have freedoms like equality, liberty, privacy and speech socially keep them legally free of government intrusion. No one who does not have them socially is granted them legally.*"

The Constitution of Kenya, 2010 attempts to tackle gender equality in politics. Article 81(b) provides that not more than two-thirds of the members of elective public bodies shall be of the same gender. To give effect to this, Article 97(1) (b) creates in the National Assembly, positions for forty-seven women, each elected by the registered voters of the counties, each county making up a single-member constituency.

However, the reality is that gender equality is far from being achieved in politics. A Gender Bill introduced to the National Assembly, to give effect to Article 27 of the Constitution, which seeks to promote affirmative action mechanisms that ensure that not more than two-thirds of the members in elective and appointive bodies shall be of the same gender, was rejected. The Gender Bill was debated upon in early May, 2016 at the National Assembly. Out of the 199 members present, 178 objected to it. The general feeling among male members of parliament was an interpretation that it was a move to give 'free' seats to women.

In the meantime, any issues pertaining to women that are raised are either ignored, debated and not acted upon, legislated but not implemented, given low priority, misinterpreted as destroying our traditions and culture and most often, they do not even pass to law as they are rejected by the majority of the Members of Parliament who are men.

3. FAMILY LAW (MARRIAGE AND DIVORCE)

Feminists propound that the structuring of the law itself is a reason for gender inequality. Family and matrimonial issues continue to be approached from a gendered perspective.

According to traditional African society, culture ruled that property should be owned by the husband in marriage. The place of women in society was to maintain a family and raise children. In divorce cases, the insistence on dividing property according to contribution has in many instances, failed to protect women who are housewives and whose contributions are not monetary yet who work so hard to keep their families intact while their husbands go to work.

Before the enactment of the Matrimonial Property of 2013, Section 17 of the Married Women's Property Act (MWPA) of 1882 (now repealed) was used to divide matrimonial property in divorce cases. It was first applied in Kenya in the case of *I vs I* (1970), as a statute of general application. Such a statute can only be applied if there is no other written law to that effect and in so far as the circumstances of Kenya and its inhabitants permit, according to section 3 of the Judicature Act (Chapter 8, Laws of Kenya). It states: " In any dispute between husband and wife as to the title or possession of property, either of them may apply to the High Court... and the judge may make such order with respect to property in dispute... as he thinks it." (ibid).

Kenyan courts have innovatively interpreted section 17 of the MWPA to develop jurisprudence in the division of matrimonial property (Baraza, 2009). The problem is that section 17 was applied inconsistently by case law, often to the detriment of women. In the Kenyan case of *Karanja vs Karanja* (1976), the wife alleged she had contributed money to the purchase of their matrimonial property, which included a matrimonial home but the husband evicted her from their home. The court awarded her only a third of the property while the husband remained in the matrimonial home.

It is also important to note that housewives are not the only women vulnerable to economic domination and exploitation by their husbands. Elite women may also be oppressed in other non-cultural ways. For example, many working women take loans to purchase property to be registered in their husbands' names or buy cars for their husbands while they go to work by bus (Kabira and Muthoni, 1994). The reason is simply because of the cultural ideologies entrenched in our society that a man should be 'seen' as the one who is doing economically better than his wife. Neither education nor the law can fully erase this traditional mindset.

Article 45(3) of The Constitution of Kenya (2010) is a great milestone as it tries to cure the defect of section 17 of the MWPA. It states; " Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage." (COK, Art 45).

The Matrimonial Property Act however provides for the division of matrimonial property on the basis of contribution, which contradicts the constitutional right to equality in marriage. To remedy this, courts have construed the meaning of contribution to matrimonial property to include contribution in both monetary and non-monetary terms. For instance, the holding in *Kivuitu vs Kivuitu* (1997) suggests that participation of a wife in managing the family affairs is sufficient contribution (Baraza, 2009). However, strict evidence has to be adduced to convince the court to adopt such position, hence the assumption that neither party is an 'automatic asset' to the matrimonial property until the value of their contribution is proven.

4. PROPERTY OWNERSHIP

Article 40 of the Constitution provides that every person has the right to own property. Under all customary law, property, land in particular, could only be possessed by men. Women could not own property as they were also considered property. The inequality has been reflected in divorce and succession disputes, many of which were settled by clan elders. Kenya's Constitution and the Law of Succession now protects women from customary deprivation of property rights.

The Law of Succession Act, which is the main legislation in succession matters, does not discriminate against children as any child of the deceased is entitled to inherit, whether male or female. This position has been upheld by the Constitution which invalidates any customary law inconsistent with the Constitution.

5. DOMESTIC VIOLENCE

Domestic and family violence occurs when someone in an intimate or familial relationship attempts to gain and/or maintain power and control over another through a wide range of abusive behaviours. Abuse may be demonstrated by a single act as well as several acts that form a pattern, even though some or all of those acts, when viewed in isolation, may seem insignificant.

Many cases go unreported because the victims accept and condone the violence. In African Traditional society, a man had a right to chastise his wife, and she had a duty to apologise. The customary ideology was that the wife had wronged the husband and therefore deserved a beating.

In Kenya, as in many societies, women are socialised to accept, tolerate, and even rationalise domestic violence, and to remain silent about such experiences. One reason is because the family is said to be a private setting, whose issues are further considered private family matters. Families will often hide and dismiss blatant and frequent crimes, including murder, rape, and physical abuse of women in the home, in the name of defending the family honour. Subsequently, many victims of abuse in intimate relationships do not seek help or report for fear of stigmatisation. Others cover up for the perpetrators because they may be the bread winners and they think they cannot live without them.

6. FEMALE GENITAL MUTILATION (FGM)

The barbaric practice of Female Genital Mutilation (FGM) is one of the ways which gross violence has manifested itself by way of customs. It is also a unique form of violence against

women because it is often perpetrated by women against other women, in the furtherance of culture and tradition.

The agony that accompanies FGM is intolerable and detrimental to human rights. It is a criminal offence and campaigns to eliminate this practice have been successful in many parts of the country.

7. SEXUAL INEQUALITY

Women's place in marriage has been held by culture to provide sex and consortium. One of the reasons given for polygamy in Traditional African society was to ensure that a man is satisfied sexually at all times. The wife had no similar conjugal rights. Women have been looked upon as sex objects by men and the society.

Rape and defilement are criminal offences rampant in most African countries, including Kenya. Marital rape is not included in the Sexual Offences Act. Victims continue to suffer in silence with nowhere to run for help. Cases of rape and defilement are rampant within the family, the majority of victims being women and children.

LEGAL MILESTONES: CONSTITUTIONAL AND OTHER PROVISIONS

The Penal Code as read with the Sexual Offences Act criminalises all forms of sexual offences. However, other factors hinder justice to rape victims. Many victims have complained that Police officers are not cooperative in the investigation of cases and arrest of culprits while others have attributed delayed justice to the complicated evidence gathering process

The enactment of the Protection Against Domestic Violence Act in 2014 is a milestone that has shown the state's determination towards curbing family perpetrated gender violence. However, it only grants an interim protection order to the victim but does not initiate criminal proceedings, which are still instituted under the Penal Code, as normal assault.

Currently, the Prohibition against FGM Act seeks to protect women from this barbaric practice. It criminalises the practice of FGM of any kind in Kenya. Other than the statutes in place to deal with gender-based violence, such as the Sexual Offences Act, the Constitution of Kenya provides for the Bill of Rights (Chapter four of the Constitution), which provides for various fundamental rights and freedoms.

Article 27(4) outlaws discrimination on the basis of sex while Article 29(d) guarantees protection for all Kenyans from torture, inhuman or degrading punishment and other treatment whether physical or psychological. Rape, marital or otherwise is a demeaning and undignified act. It therefore falls into the category of inhuman and degrading treatment as enshrined in the Constitution.

Equally, the protection of the right to life under Article 26 as well as the right to the security of the person is also evident and upholds the dignity of women. It states that no person shall be subjected to any form of violence from either public or private sources. The family is a 'private' setting and therefore is prohibited from perpetrating acts of violence.

Article 2(4) of the Constitution invalidates any law, including customary law, contrary to the Constitution. This automatically invalidates traditional and cultural practices contrary to the Bill of Rights or repugnant to justice and morality.

Article 2(5) of the Constitution, provides that the general rules of international law shall form part of the law of Kenya; and article 2(6) provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya. Whether the ratified treaties and conventions will have the same force as laws enacted by the Kenyan legislature remains to be seen.

International treaties and conventions that continue to guide Kenya on the upholding of human rights and eradication of gender-based violence include:

1. Universal Declaration of Human Rights
2. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
3. Declaration on the Elimination of Violence against Women (DEVAW)
4. The African Charter on Human and Peoples Rights (Banjul Convention) Provisions on the Rights of Women
5. The International Covenant on Civil and Political Rights (ICCPR)
6. Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.
7. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

CONCLUSION

Culture and patriarchy remain dominant in the African family system. Some cultural practices infringe on human rights pertinent to women, while some cultural stereotypes are a barrier to women empowerment. The law itself is male dominated, in its structure, interpretation and its practice. The majority of the lawmakers are men, therefore, making it difficult to pass laws that benefit women.

Judicial approach on gender issues is not impressive. Courts have a duty to interpret the constitution in a manner that upholds its dignity and supremacy. Several Judges have been accused of displaying ignorance on gender equality, notably in matters of divorce. Police officers also relax on their role in maintaining law and order, in ensuring that the female gender is not vulnerable to gender-related abuse.

Women should also strive to promote their own empowerment. For instance, one wonders why women are the minority in Parliament despite being the majority of voters. Is it because they are jealous of their fellow women? The question remains rhetoric. Certain types of Gender Violence such as FGM, are perpetrated by women.

However, despite the setbacks, Kenya has witnessed remarkable improvement in the welfare of women. The Constitution itself has departed from harmful cultural practices and has upheld a deep regard for human rights and dignity. This is an indicator that there is progress in Africa towards achieving the Sustainable Development Goals, in particular, SDG5.

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