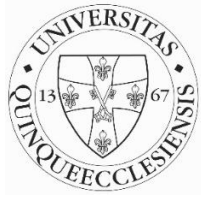


**UNIVERSITY OF PÉCS**



**CUSTOMARY LAW OF SUCCESSION AND THE INFLUENCE OF  
COLONIALISM**

*The case of Kenya, Uganda, and Tanzania, compared to the English Law of  
Succession*

**By**

**KENNETH KAUNDA KODIYO**

**Supervisor: Dr. habil. Benke József PhD DSc**

**Submitted by the requirements for the**

**Degree of Doctor of Law**

**Pécs, 2023**

## ABSTRACT

In the context of the Western legal system, inheritance, and succession are legal areas governing the distribution of a deceased person's assets after their death. However, in African customary law, these terms have distinct meanings. In African customary law, inheritance involves bequeathing a deceased person's property to their heirs, either in accordance with a will (testate) or common laws when no will exists (intestate succession). In contrast, succession primarily involves assuming the deceased's social role and power over the people and possessions they ruled. Customary succession laws outline rules for handling the property, titles, and succession of the deceased, typically the family head.

African countries often have multiple legal systems, including indigenous/customary laws, religious laws, and received laws introduced by colonizers. Indigenous laws are rooted in the customs and traditions of native populations and vary among ethnic groups. These laws predominantly govern personal matters like marriage, succession, and traditional leadership. However, customary laws have faced criticism for discriminating against women, as they often favor men and consider women as property. Many African nations have enacted constitutions guaranteeing equality before the law and prohibiting discrimination.

The study focuses on the impact of English laws on customary intestate succession in Kenya, Uganda, and Tanzania, and women's rights in these systems. The research objectives include:

- a) Investigating customary and intestate succession rules in each country.
- b) Assessing the role of courts and government bodies in interpreting customary laws in line with constitutional principles.

- c) Analyzing how the written constitutions of these countries have influenced customary laws, particularly in intestate succession.
- d) Examining the potential for existing laws to eliminate discrimination in succession.
- e) Evaluating the influence of English and colonial laws on East African customary succession laws.

The research scope is limited to these three East African countries due to their colonial history, legal pluralism, and constitutional guarantees of equality. The study does not delve into specific tribal laws but focuses on customs generally. The legal framework for this research includes the Constitution, legislation, common law, case law, and customary law. Customary law, influenced by custom and tradition, played a significant role in pre-colonial African societies and is recognized in the constitutions of these countries. However, it must align with constitutional and written laws to be valid. Customary law is characterized by its oral nature, community-based practices, and role in expressing communal values. It evolves over time and aims to maintain social order and harmony within communities.

In summary, this research explores the impact of colonialism and English law on customary intestate succession in East African countries and examines women's rights within these legal systems. It delves into the legal framework, sources of law, and attributes of customary law in these nations.

## KEYWORDS:

Customary law, succession, east Africa, Kenya, Uganda and Tanzania, England, colonialism

## CONCEPT, TERMS, AND GENERAL RULES OF INTESTATE SUCCESSION

**Introduction:** This chapter explores the key concepts and terms associated with intestate succession under customary laws in East African countries, namely Kenya, Uganda, and Tanzania. The significance of this discussion lies in laying the foundation for understanding inheritance laws, particularly in the context of polygamous marriages and the welfare of vulnerable family members. This knowledge is crucial for comprehending the complexities of the thesis.

**Customary Laws and African Inheritance:** Customary laws in Africa are deeply rooted in community-based systems, where the family serves as the central focus. Traditional African families are often polygamous, forming family units under a common patriarch. Intestate succession under customary laws is guided by these family units, which appoint successors.

**Male Primogeniture:** Male primogeniture, where the firstborn male inherits everything, has been a common practice in many African tribes, including the Kikuyu, Luo, Baganda, and Chagga. Constitutional reforms in Kenya, Uganda, and Tanzania have challenged and, in some cases, abolished male primogeniture, promoting gender equality and women's empowerment. The practice has varied across East African countries and has been subject to legal interpretations reflecting changing social norms.

**Devolution of Duties and Rights:** The head of the family, traditionally a male figure, had responsibilities for managing and providing for the family's estate. Intestate succession aimed to preserve family property and maintain the family's name. The head had to consult with family members before making decisions, and family matters were initiated by him.

**Harmonization of Indigenous African Laws and Common Law:** Colonization introduced changes in traditional gender roles and practices among Indigenous African communities. Customary Law remains a fundamental aspect of African legal systems and is considered valid if it aligns with common sense, good conscience, and does not conflict with written law. Efforts to harmonize customary and common laws have been made to resolve conflicts, as seen in South Africa's Reform of Customary Law of Succession and Regulation of Related Matters Act.

**Safeguarding Cultural Practices and Equality Rights:** Cultural practices and equality rights are protected by various human rights bodies and constitutions in Kenya, Uganda, and Tanzania. While

culture is recognized as a way of life, equality entails non-discrimination and the realization of constitutional rights. Conflicts between cultural practices and constitutional rights should be resolved in favour of equality. The South African Constitutional Court's decision in *Bhe v Magistrate, Khayelitsha* emphasized the importance of aligning cultural practices with constitutional guarantees of equality.

**Polygamy:** Polygamy is a prevalent practice in Africa, particularly in rural areas. Laws in Kenya, Uganda, and Tanzania permit polygamous marriages, with polygyny (one man with multiple wives) being more common. Polygamy is seen as a symbol of wealth, status, and family expansion. Colonization introduced monogamy but did not eradicate polygamy, which remains deeply ingrained in many African societies.

**Conclusion:** Intestate succession under customary laws in East Africa involves complex dynamics influenced by polygamous marriages, male primogeniture, and evolving legal landscapes. Constitutional reforms have challenged traditional practices, emphasizing gender equality and women's rights. The harmonization of customary and common laws seeks to address conflicts and uphold cultural practices while ensuring equal rights. Understanding these key concepts is essential for navigating the intricate world of African inheritance laws.

## **THE RECOGNITION, IMPLEMENTATION, AND EVOLUTION OF INTESTATE SUCCESSION IN KENYA AND THE INFLUENCE OF COLONIZATION ON THE CUSTOMARY LAWS**

This chapter delves into the intricate landscape of intestate succession in Kenya, exploring its historical evolution and the influence of colonization on customary laws. Kenya's inheritance laws are shaped by a complex interplay of cultural, historical, and legal factors. The chapter also examines the recognition, implementation, and evolution of intestate succession in Kenya, considering the influence of colonization on customary laws. Kenya's inheritance laws are marked by their complexity and diversity, rooted in the rich tapestry of the country's cultural and historical background. This chapter delves into the multifaceted nature of inheritance laws in Kenya, highlighting their historical evolution and the role of Indigenous customs alongside colonial

influences. It also explores the constitutional recognition of African customary laws and their impact on succession matters.

### **Pre-Colonial Inheritance Systems and Colonial Influence**

Before British colonization, Kenya's diverse communities had well-established customary inheritance laws deeply entrenched in their cultural norms. However, during British rule, English common law and statutes were introduced and applied uniformly across Kenyan communities, affecting both real and personal property inheritance.

### **The 1981 Succession Act and Its Limitations**

The Succession Act of 1981 aimed to harmonize inheritance laws across Kenya but faced significant challenges in its comprehensiveness. It addressed issues related to polygamy, cohabitation, concubinage, and gender equality in inheritance but left out some communities, compelling them to rely on customary laws for intestate succession.

### **Constitutional Recognition of Customary Laws and Customary Inheritance Practices**

The Constitution of Kenya 2010 recognizes the importance of customary laws, promoting alternative dispute resolution mechanisms. Article 78 mandates the National Assembly to enact legislation recognizing and regulating the use of Indigenous law in the formal justice system. Indigenous African customary laws often emphasize communal ownership of land, with gender disparities historically present but subject to judicial intervention. The summary concludes by highlighting the ongoing debates and challenges in Kenya's succession law landscape.

### **Laws that Governed Hindus and Europeans**

Hindus and Europeans in Kenya were subject to distinct legal frameworks. Hindus operated under customary Hindu laws until the enactment of an ordinance in 1946, which provided a legal framework for Hindu marriage, divorce, and succession. Europeans, on the other hand, were governed by the Probate and Administration of Estates Act 1881 and the Indian Succession Act. These Acts gave testators significant freedom to dispose of their property but had provisions for intestate succession based on family ties.

## **The Law of Succession After Independence**

After gaining independence in 1963, Kenya enacted the Succession Act in 1972, which applies to all Kenyans, regardless of religion or ethnicity. This law distinguishes between testate and intestate succession, providing guidelines for the capacity of a testator and requirements for a valid will. It also includes provisions for dependents' claims, ensuring that family members, including women, are not left out of inheritance.

### **Intestate Succession Mechanism Under the 1981 Succession Act in Kenya**

The 1981 Succession Act primarily addresses intestate succession in Kenya, reflecting the influence of English laws and historical factors. It recognizes blood relatives as heirs, with exceptions for widows but no provisions for cohabitees. The Act allows customary laws for cases predating its implementation and offers a structured approach to probate and letter of grant procedures.

### **Conclusion**

In conclusion, Kenya's succession laws have evolved over time, reflecting the country's colonial history, religious diversity, and changing societal norms. The post-independence era brought about significant reforms, but challenges and debates over equality and religious rights continue to shape the landscape of succession law in Kenya. The chapter provides a comprehensive overview of the intricate and evolving legal framework governing inheritance in the country.

## **INTESTATE SUCCESSION IN UGANDA**

This chapter explores Uganda's customary law of intestate succession and its shortcomings in adequately protecting widows. It also investigates the influence of received laws from England on Uganda's traditional legal systems. The chapter provides an overview of the legal and cultural landscape of intestate succession in Uganda, highlighting the coexistence of African customary law, religious laws, and English law. It delves into the complexities of succession based on cultural and tribal factors.

The historical context section discusses how inheritance in Uganda was once governed by a patriarchal system favouring men, with communal property, especially land and cattle, playing a significant role. It emphasizes the enduring impact of customary law's discriminatory practices against women and how colonization and legal changes failed to address gender inequalities.

The section on the Ugandan constitution of 1995 and inheritance laws explains how the constitution promotes gender equality and women's property rights. It also highlights the role of the Succession Act in implementing these rights, along with practical challenges. The discussion on the 1972 Succession Amendment Act underscores the attempt to create a unified succession law in Uganda to protect widows and ensure equality. However, it reveals that the Act still favours male heirs. The section on recent intestate succession law disputes mentions a 2007 constitutional court decision against discriminatory sections of the Succession Act but emphasizes the need for legislative changes. It also highlights the challenges faced by widows in inheriting and using matrimonial property.

The chapter discusses various aspects of customary succession laws, including the recognition of both patrilineal and matrilineal families, the historical context, and legal frameworks governing Muslim succession in Uganda. It also addresses the issue of polygamy and its impact on inheritance. The influence of culture, tradition, legal structure flaws, religious practices, and interference with an intestate's estate are identified as key elements violating women's succession rights in Uganda. Low awareness about will-writing is noted as a barrier to women protecting their rights.

Efforts by government ministries, the judiciary, local councils, the police force, religious leaders, village elders, cultural leaders, NGOs, and organizations like FIDA to address these challenges are highlighted. These efforts include policy reforms, legal representation, awareness campaigns, mediation, and support services.

In conclusion, the chapter paints a comprehensive picture of intestate succession in Uganda, its historical context, legal framework, and ongoing gender discrimination issues. Despite progress, challenges persist, and continued efforts from various stakeholders are needed to ensure equitable inheritance for women in Uganda.

## INTESTATE SUCCESSION IN TANZANIA

This chapter discusses essential topics related to intestate inheritance in Tanzania, including the key statutes regulating it and the historical development of Customary Law. It also evaluates recent statutory changes aimed at promoting women's empowerment in intestate succession. Tanzania, a diverse country in Eastern Africa with over sixty million people, has more than 120 ethnic groups, various languages, and a predominantly young rural population. English and Kiswahili are its official languages, and it upholds religious freedom, with a majority of Christians and Muslims. The country's history includes colonial rule by the British and Germans, with Tanganyika gaining independence in 1961 and merging with Zanzibar to form Tanzania in 1964.

Intestate Succession under Customary Law in Tanzania is primarily governed by the 2008 Law of Succession Act, supplemented by the Marriage Act of 1974 and the Local Customary Law (Declaration) (No. 4) Order of 1963. Islamic law is also applicable to Muslims based on the Quran and Hadith. This succession framework defines heirs, addresses polygamy, and outlines distribution rules. Customary law significantly influences family structures, emphasizing patriarchal systems and viewing marriage as a union of two families. Inheritance practices vary among tribes, often favouring male heirs, but legal reforms aim to promote gender equality.

Tanzania recognizes both matrilineal and patrilineal succession systems, depending on tribal and regional factors. Matrilineal succession is practiced by certain tribes, such as the Chaga, Kaguru, Zaramo, Yao, and Makonde, where women play prominent roles in property inheritance. Patrilineal succession, found in tribes like Sukuma, Nyamwezi, and Zanaki, passes property down through male lineage, often discriminating against women and children. However, exceptions exist, influenced by factors like marital status and individual preferences, as legal reforms strive for gender equality.

The inheritor in Tanzanian Customary Law has specific responsibilities towards the surviving spouse, including ensuring access to resources, providing security, and upholding customary law. Failure to do so can have legal consequences, as demonstrated in cases like *Mawazo v. Mawazo* and *Ngamita v. Sabato*. Additionally, the successor is responsible for settling the deceased's debts, following the *jikopo* principle, which is deeply rooted in tradition and upheld



by legal precedents. Disinheritance of a successor can occur under various circumstances, depending on the ethnic or tribal group's customs.

The historical development of intestate succession legislation in Tanzania involves pre-colonial customary laws that favoured patrilineal succession. During colonial rule, the British introduced reforms to eliminate gender discrimination. Post-independence, Tanzania enacted the Succession Act of 1963 to create a uniform system, and subsequent amendments aimed to reflect evolving societal norms.

The Marriage Act of 1971 governs marriage and divorce in Tanzania and is linked to intestate succession by identifying the rightful spouse for inheritance purposes. The Courts Act of 1984 empowers the High Court to handle intestate succession disputes, ensuring a fair process. The Intestate Succession Act of 1971, repealed discriminatory customs, promoting fairness in estate distribution.

The Tanzanian Constitution, while not directly addressing intestate succession, protects property rights and equality before the law, recognizing customary law as a source of law in the country. The Customary Law Court System handles inheritance disputes, aiming for restorative justice. Matrimonial property rights are defined by The Law of Marriage Act, and widows have legal provisions to inherit their deceased husband's property, although challenges persist.

In summary, this chapter provides a comprehensive overview of intestate succession in Tanzania, including its legal framework, cultural influences, historical evolution, and the role of customary and statutory laws in shaping inheritance practices. It also highlights efforts to promote gender equality and protect inheritance rights.

## **CONCLUSION AND RECOMMENDATION**

This chapter examines the effectiveness of legal measures and case law in improving women's rights regarding intestate property in Kenya, Uganda, and Tanzania. It evaluates the impact of these laws on the livelihoods of women of African descent in these countries. The key points discussed include:

**Introduction:**

- The customary law in Africa has traditionally favoured men in inheritance cases.
- Kenya, Uganda, and Tanzania have introduced legislation to address gender bias in inheritance.

**Revolutionizing the Conventional Idea of the African Household:**

- African societies prioritize the family as a crucial social unit.
- These countries recognize both nuclear and extended family structures.
- The patriarchal nature of African families is prevalent.
- Customary law governs inheritance when there is no will.
- Codification of customary laws faces opposition from traditional leaders.

**The Neglect of the Communal Nature of African Societies:**

- African traditional law emphasizes community collectivism.
- Constitutions in these countries acknowledge cultural diversity.
- Balancing cultural practices with individual rights, especially for women, is challenging.
- Efforts to adapt and modify discriminatory laws are evident.
- Education and awareness can challenge gender inequalities.

**Replacing Customary Law with Common Law:**

- Legislative measures may replace customary law, potentially eroding traditions.
- Traditional leaders may resist new laws.
- The approach should aim for a legitimate advancement of customary law.
- Interpretive clauses can ensure the coexistence of customary and modern legal systems.

**Individuals Lack Knowledge About Legal Matters:**

- Traditional communities may lack legal education and access to information.
- Measures are needed to provide legal education and access to information.

**The Changing Role of Women in African Societies and Their Rights to Inheritance:**

- Women's roles in African societies have evolved.
- Legal reforms aim to achieve gender parity in property inheritance.

- Challenges persist in enforcing these laws.

**Inheritance Rights Reforms:**

- Legal reforms challenge traditional inheritance norms.
- Kenya, Uganda, and Tanzania have made legislative changes.

**Challenges and Limitations:**

- Challenges remain in enforcing laws due to limited resources, cultural resistance, and political will.
- Cultural norms favouring male inheritance are deeply entrenched.

**The Role of International Agreements:**

- Global human rights agreements influence legal changes but face implementation challenges.

**Conclusion:**

- Legal reforms alone are insufficient to improve women's inheritance rights.
- Governments must prioritize enforcement and cultural transformation.
- International agreements provide guidance but require legislative action for full effectiveness.
- Achieving gender equality and women's inheritance rights requires a multi-faceted approach.

**PUBLICATIONS ON THE SUBJECT OF THE THESIS**

KODIYO, Kenneth Kaunda: *Historical Analysis of Women's Inheritance Rights in East Africa (Kenya, Uganda, and Tanzania) and the Influence of Colonialism*, DÍKÉ: A MÁRKUS DEZSŐ ÖSSZEHASZNÁLÓ JOGTÖRTÉNETI KUTATÓCSOPORT FOLYÓIRATA 6: (2) (2023) pp. 116-140.

KODIYO, Kenneth Kaunda: *The Role of Children's Court in Parental Responsibility and Child Maintenance: A Comparative Study of England and Kenya Children's Court*, INTERNATIONAL JOURNAL OF SCIENCE TECHNOLOGY AND SOCIETY 10: (3) (2022) pp. 82-92.

KODIYO, Kenneth Kaunda: *Intestacy Laws and the Influences of Colonialism – The Case of Kenya, in Comparison with the English and Australian Laws of Succession*, ZBORNIK PRAVNOG FAKULTETA U ZAGREBU 71: (1) (2021) pp. 93-126.

\*

\*

\*