



**The Honourable  
Lady Justine Joyce Aluoch**

*The Impact of Social Change  
on the Family*

THE 2001 WORLD CONGRESS ON FAMILY LAW AND THE RIGHTS  
OF CHILDREN AND YOUTH

FAMILY LAW AND SOCIAL CHANGE: THE AFRICAN PERSPECTIVE

**HONOURABLE LADY JUSTICE JOYCE ALUOCH**  
HEAD, FAMILY DIVISION HIGH COURT OF KENYA

## **Introduction:**

Africa's diverse ethnic, religious, and cultural heritage has created a very unique system of family law. This paper examines the social forces that have shaped and which continue to shape the character of the African family and analyses the regimes of family law that have evolved to address this diversity. The experience of Kenya is used to illustrate the dynamics that underlie the evolution, the present challenges to African family law and the possible ways of resolving them.

This paper contends that while family law in most jurisdictions of the world is governed by a single regime of civil law, the same is not true of commonwealth Africa. Here there exists a blend of customary law, statute, common law and religious based practices. As a result, ethnicity and religion occupy a special place in the determination of an individuals personal law generally and family law in particular.

The paper outlines the various regimes of family law that have evolved in response to the changes that have occurred in the African society over the last century. It seeks to examine the contemporary problems posed by these changes and the profound impact on the nature of the African family that they have had.

Presently, African family is characterised by a deep diversity. While much of rural Africa continues to organise its affairs on the basis of customary law, the modern urban-based elite does so on the basis of the English based modern legal system. In between the two, is a large section of the urban poor who are also largely detribalised. This group has organised family life outside the formal legal framework. Neither within statutory law nor within customary Law. Yet when disputes arise they seek the intervention of the judicial process.

Finally, the paper seeks to explore ways in which law reformers in the area of family law can respond to the existing problems. While recognising that there has been some law reform efforts, much of statutory law is outdated both in substance and in procedure. Customary law, which evolved within very specific social circumstances, is today inapplicable in many situations. The paper proposes that there is urgent

need for major family law reform to bring the reality of African family life in conformity with modern Law while retaining fidelity to African values and beliefs.

### **The set up of the African Family**

The African family though not homogenous is largely similar. In much of the continent it is characterised by a strong sense of community. The individual is subordinated to the clan and the community. Marriage is both the unions of the individuals involved and of their families. The nucleus family is under the influence of the extended one. Important decisions affecting the lives of individuals are made at the clan level. It is virtually impossible for the average African, no matter how immersed in other cultures, to completely remove himself from the enduring influence of the extended family and therefore of custom. Although modern law is an important source of the social obligations that govern the African family, customs and traditions are still a very powerful influence, especially over the rural based communities.

Yet tremendous forces have been reshaping the African family over the last century. The most important of these forces has been the influences of religion, particularly Christianity and Islam. The Second has been the influence of western secular culture through the spread of western education and other cultural influences in music, art and film. The third has been the continuing influence of fundamental African values, customs and traditions. Finally, has been the influence of globalisation, which has created the basis of a more liberal and permissive global culture. All these influences have rendered African family law very unique.

### **The peculiarities of African personal law.**

African personal laws generally and African family law in particular manifest peculiar characteristics that reflect the multiplicity of forces that have given shape to them, particularly ethnicity and religion.

### **Ethnicity**

Most African countries are home to several ethnic and racial groups .In Kenya for example there are up to 42 different African tribes. In addition there are Europeans

(which term includes all Caucasians) Asians (which term including Indians Pakistanis, Koreans, Chinese etc) and Arabs. Ethnicity is an important basis of determining an individual's personal law. For example among the Africans the choice of the applicable customary law differs from tribe to tribe. The migration and intermarriage of various communities has made this a most complex matter. Only recently a hybrid of customary law has begun to emerge reflecting common customs among the various tribes for example in the area of dowry.

Among the Europeans, statutory law (which is essentially the pre-1950 English legislation) is mostly applicable. Although in theory customary law can govern a European or Asian who marries an African under customary law at least relative to the marriage, in practice customary law exclusively governs Africans. Among the Asians Hinduism and Islam govern the majority.

### **Religion**

Africans are generally a very religious people. Most religions have a code relating to family matters. Religion therefore plays a very important role in determining the personal law of most people. While most regimes of law address the *ceremony* of marriage some also addresses the *substance* of the rights and obligations of the parties. An example of this is to be found both in Hindu and Islamic law. This centrality of religion is recognised by statute. Section 38 of the Marriage act provides as follows: -

*Every marriage celebrated in Kenya before the 1st December 1992, by any minister of any religious denomination or body, according to the rites in use by such religious denomination or body shall be and shall be deemed to have been from the time of the celebration thereof, a legal and valid marriage; Provided that nothing herein contained shall legalize any marriage which had before that date been declared invalid by any competent court, nor any marriage either party to which had at the time of its celebration a lawful wife or husband living, nor any marriage which was void by reason of kindred or affinity, or fraud, or incapacity to contract marriage, nor any marriage otherwise invalid, either party to which before the said date, and in the lifetime of the other party thereto, intermarried with any other person.*

## **THE MULTIPLICITY OF REGIMES OF FAMILY LAW IN KENYA**

As a result of the ethnic, racial and religious forces discussed above, a multiplicity of regimes of marriage laws exist in Kenya: These are

- a) Customary law
- b) Islamic law
- b) Hindu law
- d) Civil law
- e) Christian law

The effect of these various systems is that there are now five recognized forms of marriage in Kenya:

- ◆ **Christian marriages** under the *Marriage Act* or the *African Christian Marriage and Divorce Act*;
- ◆ **Civil marriages** under the *Marriage Act*;
- ◆ **Hindu marriages** under the *Hindu Marriage and Divorce Act*; all of which are monogamous;
- ◆ **Islamic marriages** which are recognized under the *Mohammedan Marriage, Divorce and Succession Act*, which are potentially polygamous except among the Shia/Imami Ishmailis;
- ◆ **African customary Marriages** under *African Customary law*, which are potentially polygamous.

## **PROBLEMS ASSOCIATED WITH THE PLURAL FAMILY LAW SYSTEM.**

The diversity of marriage laws with all its advantages in addressing the multiracial, multi-religious and multicultural nature of Kenya, has created a number of practical problems:

- ◆ Created at a time when the ethnic and racial groups had distinct and separate identities, the system presently has serious legal limitations in addressing, inter-ethnic, inter-racial and inter-religious marriages which have since become common.
- ◆ There are serious difficulties in ascertaining the existence of marriages due to the diversity of Marriage registries, which are not linked in a central database.

- ◆ There are difficulties in processing matrimonial disputes to which various *procedural* and *substantive* laws apply and which most times require different *forums* as well.
- ◆ There are difficulties in ascertaining the law applicable to specific family law disputes.
- ◆ There are major conflicts occasioned by the co-existence of statute law and customary law.
- ◆ There are conflicts between marriage laws and succession laws (For example statutory law declares marriages monogamous but succession law provides for other wives and children )

### **Contemporary social problems and family law in Kenya**

In addition to the *technical* problems posed by existence of a multiplicity of family laws, there is the even greater problem of ensuring that the law is in tandem with social reality. Presently there are several problems that the law has totally failed to address or which it has addressed inadequately:

#### **Cohabitation outside marriage**

Several people both in the rural areas but more so in the urban areas have contracted unions that do not comply with the strict requirements of either statutory or customary law regarding marriage. These are commonly referred to as “come we stay” relationships. Whenever disputes arise out of these unions, the formal judicial process provides no solutions.

#### **Polygamy**

Polygamy is legal both under customary and Islamic law. It is however unlawful under statutory law (providing for monogamous marriages only) and indeed is considered bigamy under the criminal law.

Section .171 of the penal code provides that::

*Any person who, having a husband or wife living, goes through a ceremony of Marriage which is void by reason of its taking place during the life of the Husband or wife, is guilty of a felony and is liable to imprisonment for five Years: Provided that this section shall not extend to any person whose marriage with the husband and wife has been declared void by a court of competent Jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife if the husband or wife, at the time of a former husband or wife, at the time of the subsequent marriage, has been continually absent from such person for the space of seven years, and has not been heard of by such person as being alive within that time.*

The intention of statute was to ultimately establish monogamy as the norm. The marriage Act provides ample evidence of this: It provides that:

*No marriage in Kenya shall be valid which, if celebrated in England, would be null and void on the ground of kindred or affinity, or where either of the parties thereto at the time of the celebration of such marriage is married by native law or*

*custom to any person other than the person with whom such marriage is had. Provided that nothing in this subsection shall affect any marriage celebrated before the commencement of this sub-section.*

Further the Marriage Act at Section 37 provides that :

*Any person who is married under this Ordinance, or whose marriage is declared by this Ordinance to be valid shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but save as aforesaid, nothing in this Ordinance contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted. The statute provides for penal sanctions.*

Section 42 provides that:

*Whoever, being unmarried, goes through the ceremony of marriage with a person whom he or she knows to be married to another person shall be liable to imprisonment for a period not exceeding five years.*

Further, section 48 provides that:

*Whoever contracts a marriage under this Ordinance, being at the time married in accordance with native law or custom or in accordance with Mohammedan Law to any person other than the person with whom such marriage is contracted, shall be guilty of an offence and liable to imprisonment for a term not exceeding five years.*

The statute takes away the capacity of persons married under it to contract potentially polygamous relations under customary law. Under section section 50 it provides that:

*Whoever, having contracted marriage under this Ordinance, during the continuance of such marriage contracts a marriage in accordance with native law or custom shall be guilty of an offence and liable to imprisonment for a term not exceeding five years.*

In practice men who are married monogamously under statute nonetheless contract other unions supposedly under customary law. These practices while frowned upon by the church and other religious institutions does have some social acceptability. This is due to the enduring influence of customary values. The law has created a very ambivalent situation whereby it seeks to protect the Sanctity of monogamous marriages while recognising the reality of Polygamous unions that have been imposed on monogamous ones. As a result marriage law and succession law are in direct conflict.

Section 3(5) of the law of Section Act provides that:

*"Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act and in particular section 29 and 40 thereof, and her children are accordingly children within the meaning of this Act."*

Section 29 of the same Act defines a "dependant"(a person who is entitled to inherit as of right) as:

- (a) *the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death:*
- (b) *Such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death and*
- (c) *Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.*

**In Probate & Administration Cause No. 843 of 1986 (Unreported) In The Matter of the Estate of Rueben Nzioka Mutua** I tried to resolve this anomaly in the law in the following way:

*"I find the operative words of the amendment to be "a woman married under a system of law which permits polygamy..." Those are the words which give a woman a ticket to seek refuge under the amendment to Section 3 of the Law of Succession Act. I have read the provisions of the amendment carefully and my conclusion is that Mr. Situma misunderstood them completely. My understanding of the amendment is that it talks of or envisages a situation where for example, a man whom I will refer to as A married woman B under customary law and that marriage is valid and recognized under that custom. Subsequently, he meets another lady C and the two contract a marriage under statute. Upon A's death and for purposes of inheritance to A's estate, B is considered a wife by the Succession Act, despite the fact that C is the one with a marriage certificate, having been married under statute law. The Succession Act will consider B a wife and, therefore, is entitled to inherit from the estate of the deceased. The amendment will come to B's aid because she will be "a woman married under a system of law which permits polygamy..." I see this amendment as having been brought in to cater for women married under customary law who were either neglected or abandoned by their husbands during his lifetime. To my mind, this amendment cannot be interpreted any other way, or least of all Mr. Situma's way because to do so would be to open "a Pandora's Box", so to speak, and would render useless any marriages under statute, if upon death of a husband any woman who believed the deceased "married" her was allowed under the Succession Act to inherit from his estate. I do not consider that that is what the legislature intended by this amendment..."*

Only recently the Court of Appeal in **Civil Appeal Number 139 of 1994 Irene Njeri Macharia Vs. Margaret Wairimu Njomo and Patrick Muriithi Harrison** has disagreed with me and declared that:

*We find it somewhat difficult to appreciate the learned judges reasoning in this extract. To use her own example of a man A marrying a woman B under customary law, if it be taken that the marriage between A and B is valid and recognized under a particular customary law, A has lost the capacity to contract a statutory marriage under either Cap 150 or Cap 151. In the example given by the Judge it is the purported marriage of A to C, which would be invalid, and all the marriage certificates in the world could never validate it. A valid customary law marriage is never dissolved by a statutory marriage and if it came to the question of who, as between B and C, is entitled to inherit from the estate of A, the obvious answer even before the passing of the amendment under consideration, would be B unless it be the law that a statutory marriage can never be declared to be invalid even when it is foisted or superimposed upon a subsisting valid customary law marriage. B would be entitled to the estate of A not because of Section 3(5) but because she is the only lawful widow of A. C, on the other hand could not call in her aid Section 3(5) because the statute under which she and A purported to marry is "a system of law which does not permit polygamy".*

*Our understanding of Section 3(5) of the Act is that it was expressly intended to cater for women who find themselves in the situation in which Josephine found herself. Mutua, previous to his union with Josephine, had contracted a statutory marriage, which remained undissolved upto the time of his death. But subsequent to that marriage, he purported to marry Josephine under Kamba customary law. Kamba customary law recognizes polygamy and Josephine was telling the court that she was a woman married under a system, which recognizes polygamy. Parliament, in its wisdom and whatever it might have intended to do, provided that: -*

*"Notwithstanding the provisions of Section 37 of the Marriage Act..." Josephine was, nevertheless, a wife for the purpose of the Law of Succession Act, and in particular Section 29 and 40 of the Act. We have unhesitatingly come to the conclusion that Mutua's case was wrongly decided and must now be treated as not correctly stating the position at law. Presently the law is as declared by the Court of appeal.*

### **Wife inheritance**

In many traditional and rural based communities. Wife inheritance is a time-honored tradition. The original intention behind the custom was that a widow and her children should never be without financial and social support. Today whatever the intention, the practice is oppressive to women. In the era of HIV-AIDS the practice can be life threatening. In leaving such matters unregulated the law is failing.

### **Burial disputes**

For many Africans both in the modern sector and in the rural areas, the final burial place is a very important issue. Over the last 15 years, as people have become more litigious, the courts are faced with numerous lawsuits over who has the right to bury and where. The problem becomes more complex where the burial place is tied to the ownership of land. The law is largely silent on this matter. Consequently court decisions are ad hoc and unpredictable.

### **Child support for Children born out of Wedlock**

Since the late 1960s there has been no legislation providing for the support of children born out of wedlock. As a result single mothers have no remedy as against errant fathers. The inability of the law to provide any relief to thousands of suffering children fathered by individuals who have the material ability to support them is unacceptable. Some attempt has now been made in the Children's Bill pending before parliament to address this issue.

Section 21(3) provides that:

*Where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other*

- (a) the mother shall have parental responsibility*
- (b) the father shall not have parental responsibility for the child unless he*
  - (i) acquires it by a court order in accordance with section 22(1)*
  - (ii) acquires it by a parental responsibility agreement or*
  - (iii) acquires it in accordance with section 22(2)*

Section 22 further provides that:

- (1) Where a child's father and mother were not married at the time of the his birth*

- (a) *the court may, on application of the father, order that he shall have parental responsibility for the child or*
  - (b) *the father and mother may by agreement (a parental responsibility agreement) provide for the father to have parental responsibility for the child.*
- (2) *Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father.*

Section 24 also provides that:

(2) *Where the father and mother of the child were not married at the time of the birth of the child and have not subsequently married each other*

(a) *on the death of the mother of the child, the father of the child, if he has acquired parental responsibility under the provisions of this Act, shall if he is still living, have parental responsibility for the child either alone or with any testamentary guardian appointed by the mother or the relatives of the mother*

(b) *on the death of the father of the child who has acquired parental responsibility under the provisions of this Act, the mother of the child shall exercise parental responsibility in respect of the child either alone, or with any testamentary guardian appointed by the father;*

### **Child marriages**

In many communities, especially where dowry is an important aspect of marriage, many young females (under the age of 14 years) are married off early as a way of generating income for their families. Most of these so-called marriages are purportedly conducted under customary law where the issues of the age of majority are at best fuzzy.

### **Female circumcision**

Female circumcision presents special problems, as most of its victims are not required to consent to it. The law affords very little protection to the victims. Rarely are there any prosecutions. The influence of culture over modern law is very pervasive. With the onset of HIV/AIDS pandemic, the chances of contracting the virus through the sharing of contaminated instruments is very real. The intervention of the law in this area is a matter of life and death.

## **PROPOSALS FOR REFORMS IN FAMILY LAW:**

- ◆ The various demands of a multi-racial, multi-ethnic and multi-religious society must be addressed in one body of family law (both *substantive* and *procedural*) to provide certainty in the law and in order to facilitate expeditious disposal of disputes.
- ◆ The new regime of family law should seek to capture the dynamic changes that have occurred within African culture and society in the last century. (For example should make divorce less acrimonious i.e. on irretrievable breakdown of marriage).
- ◆ While recognising the continuing influence of customary law, the new regime of family law should seek to create greater certainty in the rights and duties of parties and to *formalise* the institutions of resolving all family disputes.
- ◆ The new regime of family law should resolve the contradictory definitions of "family", "wife" and "child" in the marriage law and in the succession Act.
- ◆ Family courts should be set up to deal exclusively with family disputes and especially to ameliorate the suffering of children.
- ◆ African judges, lawyers and policy makers should anticipate and prepare for some of the problems currently facing family law in the west, such as homosexual and lesbian unions, same sex marriages, adoptions by singles, Test tube babies etc.

## **Conclusion**

The future of African family law is hard to predict. There are very profound social forces "modernizing" the African family, yet the influence of tradition and custom remain strong. The law is struggling to capture and regulate this dynamic state. I personally believe that the real challenge is to ensure that the law changes sufficiently to keep in touch with social reality without undermining traditional values. That challenge is a never-ending one.