

INHERITANCE RIGHTS OF A TRANSGENDER PERSON WITHIN KENYA

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Abstract

With the continued violation of human rights of the transgender community of Kenya, the state continues to hold a hypocritical stance where it claims to not sanction/condone discrimination against the minority community all while ratifying laws that fuel the fire of state-sponsored transphobia. While the inheritance laws of the nation are only recently breaking from the cliché of a sex-based narrow interpretation of laws there still exists a wide hole in the system that leaves the LGBTQIA+ community in vulnerable situations without means to access social security. With calls from activists and organizations within the country demanding accountability from the Kenyan government over their conservative and transphobic views and mounting pressure from International Organizations that the government has ratified their blooms hope for the future of the inheritance laws in the state to be more inclusive to different minority groups within Kenya. This paper adopts an analytical and descriptive methods of analysis on secondary research resources from the International Covenant on Economic, Social and Cultural Rights; African Charter on Human and People's Rights; Convention on the Elimination of All Forms of Discrimination Against Woman and the famous Yogyakarta Principles to achieve the objectives of this paper.

Inheritance rights of a Transgender person within Kenya

To this date the LGBTQIA+¹ community face heavy bias in the Kenyan communities with odds stacked against them and lack of resources provided by the state. Often, the portrayal of LGBTQIA+ community is referred to as un-African and foreign to the "true culture" of the country and this is contestable considering contradictory evidence of ancient tradition of homosexual marriages in African tribal communities. Homosexuality is not new to the African Culture, in fact a century ago it was quite common for a woman from the Azuah's Igbo tribe to marry and cohabit with another woman and such marriages between 2 women or

¹Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual +

men was witnessed and documented across 30 African Tribes². The criminalization of same sex relationships was inherited in countries like Kenya, Ghana, Nigeria through colonial-imposed homophobia and the laws thereafter drafted against the community still holds colonial undertones. Based on the argument of homosexuality being un-African Yash Pal Ghai and Jill Cottrell Ghai in a Nairobi daily newspaper made an interesting argument “The idea of homosexuality is not African has no basis... what is un-African is the very law against same sex relations³.” Through this research paper I would like to point out the contradictory stances taken by the state in regard to the inheritance laws of transgender individuals and the future of these laws in midst of dynamic changes by LGBTQIA+ Activists.

Methodology

This paper adopts an analytical and descriptive methods of analysis on secondary research resources to achieve the objective of the paper and to arrive at a close accurate formulated opinion of the hypothesis.

Transgender Rights within the Realm of LGBTQIA+ Rights in Kenya

Kenya as a country to remain progressive and ensure realization of economic and social rights of the women, youth, ethnic/sexual minorities has ratified many important human rights treaties such as International Covenant on Economic, Social and Cultural Rights [ICESCR], African Charter on Human and People’s Rights, Convention on the Elimination of All Forms of Discrimination Against Woman [CEDAW] and other important treaties. Despite such efforts by the state there exists rampant injustices and atrocities committed against the LGBTQIA+ community along with negligible resource allocation for the community to ensure their safety and security. The country’s contradictory stance is quite clear by the ignorance displayed by the state’s lawmakers; In an interview with CNN, President Uhuru Kenyatta had stated that “the rights of the LGBTQIA+ community was a non-issue for the country, and it was not an essential human right as it was not in line with the ‘cultural beliefs

²Jacob Kushner, *The British Empire's Homophobia Lives on in Former Colonies*, The Atlantic, May 05, 2019, <https://www.theatlantic.com/international/archive/2019/05/kenya-supreme-court-lgbtq/590014/>

³*Id.*

of the state⁴.” According to the National Gay and Lesbian Human Rights Commission it has documented over 1500 cases of violence meted out against the LGBTQIA+ community with over 40% of locals agreeing that LGBTQIA+ are ‘crimes’ and thus justifying the rationale behind the denial from accessing premises, disownment, disinheritance, evictions and forced relocations⁵.

In 2018 during the Kakuma Refugee camp’s first Pride event they witnessed around 600 threatening messages towards transgender individuals to the extent of sustaining physical violence⁶. A 2019 report by the Arcus Foundation on the violence perpetrated against the LGBTQIA+ Communities in Kenya and other countries has highlighted that Trans, intersex and gender diverse individuals still face difficulties in accessing documentation, legal status and healthcare benefits from the state and this can translate to difficulties in attaining basic social security measures such as, access to property, inheritance and so on⁷. Revolutionary trans female activist Audrey Mbugua has also come out to speak against the invisibilisation of transgender people and public humiliation, violence, that is often justified by the “conservative majority” of the country⁸. Disinheritance, disownment, and violence meted out is often by their family members and partners. Besides, the country also considers that inheritance related matters should and are exceptions to sex-based non-discrimination laws, stacking the odds against them higher. Despite efforts to allow for legal name change there has not been any active measure by the government to allow for legal recognition of trans people.

While transgender individuals face a plethora of challenges that threaten their survival, there is as discussed above an urgent need in Kenya to allow for legal recognition of a third gender. As a first step towards realization of their basic Human Rights, Kenya’s right based Constitution consists of articles like 27 (4) which provide for protection from discrimination by the state through affirmative measures and legislations but has ultimately failed to be practically applied to the same government/legal system⁹. In pursuance of these basic rights

⁴United Kingdom: Home Office, *Country Policy and Information Note- Kenya: Sexual orientation and gender identity*, March 13, 2017, v 2.0e, <https://www.refworld.org/docid/58d3c7554.html>

⁵2, UPR CYCLE SHADOW REPORT ON SEXUAL & GENDER MINORITIES IN KENYA, 4 (2017)

⁶United Kingdom: Home Office, *supra* note 4.

⁷ Arcus Foundation, *Data Collection and Reporting on Violence Perpetrated Against LGBTQI Persons in Botswana, Kenya, Malawi, South Africa and Uganda*, January 2019, <https://www.arcusfoundation.org/wp-content/uploads/2020/04/Iranti-Violence-Against-LGBTQI-Persons-in-Botswana-Kenya-Malawi-South-Africa-Uganda.pdf>.

⁸Katy Migiro, *Kenya’s Transgender warrior: from suicide bid to celebrity*. THOMAS REUTERS FOUNDATION NEWS, April 8, 2015, <https://news.trust.org/item/20150408000144-v8dqs/>

⁹CONSTITUTION art. 27 (2010) (Kenya)

G-Kenya Trust along with a panel of LGBTI activists have published “My way, Your way, or the Right Way?” which took inspiration from the famous Yogyakarta Principles to put forward a resource for any person or community service who struggles to access equal rights. One of the many rights proposed was the Right to social security and to other Social Protection measures such as inheritance, property ownership and so on¹⁰.

Inheritance Laws in Kenya and their history

The history of inheritance laws of the country was dominated by numerous socio-cultural groups such as the African Wills Act, Hindu Succession Act, Indian Succession Act, Mohammedan Marriage and Divorce Act¹¹ before the introduction of a uniform Law of Succession which came into force on the first of July 1981. The inheritance laws during the colonial period were based on a combination of the prevalent customs of the Kenyan land and western/colonial laws such as the African Christian Marriage and divorce Ordinance which was applicable to all the Africans who chose to convert to Christianity. Overall, these laws gave birth to a patriarchal system that largely discriminated against minority groups such as the transgender community.

The succession laws remained in this similar fashion until the implementation of the Law of Succession Act, 1981 which was an attempt to unify the frazzled succession laws of the country into one umbrella law. In theory based on the Constitutional Article 27(4) there must be no discrimination based on an individual's sex, gender identity or other factors but unsurprisingly the Law of Succession Act is in direct violation of this on many counts¹². Section 32 & 33 of the Law of Succession Act (2015) allowed for exclusion of certain districts from applying the intestacy rules thus allowing precedence of customs which were inherently patriarchal to take over¹³, apart from these Section 35 is also discriminatory to widows who remarried a life interest of the deceased estate whose application was not extended to widowers¹⁴. The laws of succession should be considered as a determinant of individual human rights as they are means of securing economic and social rights for oneself, by championing for the rights of the minority groups the Kenyan economy also seeks to

¹⁰G-KENYA TRUST, MY WAY YOUR WAY OR THE RIGHT WAY? 13 (2010).

¹¹P Kameri-Mbote, *The Law of Succession in Kenya*, IELRC, 1995, <http://www.ielrc.org/content/b9501.pdf>

¹²Kimiriny Doris Soyian, *Kenya's Laws of Succession And The Bill Of Rights Of The Kenya Constitution (2010): A Study In Legal Reform*, STRATHMORE UNIVERSITY LAW SCHOOL, Feb 2017, at 10, 11.

¹³*Id.*

¹⁴Law of Succession Act (2015) Cap. 160 § 35 (Kenya)

benefit from the same. One can draw on the understanding that when individuals who are considered to be in the lowest rungs of social and economic hierarchy while experiencing multiple facets of disadvantage (here the transgender of the country who face economic and sexual discrimination) are uplifted and supported by the state it stands to create a domino effect that everyone above them would also be uplifted.

The Future of Inheritance Laws in the state

As pointed out in the previous paragraphs the sex based narrow interpretation of succession laws in the state has forced for transgender individuals to choose between male or female genders in order to avail any rights. Furthermore, the glaring disadvantages present in the law of succession for these two genders is something that can be explored in greater depth to bring out various inconsistencies in the system. While Kenya maintains an image of a dualistic state which aims to incorporate international law into its own state law and the states efforts to ratify different human rights treaties it has yet to incorporate these ideals into its laws and governance. While the laws of the land have attempted to make changes within its orthodox system through recognizing the need for legal name change for transgender individuals there is still many changes that need to be embraced for the laws to actually help the community.

The lack of measures taken up by the Kenyan government despite having a “progressive constitution” with a comprehensive Bill of Rights that focuses on the realization of economic and social rights of women, minorities and so forth brings out the deep-rooted biases and hate unfairly held against the community that forces them to give up on the enjoyment of basic human rights¹⁵. The ‘*Linkages Kenya Gender Analysis report*’ has stated that transgender individuals have to face medical and societal barriers that continue a cycle of risk that leaves the community vulnerable to prejudice, poor mental health and extreme violence¹⁶. The inefficiency of the misalignment between the Kenyan Penal Code and the Constitution are some of the present problems the community has to fight against. While the present laws in Kenya are lacking in many spheres there can be hope in the future of Kenya’s law and

¹⁵Hisayo Katsui et al., *Reducing Inequalities: A Human Rights-Based Approach in Finland's Development Cooperation with Special Focus on Gender and Disability: A Case Study on Ethiopia and Kenya*, SSRN, 12, 70-72 (2014)

¹⁶*supra* note 5, at 5

governance through various measures that I would consider starting blocks for a more inclusive succession law.

Kenya as a member of CEDAW can incorporate the provisions under Article 16 which guarantees equality of genders within the family, essentially petitions for states to enforce laws and regulations to implement policies that eliminate discrimination on a political, economic or social basis¹⁷, especially the Law of Succession Act which is in direct violation of this general framework presented by CEDAW. Another important international principle that the law of the land can incorporate within itself is the ‘Yogyakarta Principles’, which states in its third principle the importance of the right to recognition before the law and their right to enjoy legal capacity in all aspects of their lives¹⁸. The principle makes it clear that no individual shall be pressured to suppress, conceal or deny their sexual orientation or gender identity and through these measures’ transgender individuals are ensured of their inheritance rights by enabling the state to take any and all necessary legislative administrative measures to fully respect their inheritance rights without any discrimination against them. Lawmakers from Kenya must adhere to these treaties and reform the archaic colonial laws in order to better suit the current times¹⁹.

Furthermore, the state must begin to take active measures to involve transgender individuals while drafting laws for their community in order to broaden the representations and make comprehensive laws that achieve equality and secure justice for the community. As mentioned before due to the dualistic state of Kenya and its efforts to ratify various treaties in respect to human rights such as CEDAW, African Charter on Human and People’s Rights and many other, there needs to be international accountability for any laws enforced that stand to be direct violation of these treaties. As the country’s lawmakers adapt a culture of impunity there is an urgent need for international accountability through trial at the International Criminal Courts²⁰. These measures are just the steppingstones in the long path of equality, the state must begin to recognize the need for equality for not only the betterment of the community but overall welfare of the state.

¹⁷n.a, List of Issues Relating to the Violence and Discrimination against Lesbian, Bisexual, Transgender, Intersex and Queer Women in Kenya 4 (n.d).

¹⁸THE YOGYAKARTA PRINCIPLES -Principles on the application of international human rights law in relation to sexual orientation and gender identity, (2017)

https://data.unaids.org/pub/manual/2007/070517_yogyakarta_principles_en.pdf

¹⁹Id.

²⁰Hisayo Katsui et al., *supra* note 13, at 7.

Conclusion

Inheritance laws in Kenya have moved from multiple custom based laws governing inheritance to more uniform laws as a means to ensure inheritance rights to all sections of the society. While the laws attempt to bring in uniformity the state has taken up contradictory stances in the enforcement of the inheritance laws to the extent that it marginalizes the transgender community. While the Kenyan constitution remains to be one of the most progressive constitutions in Africa, the laws of the state have failed to follow through and has left the transgender community at a disadvantage. With the states action of ratifying various treaties regarding human rights, but a contradictory stance portrayed by the African lawmakers and members of the government is disheartening and in need of change. In order to ensure rights of the transgender groups there needs to be reform in the governance, minority representation and appropriate forums to address and remedy such situations. In recent times there are multiple international organizations making dynamic changes laws and regulations in order to secure better rights and amenities for the community and these efforts give us better hope towards reforms being initiated locally in different nations including Kenya.