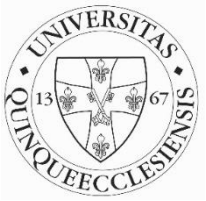
UNIVERSITY OF PÉCS

The Doctoral School of the Faculty of Law and Political Sciences



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

TABLE OF CONTENTS

ABSTRACT 10
Chapter 1: INTRODUCTION, FRAMEWORK, AND OBJECTIVE OF THE STUDY 11
1.1 PROBLEM STATEMENT 12
1.2 The study's aims or objectives 13
1.3 Explanation of the boundaries and justification for limiting the scope of the research 14
1.4 The legal framework 15
1.4.1 Sources of Law 16
1.4.2 Customary Law 16
1.4.3 The typical attributes of Customary Law 18
1.5 The methodology employed in conducting research 22
1.6 A comprehensive analysis/assessment/examination of existing literature 23
1.6.1 Primary sources 24
1.6.2 Secondary sources 24
1.6.3 International Law Analysis 24
1.6.4 As part of the literature review, the following are essential information sources 25
1.7 THEORETICAL FRAMEWORK 31
1.7.1 Pluralism and Centralism Legal system 31
1.8 The Chapters of the thesis 32
1.9 Conclusion 33
Chapter 2: CONCEPT, TERMS, AND GENERAL RULES OF INTESTATE SUCCESSION 34
2.1 Abstract 34
2.2 INTRODUCTION 35
2.3 THE CONCEPT OF MALE PRIMOGENITURE 36
2.4 The foundation of communal living and solidarity lies in the institution of the family 39
2.4.1 The exceptionality of the African family unit 41
2.5 Application of Traditional African Laws to Intestate Succession 43
2.6 The way various courts have applied the male primogeniture rule 45
2.7 Harmonization of indigenous African laws and common Law of Succession 50

2.8 Safeguarding the cultural practices along with equality rights 53
2.9 POLYGAMY 57
2.10 The head of the family 59
2.11 The order of Succession in African customary Law and factors affecting it 60
2.11.1 Gender of the heir 60
2.11.2 The family Class 60
2.11.3 The house ranks 62
2.12 Special and General Succession 62
2.13 The responsibilities and authority of the successor 63
2.14 The order of Succession 65
2.14.1 Monogamous marriages, order of Succession 65
2.14.2 Polygamous marriages, order of Succession 66
2.14.3 Taking care of heirless successor 67
2.15 Provision of dependents and successors under the African customary Law 70
2.15.1 *Inter Vivo* Asset disposition 71
2.15.2 Disinheritance of a son 72
2.16 Conclusion 73
Chapter 3: THE RECOGNITION, IMPLEMENTATION, AND EVOLUTION OF INTESTATE SUCCESSION IN KENYA AND THE INFLUENCE OF COLONIZATION ON THE CUSTOMARY LAWS 74
3.1 Abstract 74
3.2 INTRODUCTION 74
3.3 Background of the Chapter 76
3.4 Applicable Law 76
3.5 The laws of succession in Kenya during the English rule 77
3.6 The acknowledgment of African Indigenous Laws in Kenya 80
3.7 Law of succession under Islam in Kenya 84
3.8 The inheritance law, according to the Hindu in Kenya 86
3.9 Common law applicable in Kenya During colonialization 88
3.10 The development of succession law in Kenya during and after independence 90
3.10.1 Among Africans 90
3.10.2 The laws that applied to Muslims in Kenya 93
3.10.3 The laws that applied to Hindus 94
3.10.4 Laws that governed European 95
3.11 The law of succession after independence 95
3.11.1 Testate Succession 97
3.11.2 Intestate succession 101
3.12 Intestate Succession Mechanism Established Under the 1981 Succession Act 106
3.12.1 Probate and letter of grant 110

3.13 CONCLUSION 112
Chapter 4: INTESTATE SUCCESSION IN UGANDA 114
4.1 Abstract 114
4.2 Introduction 114
4.3 Customary law and Intestate succession 115
4.4 Background of the study 116
4.5 The Ugandan constitution 1995 and the Inheritance law 118
4.6 The 1972 Succession Amendment Act 119
4.7 Recent intestate Succession Law disputes 122
4.8 Customary patriarchal laws 124
4.9 Succession Law for Muslims under Ugandan Law 124
4.9.1 Succession law for Muslims in Uganda 125
4.10 Does Uganda's succession legislation meet the justification for succession in Uganda? 126
4.10.1 The Administrator General Act Cap 157 126
4.11 The concept of matrimonial property in Uganda 127
4.11.1 The rights attached to matrimonial property. 128
4.12 The influential elements of Violation of Women's Succession Rights in Intestate Succession 129
4.12.1 Customs, culture and tradition 129
4.12.2 The Flaws in the legal structure 130
4.12.3 Religious Practices 132
4.12.4 Interfering with an intestate's estate 132
4.12.5 The population has a low degree of awareness 133
4.12.6 Women have fewer economic chances than males. 134
4.13 Various agencies, including the Ugandan government, work to bridge the gap and eliminate gender discrimination based on intestate succession. 135
4.13.1 Ministry of Gender Labour and social development. 135
4.13.2 The Judiciary 136
4.13.3 Local councils 137
4.13.4 The police force of Uganda 139
4.13.5 The duties of religious leaders 140
4.13.6 Village elders and cultural leaders 141
4.13.7 Non-Governmental Organizations' Initiatives 141
4.13.8 Uganda Association of Women Lawyers. (FIDA) 142
4.14 CONCLUSION 144
Chapter 5: INTESTATE SUCCESSION IN TANZANIA 146
5.1 INTRODUCTION 146
5.2 Intestate succession under customary Law 148
5.3 Matrilineal and patrilineal succession 151

5.3.1 Matrilineal Succession 151
5.3.2 Patrilineal Succession 153
5.4 The obligations and entitlements of the inheritor according to Customary Law 159
5.4.1 The duties of the inheritor towards the surviving spouse of the deceased as prescribed by the customary laws of Tanzania 161
5.4.2 The successor's liability for debts 162
5.4.3 Disinheritance of a successor under Customary Law 163
5.5 Legislation in Tanzania governing intestate succession 164
5.5.1 History of intestate succession Legislation 164
5.6 The intestate succession after Tanzania had gained independence 166
5.6.1 The Marriage Act 167
5.6.2 The effect of the Courts Act in Tanzania on intestate succession 170
5.6.3 The Intestate Succession Law 171
5.6.4 Order of Succession in Tanzania 172
5.7 The Constitution of the Republic of Tanzania and intestacy succession 176
5.7.1 Recognition of customary laws by the Constitution of Tanzania 177
5.8 Customary law court system in Tanzania 178
5.9 Tanzanian Constitution and the intestate succession 179
5.9.1 Comments and criticism on the Tanzanian Constitution regarding Intestate succession 180
5.10 Matrimonial Property Act 182
5.10.1 A widow's right to her deceased husband's property 183
5.11 Challenges faced by women in Tanzania as far as inheritance rights are concerned 183
5.12 How colonialization influenced the intestate succession in Tanzania 186
5.13 CONCLUSION 188
Chapter 6: CONCLUSION AND RECOMMENDATION 189
6.1 Revolutionizing the conventional idea of the African household 189
6.2 The neglect of the communal nature of African societies 192
6.3 Replacing customary law with common law 196
6.4 Individuals lack knowledge about legal matters 198
6.5 The changing role of women in African societies and their rights to inheritance 199
6.6 Conclusion 201
Chapter 7: BIBLIOGRAPHY 207

DECLARATION

I, **Kenneth Kaunda Kodiyo**, declare that this thesis, which I hereby submit for the award of Ph.D., is entirely my original work, except where I have given appropriate acknowledgment to the contributions of others. This research has not been submitted for any other degree or award at any other institution.

Signed:

…….

Kenneth Kaunda Kodiyo
University of Pécs
Hungary, EU

List of Abbreviations

ACHPR	African Charter on Human and Peoples Rights
CEDAW	Convention on Elimination of All Forms of Discrimination against Women
CHRGG	Commission for Human Rights and Good Governance
FIDA	Association of Women Lawyers/ "International Federation of Women Lawyers
HC	High Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Convention on Economic, Social, and Cultural Rights
ICJ	International Commission of Jurists
IRC	International Rescue Committee
JALA	Judicature and Application of Laws Act
KLR	Kenya Law report
KNCHR	Kenya National Commission on Human Rights
NGO	Non-Governmental Organizations'
SC	Supreme Court
TAWLA	Tanzania woman lawyers
TZHC	Tanzanian High Court
TZCA	Tanzania Court of Appeal
UHRC	Uganda Human Rights Commission
UPF	Uganda Police Force
UDHR	Universal Declarations of Human Rights
UNDP	United Nations Development Programme
WLAC	Women's Legal Aid Centre

ACKNOWLEDGMENTS

The success of this work would not be possible without the supervision of **Prof. Dr. Benke József Zoltán;** his guidance, support, and encouragement throughout my Ph.D. journey were very instrumental, and I sincerely thank him. The insights and feedback he gave me were precious in developing the direction of my research work.

I am very grateful to the **University of Pécs**, the faculty of law members, and colleagues for providing me with the necessary assistance, including valuable feedback and constructive criticism during this research. Their suggestions and comments were crucial in helping me to refine my arguments and develop my ideas.

I want to express my deep appreciation to the **Tempus Foundation** and the **Stipendium Hungaricum Scholarship** for their financial support during my study in Pécs. I am grateful for their assistance in enabling me to complete this academic program. Additionally, I want to extend my heartfelt gratitude to the staff of the Civil Law Department, Doctoral School of Law at the University of Pécs, Administrative Staff of the Faculty of Law, and PTE Language School.

My parents, family, and friends deserve special recognition for their unwavering support, encouragement, constructive ideas, and kindness throughout my academic journey, including this study. Without their help, I would not have been able to complete the educational requirements effectively. Thank you to all those who have supported me during this academic journey.

SPECIAL ACKNOWLEDGMENT

This research work is also dedicated to my late father, Mr. ***Duncan Michael Mwaya Kodiyo***; we sadly lost him while attaining my doctorate. His love, moral support, and encouragement were fundamental in assisting me through the academic journey. He was the origin of my inspiration, and his motivations made this journey worthwhile. He firmly believed that I could make it even when I had doubts. His words and memories are the fuel that keeps the fire burning in me to keep going to excel in everything I do. His belief in me and my abilities never wavered, even during the most challenging times. His memory will always be a driving force for me to strive for excellence in everything I do.

I am extremely and forever grateful to him for the sacrifices he made my whole life, dedicating his time, money, and energy to making me the person I am today, which has made this achievement possible. It saddens me that he is not alive to witness the full realization of my academic achievement, but his memories are part of me and will always keep me grounded and grateful, and through my hard work and life, I will strive to keep his memory alive and honour his life. I appreciate everything, Dad; your support and love will always live with me; rest in peace.

ABSTRACT

In this study, the influence of colonialism on customary succession law in Kenya, Uganda, and Tanzania is compared to English succession law. It investigates how the colonial legal system affected customary inheritance patterns, especially regarding gender and property rights. The study employs a comparative examination of the relevant legal frameworks to investigate the tensions and conflicts that develop due to the junction of customary and colonial legal systems. Through literature assessment and doctrinal investigation, the study gives insights into the continuous significance and evolution of the succession matter that was dealt with by the customs of various groups in the postcolonial age. The findings have important implications for policymakers, legal practitioners, and researchers working in customary law, notably in protecting women's rights and preserving cultural heritage. In addition to providing an overview of the research topic, this chapter outlines the study's objectives and explains the rationale for selecting Kenya, Uganda, and Tanzania as the research focus. The chapter also delves into a discussion of Customary Law, acknowledges the study's limitations, and presents a literature review. Additionally, the sources of information and the theoretical framework employed in the research work are presented, and a breakdown of chapters is given.

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

Chapter 1: INTRODUCTION, FRAMEWORK, AND OBJECTIVE OF THE STUDY

Within the framework of the Western legal system, inheritance and/or Succession (sometimes used interchangeably) is an area of private Law concerned with laws governing the distribution of a dead person's assets following their death.[1] However, "succession" and "inheritance" have separate meanings under African customary Law. For example, in African customary Law, the simple bequeathal of a deceased's property to their heirs is considered inheritance, which can either be in accordance with the will, which makes it testate, or can be effected in pursuance of the common laws in case there is no will left behind by the deceased, which is intestate Succession.[2] In contrast, Succession primarily deals with assuming the deceased's "status,"[3] i.e., inheriting the deceased's function or resuming his place and gaining power over the people and possessions the deceased ruled. As a result, the customary succession law explains the rules to be followed upon the deceased's passing (i.e., usually the family head), especially regarding his property, titles, and Succession.

Most African states have a multiplicity system of laws, that is, the combination of more than one system, and they include; firstly, the African indigenous/customary laws, which have for time immemorial been governing natives before, during, and after colonisation, secondly, religious Law, which are used to govern the relationship of those who profess Muslim and Hindu religions; and the third one is the received Law, which was introduced to Africa by the colonizers, in East Africa, the English brought the Common Law to the region.[4]

---

[1] Christa Rautenbach, 'Indian Succession Laws with Special Reference to the Position of Females: A Model for South Africa' (2008) 41 Comparative and International Law Journal of Southern Africa 105. *JSTOR*, http://www.jstor.org/stable/23252720. Accessed 4 Jul. 2022

[2] Andrew P Kult, 'Intestate Succession in South Africa: The Westernization of Customary Law Practices within a Modern Constitutional Framework Note' (2000) 11 Indiana International & Comparative Law Review 697. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/iicl11&i=705.

[3] IP Maithufi, 'The Effect of the 1996 Constitution on the Customary Law of Succession and Marriage in South Africa: Some Observations' (1998) 31 De Jure 285.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/dejur31&i=291.

[4] Alan Milner, 'The Development of African Law' (1967) 1 The International Lawyer 192.. *JSTOR*, http://www.jstor.org/stable/40704433. Accessed 27 Jun. 2022.

Indigenous / customary laws governed pre-colonial Africa, the source of which emanated from African people's behaviours and how they lived. There was no codified or consolidated set of customary laws in Africa, and every tribe had its own rules and guidelines. These systems are primarily ethnic and typically function solely inside the ethnic group's territory and handle conflicts between members of the ethnic group or where the conflict is between a member and an outsider of the group. Due to modernity, customary laws have been altered because the sources of the customary laws result from political intervention and social circumstances, and the introduction of colonial laws to the natives has massively influenced the customary laws.[5]

The personal lives of the native Africans, touching on marriage, Succession, and traditional leadership, are governed mainly by customary laws. Customary laws go on to cover areas such as the negotiation of bride price and guardianship. However, customary laws have been accused of discriminating against women; women are not considered equal to men under the traditional African system, and women are considered the property of their husbands. Traditionalists and human rights defenders have always clashed on customary laws against women.[6] However, numerous African nations have written constitutions that guarantee equality before the laws and do not allow discrimination.

1.1 PROBLEM STATEMENT

Customary laws, in contrast with Succession to rank, are grounded on the idea of primogeniture among all tribes; which grants the oldest or eldest son the priority to inherit and succeed the deceased father over everyone else;[7] this excludes others like women and younger family members from inheriting the property of the deceased, purely due to their gender and or

[5] TW Bennett, 'The Compatibility of African Customary Law and Human Rights' (1991) 1991 Acta Juridica/African Customary Law 18. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/actj1991&i=28.

[6] Lea Mwambene, 'Marriage under African Customary Law in the Face of the Bill of Rights and International Human Rights Standards in Malawai' (2010) 10 African Human Rights Law Journal 78.*HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/afrhurlj10&i=82.

[7] Kgopotso Maunatlala and Charles Maimela, 'The Implementation of Customary Law of Succession and Common Law of Succession Respectively: With a Specific Focus on the Eradication of the Rule of Male Primogeniture' (2020) 53 De Jure 36. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/dejur53&i=38.

position at birth.[8] This is in contrast to the western system of the Law of Succession, which permits everyone, irrespective of their gender or position at birth, to inherit or succeed the deceased's property and position. The discrimination meted out on specific groups of people based on their gender and position of birth in the family in this time and era is baffling, especially in this era of constitutionalism, in which several African states have adopted and guaranteed the right to equality among other fundamental human rights, including freedoms, and equal inheritance rights accorded to everyone over a relative who dies intestate, forms part of the inalienable human rights.

This study covers English laws' impact on customary intestate succession in the English colonised countries of Uganda, Kenya, and Tanzania, located in East Africa. The research also considers women's rights to intestate succession, especially in the tribal African system in the studied countries.

1.2 The study's aims or objectives

This thesis studies the effect and impact of colonialism on customary intestate Succession in East African countries, including Kenya, Uganda, and Tanzania; the study also covers women's rights to inheritance in the three mentioned countries. These are the primary goals of the study:

1) Establish the features of customary and ordinary intestate succession rules relevant in each nation.
2) To assess the power and authority of courts and other government bodies in dealing with succession issues, and mostly the judicial activism in interpreting the existing customary laws in line with the Constitution to not discriminate against anyone in matters of intestate Succession.
3) To assess how the written Constitution of the three countries has influenced the customary laws, especially the part that deals with intestate Succession.

[8] JC Bekker and PD de Kock, 'Adaptation of the Customary Law of Succession to Changing Needs' (1992) 25 Comparative and International Law Journal of Southern Africa 366. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/ciminsfri25&i=376.

4) Examine whether the existing laws can effectively eliminate discrimination in this sensitive area of the Law.
5) To assess the influence of English and colonial laws on East African states and customary succession laws.

1.3 Explanation of the boundaries and justification for limiting the scope of the research

Succession is a complicated subject that may be studied in various ways. However, this research is limited to studying customs dealing with intestacy Succession in Kenya, Uganda, and Tanzania and the influence of English succession laws in the three east African states. The reasons the east African countries have been picked are:

a) The British colonized the three east African countries, and during the administration of English laws in the area, African customary Law was almost completely ignored.
b) English law influenced the legal formation of all three countries.
c) All have a prominent level of legal pluralism, meaning they practice more than one legal system.[9]
d) The countries under study have all enacted a written constitution that guarantees numerous rights and freedoms, and I have investigated the customary Law and measured it with the rights assured to the citizens of these countries under the Constitution because the indigenous laws (customary laws) are known to favour certain people over the other. In contrast, the Constitution guarantees equality before the Law to all.
e) Kenya's reasonably new constitution and succession Act directly impacts the application of customary and intestate Succession. Tanzania is among the East African nations with a Muslim majority, and Uganda's Succession laws have similarities and points of difference with the Kenyan system; the researcher considers it a compelling point of comparison. Tanzania has also passed comprehensive legislation governing intestate Succession under Customary Law.

[9] Elizabeth Bakibinga-Gaswaga, 'Unpacking Legal Pluralism in Commonwealth Africa - Towards Strengthening Methods for Rule of Law Programming for Development Special Issue: Law and Development in Africa: Legal Pluralism and Effective Governance for Development in Africa' (2018) 11 Law and Development Review 277. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/ldevr11&i=286.

The population of Kenya is diverse and comprises many tribal groups; for example, the *Luos, the Kikuyus, the Kalenjins, the Mijikenda, the Akamba, the Hindus, the Arabs, the Europeans,* and others. Kenya has over 45 tribes, different languages, and over 70 ethnic groups.[10] Just like Kenya, the population of Uganda is heterogeneous and comprises many ethnic groupings and tribes and numerous languages spoken; the tribes in Uganda include[11] the *Banyankore, Banyaruanda, Banyoro, Batoro, Bakiga, Baganda, Bagisu, Basongo, Iteso, Karamojong, Lango, Lugbara, Acholi,* and other tribes.[12] A heterogeneous population also exists in Tanzania; there are over 120 ethnic groups in Tanzania, including Sukuma, *Chagga, Haya, Nyakyusa, Hehe, Gogo, Makonde, Masai, Zaramo, Luguru, Iraqw, Sandawe, WaArusha, Sambaa, Bondei*; however, in Tanzania, most of the population's language is Swahili;[13] therefore, tribal identification is not as pronounced as in Kenya and Uganda.

It is crucial to state at this juncture that the study will be conducted generally regarding the customs of countries under study but not regarding specific tribal laws because that would be too wide for the research.

1.4 The legal framework

This research is solely conducted from a legal perspective. Therefore, before researching the subject, I would like to discuss the origin of the laws of the studied countries, situate customary intestate succession law within the study framework, and see how the English legal system has influenced its operation in the three countries.

---

[10] Samantha Balaton-Chrimes, 'Who Are Kenya's 42(+) Tribes? The Census and the Political Utility of Magical Uncertainty' (2021) 15 Journal of Eastern African Studies 43.

[11] Murthy, T. V. Sathya. "Ugandan Politics: Convoluted Movement from Tribe to Nation." Economic and Political Weekly 7, no. 42 (1972): 2122-2128. Accessed July 4, 2022. http://www.jstor.org/stable/4361943.

[12] Peter F. B. Nayenga. (1995). [Review of *Uganda: A Country Study*, by R. M. Byrnes]. *African Studies Review*, *38*(3), 143–146. https://doi.org/10.2307/524813 & Peter F. B. Nayenga, "The History of Busoga," ed. David William Cohen, *The International Journal of African Historical Studies* 14, no. 3 (1981): 482–99, https://doi.org/10.2307/217701.

[13] Bwire Kaare, 'Review of The Making and Unmaking of the Haya Lived World: Consumption, Commoditization and Everyday Practice' (1997) 60 Bulletin of the School of Oriental and African Studies, University of London 610.Accessed March 26, 2023. http://www.jstor.org/stable/619608

1.4.1 Sources of Law

The origin of Law includes a compendium of legal norms and concepts regulating the customs of various countries, the legal framework that governs the distribution of an individual's estate in cases where they pass away without leaving behind a valid will. The term "sources of law" refers to the origin of laws.[14] This includes the Constitution (the highest land law) of the three countries, Kenya, Uganda, and Tanzania. Kenya's Constitution of 2010, Uganda's Constitution of 1995,[15] and Tanzania's Constitution of 1964,[16] legislation; the laws enacted by the parliament in the three countries, Common Law (i.e., this category includes all Laws received from the colonisers that cannot be classified as statutory Law or customary Law.), case law (This is drawn from court judgments, as courts have the authority to apply the Law as well as interpret it, apply, and this leads to precedent which can later be used by other courts to make a decision on similar matter) and customary/ indigenous Law.

1.4.2 Customary Law

African customary law is widely acknowledged as one of the foundational pillars of African Law, stemming from custom and tradition and representing Africa's earliest legal source. Customary law formed the basis of pre-colonial African societies' legal systems, and its influence is still evident today. Kenya's Constitution recognizes customary law's importance, specifically under Article 2(4) and Section 3(2) of the Judicature Act. However, it is essential to note that if customs conflict with the Constitution or any written laws, they may be deemed inconsistent and invalid to the extent of their inconsistency. Therefore, in accordance with the Constitution and

[14] Nicholas Wasonga Orago, 'The 2010 Kenyan Constitution and the Hierarchical Place of International Law in the Kenyan Domestic Legal System: A Comparative Perspective' (2013) 13 African Human Rights Law Journal 415.Accessed March 26, 2023. https://heinonline.org/HOL/P?h=hein.journals/afrhurlj13&i=428

[15] Danwood M Chirwa and Christopher Mbazira, 'Constitutional Rights, Horizontality, and the Ugandan Constitution: An Example of Emerging Norms and Practices in Africa' (2020) 18 International Journal of Constitutional Law 1231.

[16] Hamid Nassoro, 'The Process of Constitution Making in Tanzania' (1995) 22 The African Review: A Journal of African Politics, Development and International Affairs 5.. *JSTOR*, http://www.jstor.org/stable/45341621. Accessed 5 Jul. 2022.

written laws enacted by the parliament directly addressing customary law, courts have no choice but to apply customary law to matters under its jurisdiction.[17]

Customary law has been a component of Ugandan law for an extended period. As per the Local Council Courts Act of 2006, Section 2, customary law refers to the norms of conduct established through custom and prolonged practice, which are considered legally binding but do not fall under common law or are outlined explicitly in any legislation."[18] Article 32 of the Uganda constitution recognizes customary Law but cautions against its application to the people's detriment, and if it is contrary to the written laws, it would be repugnant.

Establishing customary Islamic Law (JALA) is stipulated in Section 9 of the Judicature and Application of Laws Act, Chapter 358 of the Laws of Tanzania [R.E. 2002]. These are sets of rules formed via Tanzanian ethnic tribes' conventions, practices, and/or usages, and they are acknowledged as obligatory norms by Tanzanians. The colonial authority recognised the customs as applying in 'native courts' to local parties.[19] When Tanzania gained independence, these provisions remained enforceable and were incorporated into Tanzanian Law in all courts, with primary courts having exclusive jurisdiction. Customary laws are applied to civil proceedings, notably those involving marriage, Succession, inheritance, land, family connections, and (i) criminal cases. (ii) Customary law only applies to a specific community or tribe and its members (iii) Customary law applies only where there is no written law when it does not contradict statute law and, as per today's understanding, under conditions that do not violate human rights standards. The scope of customary laws has broadened to encompass codified customary practices and religious rules from Islamic and other traditions.

[17] Lisa Owino, 'Application of African Customary Law: Tracing Its Degradation and Analysing the Challenges It Confronts' (2016) 1 Strathmore Law Review 143. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/strathlwrv1&i=155.

[18] Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 The American Journal of International Law 757.Accessed 5 Jul. 2022.

[19] Norah H Msuya, 'Challenges Surrounding the Adjudication of Women's Rights in Relation to Customary Law and Practices in Tanzania' (2019) 22 Potchefstroom Electronic Law Journal 1. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/per22&i=351.

1.4.3 The typical attributes of Customary Law

1.4.3.1 It is not written or consolidated in one document

Customary Law was unwritten at first. Proceedings at tribal courts (such as village heads and the courts of chiefs) were done in an oral manner, and the leaders of that time spread the Law from one generation to the next by word of mouth; nothing was ever reduced to writing.[20] Consequently, the broader society had a rudimentary understanding of the Law. This character of the Customary Law was equally evident in the Ugandan[21] and Tanzanian.[22]

1.4.3.2 The customary nature of the Indigenous Law

It is frequently centred on local African practices. Custom in this discussion" is about the community members' traditions, customs, ethical values, and regulations guiding members' lives members.[23] All community members widely understand the practices of an Indigenous society since the senior-most elder teaches them. The parent, in turn, teaches their children about the customs of the tribe, which leads to their long and immemorial existence. Indigenous community customs are often followed to maintain social order and avoid ancestor retribution. Customs frequently evolve into customary Law over time, after extended use, by the community members who agree with its "indispensability and attractiveness." and "by acknowledging the authority's judicial rulings." As a result, the phrases custom and customary Law, while separate, are intertwined.[24]

---

[20] Owino (n 17).

[21] D Dennison, 'The Resonance of Colonial Era Customary Codes in Contemporary Uganda' (12 December 2019) <https://papers.ssrn.com/abstract=3507853> accessed 7 May 2023. *Hein Online,* https://heinonline.org/HOL/P?h=hein.journals/per22&i=1992.

[22] Eugene Cotran, 'The Place and Future of Customary Law in East Africa' (1966) 12 International and Comparative Law Quarterly Supplementary Publication 72. *HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/icqlsup12&i=82.

[23] Max Gluckman, 'Natural Justice in Africa' (1964) 9 Natural Law Forum 25.. *Hein Online,* https://heinonline.org/HOL/P?h=hein.journals/ajj9&i=29.

[24] Chukwuemeka George Nnona, 'Customary Corporate Law in Common Law Africa' (2018) 66 The American Journal of Comparative Law 639.. *JSTOR,* https://www.jstor.org/stable/26613298. Accessed 4 Jul. 2022.

1.4.3.3 As a manifestation of communal values

Due to the community's involvement in adjudication, the Law has become a vehicle for expressing the community's established ideals or a code of ethics that applies universally. As a result, this implies that when the community's ideals shift through time, so will the Law; in the three east African countries, variations in moral and legal principles are unclear, demonstrating the developmentary character of Customary Law, which seems to be the same in all tribal groups.[25] The customary Law initiates reconciliation between people and guarantees group harmony preservation. Unlike Western Law, African customary Law is also community-oriented because the rights and obligations are mutual rather than individual-cantered, and land or property is owned collectively.[26]

1.4.3.4 Magico-religious ideas' importance in the Customary Law of Africans

There is a belief in the existence of a power beyond our world among several African communities; however, the perspectives vary by tribe. Therefore, this research restricts the study to believing in witchcraft and ancestral spirits.

1.4.3.4.1 The belief in the spirits of the ancestors

It is common in Africa to believe in ancestor spirits in that it encourages methods to keep individuals in line with accepted norms of behaviours without the necessity for legal control. It suffices to say that the belief in the ancestral spirit is fading away with urbanization. Nevertheless, the belief in ancestral spirits is deeply ingrained in many East African countries' cultural and religious traditions, including Kenya, Uganda, and Tanzania.[27] Ancestral spirits are believed to be the souls of deceased family members and ancestors who continue to exist in the spirit world and

[25] Cotran, 'The Place and Future of Customary Law in East Africa' (n 22).

[26] Nnona (n 24).

[27] Samson Mudzudza, "Ancestor Spirits and Their Role in African Traditional Religion," accessed May 7, 2023/ Joseph Okello Oliech, African Traditional Religion in Kenya: A Study of the Luo Community (Nairobi: Initiatives Publishers, 2007), 34/ https://www.academia.edu/18969932/Ancestor_Spirits_and_their_role_in_African_Traditional_Religion.

can influence the lives of those living in the physical world.[28] In these countries, the belief in ancestral spirits is often linked to traditional religion and is practiced alongside Christianity and Islam. The belief is also closely tied to ancestor veneration, a cultural practice in which people honor and show respect to their ancestors through offerings, rituals, and ceremonies.

The respect and observation of the customary laws in Kenya, Uganda, and Tanzania are based on the belief in ancestral spirits. In Kenya, the Luo tribes believe in a spiritual world that guides the living and where the original laws/ customs originated from, offering protection to the living.[29] The spirits of the deceased ancestors are believed to be interested in the property and welfare of the clan and ensure that the rules for living and customs are adhered to. Failure to follow the Law, tradition, and living norms "may anger the ancestors and lead to punishment since such disdain or variation is viewed as impolite and negligent of the guidelines left behind by the ancestors. Under such conditions, the ancestors are reconciled or appeased by sacrificing animals and sharing in a communal feast.[30]

In Uganda, ancestral spirits are often associated with healing and divination. For example, the Baganda people of Central Uganda believe that their ancestors can heal sickness and supply guidance through dreams and visions.[31] They also believe their ancestors can bring good luck and protect them from harm. As a result, the Baganda perform rituals and ceremonies to honor and communicate with their ancestors and seek their guidance when faced with challenges.[32]

---

[28] J.N.K. Mugambi, African Traditional Religion in Uganda (Nairobi: Uzima Press, 1993), 82'African Traditional Religion' (*obo*) <https://www.oxfordbibliographies.com/display/document/obo-9780199846733/obo-9780199846733-0064.xml> accessed 8 May 2023.

[29] Ogayo Otieno, Dr Ayako and Daniel Kandagor, 'The Basis for Beliefs in Luo Ancestral Spirits among the Seventh-Day Adventists Church Members in the Kenya Lake Conference' (2021) 11 International Journal of Scientific and Research Publications (IJSRP) 203.

[30] Patricia Stamp, 'Burying Otieno: The Politics of Gender and Ethnicity in Kenya' (1991) 16 Signs 808.. *JSTOR*, http://www.jstor.org/stable/3174574. Accessed 4 Jul. 2022.

[31] Michael A Gomez, 'Africans, Religion, and African Religion through the Nineteenth Century' (2013) 1 Journal of Africana Religions 78.

[32] Mudzudza (n 27). & Ofcansky, Thomas P. "*The Role of Ancestral Spirits in East African Indigenous Religion*." In African Traditional Religion in the Modern World, edited by Elizabeth Amoah and Mary Getui, 171-183. Nairobi: Acton Publishers, 1995.

In Tanzania, the belief in ancestral spirits is also widespread. For instance, the Chaga people of Northern Tanzania believe their ancestors are present and continue to watch over them. They also believe their ancestors can communicate through dreams and visions and help them make crucial decisions. The Chaga people often make offerings to their ancestors and seek their guidance through divination rituals.[33] The belief in ancestral spirits is integral to many East African countries' cultural and religious traditions. While the specific beliefs and practices may vary across different communities, the central idea of honoring and communicating with one's ancestors remains a vital aspect of the faith in ancestral spirits.

1.4.3.4.2 The belief in witchcraft

Witchcraft is evilly using magic to harm people or properties owned by them. Because the wizard is generally a human, when the community catches the wizard, they get excommunicated from society to help protect the people from witchcraft. Divination is employed to find and deter the wizard from returning to the community frequently.[34] Regardless of the effect of Westernization, many indigenous societies still hold sorcery in high respect.

The belief in witchcraft is a complex and multifaceted phenomenon that varies across different indigenous societies in East Africa, including Kenya, Uganda, and Tanzania. One common feature of the belief in witchcraft is that some individuals possess supernatural powers that they can use for good or evil purposes. In some cases, these individuals are believed to have inherited their abilities through their family lineage, while in other cases, they may have acquired their capabilities through initiation rituals or other means. [35]Accusations of witchcraft are often made in response to misfortunes, such as illness, death, or crop failure. In many cases, those accused of witchcraft may face severe social and economic consequences, such as ostracism, loss

[33] Päivi Hasu, 'For Ancestors and God: Rituals of Sacrifice Among the Chagga of Tanzania' (2009) 48 Ethnology 195.

[34] Maarten Onneweer, 'Rumors of Red Mercury: Histories of Materiality and Sociality in the Resources of Kitui, Kenya' (2014) 87 Anthropological Quarterly 93.. *JSTOR*, http://www.jstor.org/stable/43652722. Accessed 4 Jul. 2022.

[35] Richard P Werbner, *Postcolonial Subjectivities in Africa* (Zed 2002) <http://catalogue.library.ulster.ac.uk/items/1116385> accessed 8 May 2023./ Werbner, Richard. "Witchcraft and Sorcery in Uganda." Africa: Journal of the International African Institute, vol. 41, no. 1, 1971, pp. 70-84./ibid.

of property, or even physical harm or death. This can create a climate of fear and suspicion, as people may be reluctant to interact with others for fear of being accused of witchcraft themselves.[36]

In some societies, witchcraft accusations and beliefs may be associated with other social and cultural practices, such as divination, spirit possession, or ancestor veneration. For example, among the Luo people in Kenya, accusations of witchcraft may be linked to disputes over land or inheritance and may be addressed through divination and sacrifice to ancestral spirits (Olupona and Nyang, 2007). Overall, the belief in witchcraft in East African societies reflects a complex web of social, cultural, and historical factors, including traditional beliefs and practices, colonialism and modernization, and contemporary social and economic changes. As such, it is a rich and dynamic field of study for scholars of religion, anthropology, and sociology.

1.4.3.5 Categories of Customary Law

Sometimes there is a rift between regulations people engage in or follow, practices in African communities, and the customary Law documented in the country's law books. As a result, it is usual to distinguish the customary law as written and practiced in the communities. "Law genuinely followed by communities is also known as the living customary." "Official" Customary Law is "customary law found in legislation and precedents." [37]

1.5 The methodology employed in conducting research

The research subject has been handled from a purely legal standpoint; hence legal research was conducted. Generally, research may be defined as "thorough inquiry and examining materials and sources to verify the information and reach novel conclusions."[38] Legal research may be

[36] Olupona, Jacob K., and Sulayman S. Nyang. African Traditional Religion in Contemporary Society. Paragon House, 2007./Frans J Verstraelen, 'Review of Religious Plurality in Africa: Essays in Honour of John S. Mbiti' (1998) 28 Journal of Religion in Africa 247.

[37] Wieland Lehnert, 'The Role of the Courts in the Conflict between African Customary Law and Human Rights' (2005) 21 South African Journal on Human Rights 241.*HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/soafjhr21&i=247.

[38] See 'RESEARCH | Meaning & Definition for UK English | Lexico.Com' (*Lexico Dictionaries | English*) <https://www.lexico.com/definition/research> accessed 25 February 2022.

characterized as "identifying all applicable law to the legal topic being investigated, the process of using the law to address a specific legal issue, and ultimately coming up with a solution."[39] This study conducts legal research on intestate Succession under African customary Law to discover, describe, and understand a wide range of legal facts and concepts touching on women's legal position. The methods of research used in this study to obtain pertinent data are outlined by the researcher.

1.6 A comprehensive analysis/assessment/examination of existing literature

The starting point for research work is the review of various literature. A comprehensive legal study necessitates carefully examining enough of the extensive legal literature accessible.[40] A literature review aims to enhance one's awareness of the subject while setting the research in its clear historical perspective. The review of various literature gives context to the study's significant variables or concepts and illustrates the distinction of researcher's work from the rest in the same field." "Providing context for the significant variables or concepts of the study and demonstrating the similarities and differences between your research and the works of other writers and researchers in the same field." [41]The examination of various literature "helps lay the groundwork for a prevalent grasp of the legal system under study," its conflicts, and the art and method of legal study."[42] A comprehensive literature assessment broadens the researcher's understanding of the issue under consideration and enhances the receipt of new facts and information required for a Thesis. Several sources are generally reviewed while producing a literature review. This study relied on various categories of sources listed below.

[39] Terrill Pollman and Linda H Edwards, 'Scholarship by Legal Writing Professors: New Voices in the Legal Academy' (2005) 11 Legal Writing: The Journal of the Legal Writing Institute 3.*HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/jlwriins11&i=15.

[40] Bast, Carol M. and Margie Hawkins. Foundations of Legal Research and Writing. 2nd ed., Cengage Learning, 2006, xxii/ 'Foundations of Legal Research and Writing (PDF)' (*PDF Room*) <https://pdfroom.com/books/foundations-of-legal-research-and-writing/1vxdzrredRV> accessed 8 May 2023.

[41] Carol Roberts and Laura Hyatt, *The Dissertation Journey: A Practical and Comprehensive Guide to Planning, Writing, and Defending Your Dissertation (Updated)* (Corwin Press 2018).

[42] Scott Shackelford, 'Legal Research Methods in the U.S. and Europe. By J. Paul Lomio and Henrik Spang-Hanssen. Copenhagen, Denmark: DJØF Publishing, 2008. Pp 329. ISBN 978-87-574-1715-9 US$34.95.' (2008) 36 International Journal of Legal Information 216.

1.6.1 Primary sources

These are "authoritative sources, not influenced by anyone's direct perspective." [43]Case law, legislation, ordinances, and regulations are examples of primary sources of Law.[44] The following central legal authorities are considered in this study: the Constitutions of the several nations under examination; the applicable Acts of Parliaments controlling or affecting intestate succession customary law; the research focuses on the distinct rules and regulations that oversee intestate succession, as well as the corresponding case law relevant to each area examined.

1.6.2 Secondary sources

These sources of data clarify and discuss the primary sources".[45] Experts' opinions, books, and published articles are examples of secondary sources.[46] This study's secondary sources of Law included a wide range of textbooks, research articles, books, thesis, magazines, legal reviews, newspaper stories, and other materials that can be accessed either from the library or the internet. In addition, experts produce a huge number of secondary materials included in this thesis on intestate Succession and African customary Law from Europe and other parts of the world.

1.6.3 International Law Analysis

Kenya, Uganda, and Tanzania have ratified or signed several international treaties. As a result, it is crucial that this research examines as many international instruments as possible and evaluates the level of duty concerning them and their influence on intestate Succession as far as customary and modern laws are involved in the studied countries. The customary laws in East African countries dealing with intestate Succession have been flagged as discriminatory and

[43] Richard L Baskerville, Mala Kaul and Veda C Storey, 'Genres of Inquiry in Design-Science Research: Justification and Evaluation of Knowledge Production' (2015) 39 MIS Quarterly 541.*JSTOR*, https://www.jstor.org/stable/26629620. Accessed 4 Jul. 2022.

[44] Gary Blasi and John T Jost, 'System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice' (2006) 94 California Law Review 1119.. *JSTOR*, https://doi.org/10.2307/20439060. Accessed 4 Jul. 2022.

[45] Baskerville, Kaul and Storey (n 43).

[46] Blasi and Jost (n 44).

against the human rights of women and unmarried daughters. Therefore, the research/ thesis must analyse international Law, especially the rights of vulnerable society members, usually women and young and unmarried children, to inherit the deceased property.

The relevancy of International Law can be seen in Kenya under article 2(5) of the 2010 constitution, which states that *"The broad standards of international law should be incorporated into Kenyan law."*." Moreover, in Uganda's Constitution, under article 28(1)(b), the international laws shall be respected; on the other hand, the Constitution of Tanzania is silent on the relation with international bodies.

1.6.4 As part of the literature review, the following are essential information sources

Dr. Patricia Kamere Mbote's "*gender dimension of law, colonialism, and inheritance in East Africa*" is a published work that believes that to comprehend the aspects of Law and colonialism, one must see colonialism as a system of enslaving civilizations and knowledge unknown to the conquerors. When cultures and knowledge systems could not be easily conquered, colonial rulers attempted to redefine customary law institutions through legislation. Dr. Mbote states that women were not considered under customary legislation.

Due to colonialism, many African countries have a dual legal system or pluralism, in which both received laws (colonialist laws) and customary laws exist side by side. Some African countries like South Africa and Lesotho have codified their customary laws. In Kenya and other East African countries, even though customary laws are not codified, they are recognized by written laws, for example, the Constitution and the legislation.[47] Kenya, Uganda, and Tanzania still experience conflict between constitutionalism and customary laws on freedom, equality, human dignity, right to property, security of person, and right to housing. However, traditional Law applies as long as it is in agreement with the written laws and the Constitution; in case of any ambiguity, the written laws and or the Constitution would take precedent.

[47] See Bessie House-Midamba, 'Legal Pluralism and Attendant Internal Conflicts in Marital and Inheritance Laws in Kenya' (1994) 49 Africa: rivista trimestrale di studi e documentazione 375.

Scholars have argued that the Succession laws applicable to intestate matters in the East African countries of Uganda, Kenya, and Tanzania, are against women; it gives men absolute power over their wives' properties, but a widow is allowed to hold the property in trust for her children in case they are minors, and the property gets handed over to the deceased's children when they become adults. And a widow's right of inheritance is terminated when she remarries or dies, which is not the case with the widower; if he remarries or dies, the property does not revert to the deceased wife's family.[48]

Florence Akiiki Asiimwe and Owen Crankshaw, "The impact of customary laws on inheritance, the case study of widows urban Uganda."[49] The authors highlight the plights of women regarding property inheritance in Uganda, primarily upon losing their husbands. In addition, the article covers the discriminative customary intestate Succession that existed before colonisation and still exists today.

The writers have covered the available legal framework dealing with Succession and highlighted the loopholes. They have observed the discriminative nature of the succession Act against women in Uganda; for instance, the definition of the estate of a male intestate, instead of making it gender-neutral, the Law is also silent on how an estate of intestate woman is to be dealt with.

However, this leaves much to be desired because it focuses on urban women and offers no practical answers to the problem. Moreover, the challenges experienced by a woman in rural Uganda differ considerably from those faced by a woman in urban Uganda, their concentration region.

[48] KichanaP, 'Foreward'International Commission of Jurist, Enhancing the Rights of Women in Kenya, Conference Report, Kenya Section of International Commission of Jurist,2003./ *Enhancing Women's Rights in Kenya: 7th Annual Conference, Whitesands Hotel, Mombasa, August 19-23, 2003 : Conference Report* (Kenya Section of the International Commission of Jurists 2003).

[49] Florence Asiimwe and Owen Crankshaw, 'The Impact of Customary Laws on Inheritance: A Case Study of Widows in Urban Uganda' (2011) 3 Journal of Law and Conflict Resolution 7.

Inheritance law in Uganda: the plight of widows and children by Valerie Bennet, Ginger Faulk, Anna Kovina, and TatjanaEres"[50] The writers have articulated the injustices widows experience, especially concerning inheritance, upon losing their husbands, and in some cases, their children are taken away from them by the in-laws. However, the authors have failed to provide a framework for solving the injustices. But still, the paper is beneficial in that it can be used to find ways to protect the children and widow from the abuses of the deceased husband's relatives; even though there are different legal systems, customary, wit, and religious laws, in force in Uganda, it can still be used in. However, due to cultural differences that exist side-by-side with the statutory laws in Uganda, the amendments to the laws might not be that helpful on the village side.

Women, marriage and asset inheritance in Uganda Cheryl Doss, Mai Truong, and others[51]

The paper deals with marriage, inheritance, and ownership of assets; it highlights those women and child, especially girls in Uganda, lacks inheritance rights relating to the deceased father or husband's property. The authors state that women are seen as property upon payment of the bride price. Like the literature reviewed above, this one denies women equal inheritance rights. Unfortunately, the authors' suggestions have not been considered or enforced to protect women. The papers blame the government, lack of political will, and poor law enforcement mechanism for denying women equal inheritance rights.

Statutory Law, patriarchy, and inheritance 2007, written by Florence Akiil Asiimwe:[52] The research was conducted from 2004 to 2007 in Uganda, and it describes the pain window face upon losing their husbands regarding losing their homes to their in-laws. Women and children, especially female children, are deprived of their rights to home ownership due to the cultural practices that grant the entire inheritance of the deceased property to the male members of the family; apart from the customs of Uganda, there are some laws as well that denies the equal right

[50] Valerie Bennett and others, 'Inheritance Law in Uganda: The Plight of Widows and Children International Women's Human Rights Clinic Special Issue: Reports: Section V' (2006) 7 Georgetown Journal of Gender and the Law 451.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/grggenl7&i=461.

[51] Cheryl Doss and others, 'Women, Marriage and Asset Inheritance in Uganda' (2012) 30 Development Policy Review 597.

[52] Florence Akiiki Asiimwe, 'Statutory Law, Patriarchy and Inheritance: Home Ownership among Widows in Uganda' (2009) 13 African Sociological Review / Revue Africaine de Sociologie 124.

to the deceased property, especially if the deceased was a man, an example is the succession Act of Uganda.

Inheritance and the inequality of material wealth, Brooking institution 1978, a research work by John A Brittain;[53] This book shows the importance of inheritance in wealth creation and retention; the author goes ahead to distinguish between inheritance and personal wealth and shows how inherited wealth helps widow and children make more wealth and retain it. The book promotes inheritance, even though it fails to highlight how a particular social group is denied the right to inheritance. The book is beneficial in my research as it provides the influence of the Western system on East African Succession.

A case book on the Law of succession law; law Africa publishing 2010, the Law of succession law Africa 2009 by W M Musyoka; Law of Succession[54]: This book covers the regime of succession matter in Kenya; it shows the influence of western common laws in east Africa and covers the customary and practices that affect women in Kenya. The three East African countries' understudy has similar cultural traditions with the same tribes, so that the book will benefit this research.

Inheritance rights in Uganda: how equal inheritance rights would reduce poverty and decrease the spread of HIV/AIDS in Uganda, written by Rachel C Loftspring:[55] This manuscript shows how inequality in inheritance is pushing women to sell themselves to survive, which is the consequence of the spread of the H.I.V. It is beneficial in my research, as it shows how some cultural practices are leading to preventable deaths and spread of diseases in the region. Only if equal inheritance or in accordance with the laws were to be followed the spread of H.I.V would be curtailed.

[53] Bennett and others (n 50).

[54] William Musyoka, *A Casebook on the Law of Succession* (LawAfrica Publishing Ltd 2010).

[55] See Rachel C. Loftspring, "Inheritance Rights in Uganda: How Equal Inheritance Rights Would Reduce Poverty and Decrease the Spread of HIV/AIDS in Uganda Comment," *University of Pennsylvania Journal of International Law* 29, no. 1 (2008 2007): 243–82.

Islamic Law of inheritance: A new approach 1998 by Mohammed Mustafa Ali Khan:[56] The book highlights and explains how Succession is done under the Quran and Islamic laws. It explains that in Islam, the deceased property is shared among many people, not just the dependants; however, women's rights are not fully covered under Islamic laws, just like the African customary laws. This essential book has helped me collect data for the thesis research work.

Gratuitous Transfers, Wills, intestate Succession, Trusts, Gifts, Future interests and Gifts taxation cases and materials 3rd edition west publishing cost Paul Minn 1985, by Elias Clark, Luis Lusky and Arthur W. Murphy; This is an essential book as it highlights the wills and intestate Succession, which is the hallmark of my research work. The book covers cases that have been decided, showing Succession's practical application.

Women and the Law in Africa. The Law of Succession in Uganda women inheritance laws and practices; by Percy Night Tuhaise, Mugisha John Frank, Vero ID Matovu, and others: This article covers the plight of women in Uganda as the inheritance of their deceased husband's property goes, it highlights the sorry state of the widow and the mistreatments they go through at the hand of their in-laws upon the death of their husbands.

Gender Equality in the New Constitutional Dispensation of Kenya, written by Oduor and Odhiambo and explained by Nkatha Kabira[57], has discussed the way equality which covers Succession, is well defined under the 2010 constitution of Kenya; they see the provision of equality to inheritance without gender-based discrimination as a way of liberating the whole country; the duo has advocated for embracing the received laws and doing away with the customary laws that still discriminate women based on gender.

[56] Muhammad Mustafa Khan; "Islamic Law of Inheritance: A New Approach:: 9788171511044: Amazon.Com: Books," accessed June 6, 2022, &Muhammad Abdurrahman Sadique and others, 'Socio-Legal Significance of Family Waqf in Islamic Law: Its Degeneration and Revival' (2016) 24 IIUM Law Journal 309.

[57] Nkatha Kabira, 'Constitutionalizing Traveling Feminisms in Kenya' (2019) 52 Cornell International Law Journal 137.

According to Njoki Wamai, in her "*Land, Gender, and the Periphery: Women's Rights and Customary Land Tenure in Kenya" (2018),*[58] *argues that* denying women's right to equal inheritance of land, under the customs of various tribes in Kenya, has increased poverty. Njoki Wamai's work is very important to my research as it highlights the influence of western laws in East Africa and compares them with the customs which have held women back in terms of development, so embracing western ideals entirely in terms of Succession will help deal with the poverty level.[59]

John Chigiti's work, which emanates from the of Irene *Njeri Macharia v Margaret Wanjiru Njomo and another,*[60] argues for the recognition of concubines and other women to inherit from the deceased estate if they can prove that some celebration of marriage occurred and the cohabitation was of that nature, that it could be assumed to have been married, even if the man was married before meeting them. [61]In accordance with section 3(5) of the Kenyan succession Act, if the marriage or union was conducted in a way that resembles polygamy, then the second woman/ wife must be permitted to participate in the Succession of the deceased's estate. According to Prof. Ojienda Tom and Mugambi F., the other woman, who has children with the deceased, should also be recognized as the deceased's responsibility and be allowed to participate in the Succession.

Many customary norms (or actions based on customary or religious laws) contradict core principles of equality expressed in international, regional, and domestic human rights legislation. Male heirs, for example, inherit twice as much as female heirs under Sharia personal law. If there are no heirs, a widow receives one-quarter of the inheritance; if there are heirs, she receives one-eighth of the estate. In polygamous marriages, one-eighth of the estate is divided among all wives, sometimes insufficient to ensure the women's survival. When customary laws fail to keep pace

[58] Njoki Wamai, "Land, Gender, and the Periphery: Women's Rights and Customary Land Tenure in Kenya," Journal of Peasant Studies 45, no. 5-6 (2018): 1033-1053

[59] Perpetua W Karanja, 'Women's Land Ownership Rights in Kenya Realizing the Rights of Women in Development Process: Women's Legal Entitlements to Agricultural Development and Financial Assistance' (1991) 1991 Third World Legal Studies 109.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/twls1991&i=121.

[60] 'Civil Appeal 139 of 1994 - Kenya Law' <http://kenyalaw.org/caselaw/cases/view/174> accessed 28 June 2022.

[61] Natalie says, 'Legal Sharing of the Property of a Deceased' (*Valuer Kariùki, MRICS*, 28 July 2016) <https://kariukiwaweru.com/legal-sharing-of-the-property-of-a-deceased/> accessed 28 June 2022. John Chigiti-*Legal sharing of the property of a deceased The Star* Wednesday, 25 May 2011

with changing social and economic realities, the original logic for a custom may be lost, and the discriminatory component of the rule may become more evident and unacceptable. Gains gained in one area of law reform may be weakened or restricted in impact by existing regulations or by contradicting rules and processes in other laws. To legislate for women's rights, it is critical to emphasize harmonizing laws and policies. In Uganda, these procedures are similarly valid since Islamic rules allow for identical estate split processes, while the Succession Act gives equivalent percentages for widows.

1.7 THEORETICAL FRAMEWORK

1.7.1 Pluralism and Centralism Legal system

The legal system of Centralism is based on uniform regulations enforced by the state's machinery. In this system, no other legal system is recognized except that of the state, leading to criticism of the state's monopolistic control over the recognition, legitimacy, and validity of laws and its claims to integrity, coherence, and uniformity.[62] Jack Griffins defines legal pluralism as a system where legal institutions and sources of law are self-regulating and can either support, ignore, complement, or frustrate each other, resulting in a complex and unpredictable pattern of interaction, negotiation, isolation, and completion. The effectiveness of the law in such a system is based on a complex web of practices and interactions.[63]

In contrast to legal centralism, the legal pluralism system encompasses both juristic and diffuse systems. The juristic legal system recognizes and acknowledges other legal orders and establishes which should apply in each situation. This officially recognized legal system creates a conducive environment for other legal orders to thrive. For example, in Kenya, the Constitution permits the use of religious laws, such as Islamic laws, for those who practice that religion and

[62] Brian Z. Tamanaha, Caroline Sage, and Michael Woolcock (eds.), Legal Pluralism and Development: Scholars and Practitioners in Dialogue (New York: Cambridge University Press, 2012), p 54/ Bakibinga-Gaswaga (n 9).

[63] Ronald J Daniels, Michael J Trebilcock and Lindsey D Carson, 'The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies' (2011) 59 The American Journal of Comparative Law 111. / He Xin, "Legal Centralism and the Rule of Law in China," Law and Society Review 38, no. 1 (2004): 139-164

recognizes the application of customary laws in some instances, such as among nomadic communities.[64] However, in colonial and post-colonial Africa, the juristic legal system is more prevalent, where state law holds authority and other plural legal orders derive their authority from the state laws. Despite its benefits, legal pluralism has limitations. While it has helped to identify problematic areas in interactions across legal systems, it has not provided a comprehensive solution.[65] For example, legal pluralism theory can help explain how time-honoured traditions, including the inheritance of wives, land through the male line, having multiple spouses, and taking away property, affect women's ability to obtain land.

This theory will serve as the foundation for this study because it examines applicable laws in a specific community found within the East African legal system of Kenya, Uganda, and Tanzania, which allows the application of several laws ranging from customary Law, legislation, and international instruments, which are then authorized, for instance through the Kenyan Constitution 2010 under article 2, The judicature act section 3, marriage act which recognizes several marriage systems, and the succession act which states properties and localities and excludes them.

1.8 The Chapters of the thesis

The following are the chapters of the thesis.

Chapter One: The first chapter serves as an introduction to the topic under investigation. It outlines the desired study's structure, which includes stating the research problem, discussing the legal framework, and describing the research methodology.

[64] Muna Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) 18 Indiana Journal of Global Legal Studies 87./Kathleen Gallagher-Doran, "The 'Religionization' of Customary Law: How Women Are Resisting Customary Law, While Maintaining Their Identity," Journal of Law and Religion 30, no. 1 (2014): 40-63.

[65] David Pimentel, 'Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique' (2011) 14 Yale Human Rights & Development Law Journal 59./Kathryn Sturman, "Legal Pluralism and Human Rights in Post-Colonial Africa," Human Rights Quarterly 35, no. 2 (2013): 392-415.

Chapter Two: This section deals with the fundamental terminology and concepts employed in customary law's intestate succession. This facilitates understanding the overarching principles that constitute the law governing intestate succession and lays the foundation for addressing the country-specific challenges discussed in the subsequent chapters.

Chapter Three addresses the recognition, implementation, and evolution of intestate Succession in Kenya and the influence of colonisation on the customary laws.

Chapter Four covers the principles and laws of intestate Succession in Uganda, an East African country, and the influence of colonisation on the traditional customary laws thereof.

Chapter Five describes the present norms and legislation governing intestate Succession in Tanzania and the influence of colonisation on customary laws.

Chapter Six which is the last one, summarizes the inquiry and the study's findings and concerns.

1.9 Conclusion

This chapter introduces the subject to the readers; it lays out the research topic and the investigated problem. The chapter explains the reason behind the topic and the countries under investigation and sets the stage for further study on the influence of colonisation on most of the English in the East African states of Kenya, Uganda, and Tanzania. This chapter also covers the understanding of the customary laws and, as it is in the three countries under investigation, which includes the characteristic of the customs and indigenous laws. The literature reviewed for the research work and the method used to collect data and analyse the data found are all laid down in this chapter.

Chapter 2: CONCEPT, TERMS, AND GENERAL RULES OF INTESTATE SUCCESSION

2.1 Abstract

This chapter delves into the crucial terminology and concepts that form the basis of the thesis. The inheritance laws of Africa, particularly the custom of the eldest male child inheriting first, are examined in depth. The chapter also thoroughly explains the role of the head of the family's role and how property is distributed upon their death, particularly in the context of polygamous marriages. The main objective of the research work is to reconcile African indigenous laws with common or received laws, and this chapter takes a closer look at this process.

Polygamy is a widespread practice in Africa, and this chapter explains how it affects property inheritance and the extent of power held by family heads following their passing. Furthermore, the chapter also covers the provision of dependents under African customary law, a topic of significant importance.

The significance of this chapter lies in introducing the key terms and principles that will be used throughout the thesis. By providing a comprehensive understanding of the inheritance laws of Africa and the customs of polygamous marriages, readers are better equipped to grasp the complexities of the research work. Additionally, the discussion of dependents under African customary law highlights the importance of considering the welfare of vulnerable family members, which is a crucial aspect of inheritance law.

Keywords: primogeniture, polygamy, customary Law, Succession, dependents

2.2 INTRODUCTION

The customary laws that governed the Africans before, during, and after colonisation is a system of Law based on the community;[66] hence the focal point of an African social setup is the family. In most European countries and other western parts of the world, the family unit is nuclear, which comprises one father, one mother, and children; Traditional African family setup, on the other hand, is polygamous; in some cases, it includes a father and many mothers plus the children. Every marriage under the customary laws in Africa forms a different family unit, and several family units, when clapped together, form a family group with one common husband, the patriarch of the family. So, matters of intestate Succession are guided by the family unit, as the family appoints the successor in the intestate.

Customary Law in Africa has existed since time immemorial.[67] To African natives, it has been the source of Law and the reliance upon while dealing with Succession, marriage, women's rights, a rite of passage from childhood to adulthood, and general family matters, but the customs of various tribes in Africa are generally discriminatory when it comes to women rights.[68] The focal point of the execution of customary Law was the preference of the firstborn son over other children, especially in matters dealing with Succession, in other words, primogeniture, in which the firstborn male heir succeeded the deceased in everything, including the status and the duties that were performed by the deceased before the passing. In the case of a polygamous union, the oldest son of each house succeeds in the same house. Without a house's eldest son, the eldest male descendant would prevail. This would continue until the last of the deceased's male offspring and heirs. The same happens in cases of monogamous families.[69]

---

[66] Wilmien Wicomb and Henk Smith, 'Customary Communities as Peoples and Their Customary Tenure as Culture: What We Can Do with the Endorois Decision Focus: 30 Years of the Africa Charter on Human and Peoples' Rights: Looking Forward While Looking Back' (2011) 11 African Human Rights Law Journal 422.*HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/afrhurlj11&i=426.

[67] Caiphas Brewsters Soyapi, 'Regulating Traditional Justice in South Africa: A Comparative Analysis of Selected Aspects of the Traditional Courts Bill' (2014) 17 Potchefstroom Electronic Law Journal 1440.

[68] Ndulo (n 64).. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/ijgls18&i=91.

[69] Michael Musgrave, 'African Customary Law in South Africa. Post-Apartheid and Living Law Perspectives by C. Himonga and T. Nhlapo, T., (Eds.). 2015. Cape Town: Oxford University Press Southern Africa' (2016) 10 International Journal of the Commons.

I have explained the key concepts and terms used in intestate Succession under the customary laws in Africa, Kenya, Uganda, and Tanzania.

2.3 THE CONCEPT OF MALE PRIMOGENITURE

Under the custom laws that govern intestate Succession, priority and favour were given to the firstborn male, and it was common in Africa, and the practice of male primogeniture is prevalent.[70] According to the concept of primogeniture, which was based on gender, when the head of the family (primarily men) dies, the leadership and property devolve to the eldest male member of the family, usually the firstborn son.[71]The primogeniture rule prevented women and female children from inheriting deceased property and titles. Instead, women were considered property to be inherited and taken care of.[72]

The concept has been part of the tradition worldwide, and several tribes and communities/ nations have been practising it; it has been practised in the East African region, which covers countries like Uganda, Kenya, and Tanzania.[73] For instance, in Kenya, many tribes have been practising it which, include one of the largest tribes in Kenya, that is Kikuyu; traditionally, they based the inheritance on gender. The first-born son, if not the eldest male member of the family, was the next on line to inherit the estate of the intestate, which normally includes livestock, pieces of land, and other properties; the younger family members would get a very tiny portion of the property or totally be excluded from inheritance, the justification was that the custom would further unity within the family and promote stability as it would reduce or totally eliminate the possibility

[70] Sindiso Mnisi Weeks, 'Customary Succession and the Development of Customary Law: The Bhe Legacy Part III: Reflections on Themes in Justice Langa's Judgments' (2015) 2015 Acta Juridica 215.*HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/actj2015&i=235.

[71] Jelili A Omotola, 'Primogeniture and Illegitimacy in African Customary Law: The Battle for Survival of Culture' (2004) 15 Indiana International & Comparative Law Review 115.*HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/iicl15&i=123.

[72] Kim L Robinson, 'The Minority and Subordinate Status of African Women under Customary Law' (1995) 11 South African Journal on Human Rights 457.*HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/soafjhr11&i=469.

[73] Enid Schatz, Janet Seeley and Flavia Zalwango, 'Intergenerational Care for and by Children: Examining Reciprocity through Focus Group Interviews with Older Adults in Rural Uganda' (2018) 38 Demographic Research 2003.& Peters, Pauline. "Inheritance Systems and Intergenerational Transfers in Eastern and Southern Africa." Journal of African Economies, vol. 13, no. 2, 2004, pp. ii99-ii127

of a dispute over property inheritance in case of intestacy.[74] The Luo, a tribe that occupies Kenya, Uganda, Tanzania, southern parts of Ethiopia, and South Sudan, also practised the concept of primogeniture based on gender. The first-born son, or the eldest male member of the family, was given priority in terms of inheritance, and with that right, he also acquired the responsibility of providing and taking care of the whole family and the estate left behind by the deceased. Just like the *Agikuyu, the Luos* also justified their custom on the need for stability and protection of the heirloom and continuity of the family, that it would limit or eliminate the chances of family wrangling over the inheritance of the property.[75]

The concept of primogeniture also exists in Uganda; the priority is given to the first born son or the eldest male members of the family to carry on the responsibility of the intestate. The largest tribe in Uganda, the Baganda, is known to promote the favouring of the firstborn son in inheritance matters. The eldest son is given the most significant share of the family's property, including land, livestock, and household items. Like the tribes in Kenya, it was also believed in Uganda that it would promote peace and unity in the family and eliminate disputes over family property. [76] The *Chaggas*, a tribe in Tanzania, also practices the concept of primogeniture; the first-born son gets to inherit the whole estate left behind by the deceased, but he also acquires the responsibility of taking care of the whole family. The Chagga people believe this practice helps prevent disputes over property ownership and inheritance and promotes unity and stability within the family and community.[77]

---

[74] Wairimũ Ngarũiya Njambi and William E O'Brien, 'Revisiting "Woman-Woman Marriage": Notes on Gĩkũyũ Women' (2000) 12 NWSA Journal 1.& Kamau, J., & Muthiora, J. (2013). The Role of Women in Inheritance Practices among the Gikuyu of Kenya. International Journal of Sociology and Anthropology, 5(6), 253-261.& GN Wamue-Ngare, 'Gender Roles and Status of Agikuyu Women: A Religio-Cultural Approach' (Thesis, 2012) <https://ir-library.ku.ac.ke/handle/123456789/3702> accessed 8 May 2023.

[75] Amos O Odenyo, 'Conquest, Clientage, and Land Law among the Luo of Kenya' (1973) 7 Law & Society Review 767./ John Arthur McCullough, 'Defamation among the LUO of Kenya' (1971) 7 East African Law Journal 191.

[76] B Turyahikayo-Rugyema, 'The British Imposition of Colonial Rule on Uganda: The Baganda Agents in Kigezi (1908-1930)' (1976) 5 Transafrican Journal of History 111./Pretorius, Anne M. "Land, Power and Gender: The Case of the Baganda of Uganda." Journal of Southern African Studies, vol. 25, no. 4, 1999, pp. 627-647.& W Morris Carter, 'Clan System Land Tenure and Succession Among the Baganda' (1909) 25 Law Quarterly Review 158.

[77] Dorothy L Hodgson, 'Pastoralism, Patriarchy and History: Changing Gender Relations among Maasai in Tanganyika, 1890-1940' (1999) 40 The Journal of African History 41./ Njogu, Kimani. "The Impact of Colonial Rule on Inheritance Systems in East Africa: The Case of the Maasai." Journal of African History, vol. 40, no. 2, 1999, pp. 203-220. &Joy K Asiema and Francis DP Situma, 'Indigenous Peoples and the Environment: The Case of the Pastorial Maasai of Kenya' (1994) 5 Colorado Journal of International Environmental Law and Policy 149.

With the advent of colonialism and the introduction of constitutionalism, the gender-based hierarchy has been challenged and, in some cases, abolished. For example, in Kenya, the Constitution of Kenya 2010 abolished the concept of gender-based inheritance hierarchy. The Constitution in Article 60(1) guarantees the right of acquisition and disposal of property to everyone without any unreasonable restrictions; this provision effectively abolished the traditional practice of male primogeniture, which had previously excluded women from inheriting property. The Constitution, also in Articles 43, 45, and 53 covers the rights of women and children and extends protection to the rights of the vulnerable, primarily women and children; the rights protected include the right to inherit property. [78]

The 1995 Constitution of Uganda, in the line of human rights protection, also abolished the concept of male primogeniture in inheritance matters. Article 33(1) of the Constitution guarantees the right of every person to own property and not to be deprived of property without prompt and adequate compensation. Article 33(4) further prohibits discrimination based on sex in matters of inheritance.[79] In Tanzania, the Constitution of Tanzania 1977 acknowledges the existence of the custom of male primogeniture, and in Article 13, the Tanzanian Constitution guarantees the protection of the rights of women and minors.[80] Article 13(2) extends the acquisition and ownership of the property explicitly to everyone without any discrimination and that the ownership can be done individually or as a member of an association along with others." At the same time, Article 21 guarantees the right to equal treatment before the law devoid of gender-based discrimination. The constitutions of these countries have recognized the rights of women and children in inheritance and have abolished or restricted the traditional practice of male

[78] Rachel Rebouche, 'Labor, Land, and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women Note' (2006) 19 Harvard Human Rights Journal 235.Sifuna, Diana N. "Women and Property Inheritance in Kenya: Legal and Cultural Perspectives." African Journal of Social Work 2, no. 2 (2012): 51-60.

[79] Charles Manga Fombad, 'Internationalization of Constitutional Law and Constitutionalism in Africa' (2012) 60 The American Journal of Comparative Law 439./ Mwambari, D. M. Gender and Constitutionalism in Africa: The Kenyan Experience. Journal of Pan African Studies, 2011, 4(9), 63-80.

[80] Aparna Polavarapu, 'Reconciling Indigenous and Women's Rights to Land in Sub-Saharan Africa Symposium: International Law in a Time of Scarcity' (2013) 42 Georgia Journal of International and Comparative Law 93./ Elmarie Knoetze, 'Customary Law of Succession: An Alternative to the Abolition of the Male Primogeniture Rule' (2005) 68 Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law) 594.

primogeniture. These changes have contributed to gender equality and women's empowerment in these societies.[81]

The era of constitutionalism, which has overtaken the whole African states, and has brought about the death blow to many customary laws which were discriminative, has not entirely done away with the primogeniture; some elements of it can still be seen in African countries, for instance, in South Africa, the case of *Mthembu v Letsela*,[82] the matter of primogeniture was presented before the court, but the court declined to declare the principle of male preference in cases of an intestate, as unconstitutional. Instead, the judges based their decision on the duty of an heir to maintain the people under his care, especially on village sides; however, in the same ruling, there was an implication that the principle of primogeniture may not apply in urban centres.

2.4 The foundation of communal living and solidarity lies in the institution of the family

In the traditional African home setup, a man was the head of the household by the quality of male primogeniture, a way by which he was appointed, trained, and selected to take over as the leader of the clan in African setup, the leadership position in a family was reserved for the eldest male members, who was responsible for taking care of the family, but he could share that role with other elders and heads of various family households for the sake of the development of the clan.[83]

The traditional African clan setup was like a modern corporate body, with power over the family property and the clan members, under a male head responsible for leading the clan in decision-making. Considering that the family leader was a man demonstrates the primogeniture

[81] Catriona Knapman and Philippine Sutz, 'Reconsidering Approaches to Women's Land Rights in Sub-Saharan Africa' (International Institute for Environment and Development 2015) <https://www.jstor.org/stable/resrep01642> accessed 8 May 2023. /Kinyua, J., & Masese, G. Gender-Based Inheritance Practices in Kenya: A Legal Perspective. Inheritance Practices, 2019, 115-131.

[82] AM Janse van Rensburg, 'Mthembu v Letsela: The Non-Decision' (2001) 4 Potchefstroom Electronic Law Journal 1./Mthembu v Letsela 2000 (3) SA 867 (SCA); Mthembu v Letsela 1998 (2) SA 675 (T); Mthembu v Letsela 1997 (2) SA 936 (T).

[83] Fidelis Okafor, 'From Paris to Theory: A Discourse on the Philosophy of African Law' (2006) 37 Cambrian Law Review 37./ Abiola Ayinla, 'African Philosophy of Law: A Critic' (2002) 6 Journal of International and Comparative Law 147 147. See also Balogun Abiodun, 'Towards an African Concept of Law' (2007) 1 African Journal of Legal Theory 71 at 71-75.

essence of the African traditional culture, which portrayed primogeniture as a repository of principles for joint sovereignty, social life, common belonging, collective possession, and all these regulated families as active organs of a clan. The head of the clan had to be impartial in his leadership to establish equality in the distribution of resources to every household; surprisingly, in some cases, the appointment of the head required some qualities other than being the firstborn/ oldest in the family and kindness, competence and wisdom were some of the qualities for one to be appointed the head[84] and to quote Mahao:-

"*Upon closer inspection, it becomes apparent that the Law of primogeniture was merely one of many laws, serving as a foundation rather than a conclusive decree. Its true function was establishing the hierarchy of appointments for positions of authority with no additional implications. However, a subsequent law, the rule of ratification, dictated the actual succession process. This required the family's leaders to follow specific procedures and conduct a general assembly to confirm the appointment."*

There were cases in which an elder son was bypassed, and the younger man or even, in some small cases, a female was appointed as the clan's head.[85] The disfavouring of women came later when primogeniture was misinterpreted and used for tribal political manoeuvres.[86]

Primogenitor being the head of the clan and the family, was the centre through which the family corporate demonstrated personality and the management of the family affairs and wealth; his responsibility was beyond the area of Law of a person because he represented the home and everyone, the leader transcended the property laws as he was considered as the owner of the family property, the Law dealing with Succession. After all, as the head, he inherited the responsibilities

[84] TA Manthwa, 'A Re-Interpretation of the Families' Participation in Customary Law of Marriage' (2019) 82 Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law) 416.*HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/tyromhldre82&i=428.

[85] RB Mqeke, 'Customary Law and Human Rights Notes and Comments' (1996) 113 South African Law Journal 364.

[86] Nqosa L Mahao, 'O Se Re Ho Morwa Morwa Towe - African Jurisprudence Exhumed' (2010) 43 Comparative and International Law Journal of Southern Africa 317.. Accessed April 27, 2021. http://www.jstor.org/stable/23253086.

and the rights that came with it from the deceased parents, including the duty to pay the debts and pursue the claim on behalf of the family.[87]

2.4.1 The exceptionality of the African family unit

To fully understand primogeniture in the African context, it is essential to recognize the unique structure of the African family unit, which was typically headed by a respected senior member who received assistance from other senior members in managing the household. Through this lens and the discussions presented above, it becomes clear that primogeniture established a societal hierarchy across multiple levels, including the family, national, and community, by combining seniority and obligation concepts. Justice Ngcobo echoed this sentiment in the *Bhe v Magistrate Khayelitsha; Shibi v Sithole* case.:-

"The law aims to safeguard the family unit and facilitate a seamless succession process, which involves fulfilling responsibilities such as providing for the deceased's dependents and managing the family estate in a manner that benefits the entire family."[88]

This shows that the whole idea behind the traditional reliance on the primogeniture concept in choosing a leader was to aid in the selection of a servant of the people, someone who was considered to be competent enough to take over the management of the family upon the death of the head and it was not to let a despotic ruler who would oppress the women and children, take over the responsibility.[89] The immediate above study is in stuck difference with the deep-seated belief that primogeniture is a concept in which only an elder son succeeds a father in the management of the family property, which ignores the leadership bestowed upon the successor

[87] MW Prinsloo, 'J C Bekker En J J J Coertze - Seymour's Customary Law in Southern Africa Note' (1982) 1982 Journal of South African Law 189.

[88] 'Bhe and Others v. Magistrate of Khayelitsha and Others/Shibi v. Sithole and Others/South African Human Rights Commission and Another v. President of the Republic of South Africa and Another Judicial Decisions - Constitutional Law: South Africa' (2005) 31 Commonwealth Law Bulletin 207.

[89] Lynn Berat, 'Customary Law in a New South Africa: A Proposal' (1991) 15 Fordham International Law Journal 92.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/frdint15&i=102.

under the primogeniture rule and trivializes it as a discriminatory rule, based on age, birth, and gender, which defines the rule as abusive to everyone expect the firstborn son.[90]

Moreover, comparing the primogeniture rule to favouring male firstborns over all others in matters of succession shows a lack of understanding of the rule's context. It overlooks that the system served as a mechanism for transferring leadership duties from generation to generation by entrusting them to the most senior and capable member of the clan or family. The tradition of assigning male heads was primarily due to the need for assurance that women and children would be protected. The role of headship and male primogeniture symbolizes the importance of manhood as the source of obligations and commitments rather than solely serving the interests of patriarchy. The emphasis is on competence rather than gender distinctions, and the value of primogeniture lies in its capacity to facilitate social, political, and legal organization. Furthermore, the rule is adaptable to change, and in cases where the head of the family is corrupt and despotic, vulnerable members can seek justice through the collective rights and entitlements conferred by their membership in the community through the family unit.[91]

However, there is no denial of the existence of pure male primogeniture, which was entirely associated with manhood, but the argument furthered here is that its existence was for the service to other members of the society but not self-aggrandizement. It could be witnessed in the community's investment in a man's development.[92] Manhood was also seen to continue the family's legacy and clan, as women would later leave the homestead and get married elsewhere.[93]

Even though primogeniture had some benefits to society, its application in a way that favoured men was a problem that various courts in Africa have had in the recent past struck down.

[90] Obeng Mireku, 'Customary Law and the Promotion of Gender Equality: An Appraisal of the Shilubana Decision Recent Developments' (2010) 10 African Human Rights Law Journal 515.

[91] Dial Dayana Ndima, 'The Anatomy of African Jurisprudence: A Basis for Understanding the African Socio-Legal and Political Cosmology' (2017) 50 Comparative and International Law Journal of Southern Africa 84.

[92] Erika Lemmer and Michele Olivier, 'The South African Constitution as a Post-Colonial Document: A Long Walk to Freedom Notes' (2000) 33 De Jure 138.

[93] Bennett, 'The Compatibility of African Customary Law and Human Rights' (n 5).

To make South Africa an example, the Black administration Act[94] , which governed the administration of the estate of black citizens in that country,' section 23, was misinterpreted to favour senior men and subjugate the women, young men, and children (it suffices to state that this Act has been repealed and was declared unconstitutional as per the case of Bhe-Shibi.[95]). The South African Constitution under section 9 got rid of primogeniture and granted everyone equal rights without discrimination.

2.5 Application of Traditional African Laws to Intestate Succession

Devolution of property from the dead to the living was very much recognized in traditional African laws, even though property ownership was communal rather than individual.[96] The best approach to applying African Indigenous laws to intestate Succession is to solemnize a marriage. Under the customs, marriage was an agreement between two families, not just the parties. The agreement was about the bride price, procreation was the success of marriage,[97] and the marriages were mainly polygamous.[98] Women were under the legal guardianship of their fathers until they got married when the responsibility would be passed on to their husbands.[99] The marriage would continue even if the husband died, leaving behind a wife, and the kins of the deceased husband would then give the widow a husband, and even though she didn't need to accept the new husband, it was in the best interest of the mother and the children and the only way of survival. This is no

[94] NS Peart, 'Section 11(1) of the Black Administration Act No. 38 of 1927: The Application of the Repugnancy Clause' (1982) 1982 Acta Juridica 99.

[95] 'Bhe and Others v. Magistrate of Khayelitsha and Others/Shibi v. Sithole and Others/South African Human Rights Commission and Another v. President of the Republic of South Africa and Another Judicial Decisions - Constitutional Law: South Africa' (n 88).

[96] Joan Church, 'The Place of Indigenous Law in a Mixed Legal System and a Society in Transformation: A South African Experience' 13; Manfred O Hinz and Helgard K Patemann, *The Shade of New Leaves: Governance in Traditional Authority ; a Southern African Perspective* (LIT Verlag Münster 2006).

[97] TW Bennett, 'Legal Pluralism and the Family in South Africa: Lessons from Customary Law Reform Religious and Legal Pluralism in Global Comparative Perspective' (2011) 25 Emory International Law Review 1029.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/emint25&i=1033.

[98] Church (n 96).

[99] Mary P Van Hook and Barbara N Ngwenya, 'The Majority Legal Status of Women in Southern Africa: Implications for Women and Families' (1996) 17 Journal of Family and Economic Issues 173.

longer widely practiced in Kenya, but its traces can still be seen in villages because of the widow's and her children's economic needs.[100]

Male primogeniture was the guiding principle for success under indigenous laws/ customs; upon the death of the man of the house, the eldest male member would take over the management and control of the family business, it could be the son, the father, the uncle or any other close male relative and they would manage the wealth of the family in order to benefit every member of that family and with their consultation and approval.[101]

It has been argued that male primogeniture was detrimental to the development of women in that it denied them the right to own property, making them entirely dependent on the men and ignoring the contributions made by women to the property[102] argument, even though it was valid, in modern times the Africa societies have evolved and changed to respond to the changing times, most urban centres dwellers have in large part discarded the traditional laws and fully embraced the codified common laws, these social changes have influenced the gender roles that were in place and have granted equal rights and access to statutes to everybody without any form of discrimination and the traditional family set up has also gone through many changes,[103] this has also altered the social set up of Africans. In addition, the shift from communalism to individualism has rendered some uncodified indigenous laws useless.[104]

In addition to changes taking place in regarding the customary laws, the insurgence of armed conflicts that has taken place in Africa and targeting men, leaving women and children to fend for themselves, when they lose their husbands to conflicts and the denial of right of

[100] Alice Armstrong and others, 'Uncovering Reality: Excavating Women's Rights in African Family Law' (1993) 7 International Journal of Law and the Family 314.

[101] Bennett, 'Legal Pluralism and the Family in South Africa' (n 97).

[102]TW Bennett and JW Roos, 'The 1991 Land Reform Acts and the Future of African Customary Law' (1992) 109 South African Law Journal 447.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/soaf109&i=457.

[103] AJGM Sanders, 'Comparative Law, Law Reform and the Recording of African Customary Law' (1983) 16 De Jure 321.

[104] The major concern fronted by the law commission of South African is ensuring that the current codified succession laws, can deal with all types of devolution of property after the death of holder, and that it can cover fully the customary and modern property devolution; South African Law Commission, at 4

inheritance to women has made it hard for them to raise their family in refugee camps, Rwanda's genocide case is the best example, the men were killed and women left to fend for themselves, and some of the women did not have access to the properties and lack male figure in their lives made it was hard for them to survive, some were forced in to prostitution to help raise their kids and as if to add salt to an injury, after the war, most men were imprisoned for their participation in the war, some women were killed too, leaving behind children to take care of the household, most of them being girls, this brought about the question of male primogeniture , because, girls were forced in to taking care of their household without the rights to own property.[105]

Dependence on the male head of the family, except during peacetime, is a source of concern because, in some cases, young women and children are forced to rely on a male head who may not understand his position as the head and maybe uninterested in caring for the young ones, and the assistance provided by the male heir is often contingent on the relationship the female members have with him.[106]

2.6 The way various courts have applied the male primogeniture rule

Male primogeniture, even though it has been either eliminated or its application watered down, there are instances of cases where the courts in Kenya have upheld them; for instance, in the case pertaining to the way customs deals with land tenure systems, for example, in the case of *Eliud Maina Mwangi vs. Margaret Wanjiru Gachangi (2003) dated 26th September 2003 in HCSC NO. 1608 OF 1995),* the court determined that according to the Custom of the Kikuyu, the family land's right to inheritance belonged to the eldest son.[107] Essentially, the court granted the family's eldest son the ownership of the ancestral piece of land, even though the deceased father had not

[105] 'Rwanda Country Reports on Human Rights Practices for 1999: Africa' (1999) 24 Annual Human Rights Reports Submitted to Congress by the U.S. Department of State 402.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.intyb/huhelsnk0024&i=454 .

[106] Van Hook and Ngwenya (n 99).

[107] Christa Rautenbach, Willemien Plessis and Gerrit Pienaar, 'Is Primogeniture Extinct like the Dodo, or Is There Any Prospect of It Rising from the Ashes? Comments on the Evolution of Customary Succession Laws in South Africa' [2006] South African Journal on Human Rights 99.& Prempeh, Kwasi. "The Primogeniture Rule in African Customary Law." African Journal of International and Comparative Law 5, no. 2 (1993): 223-36.

made any specific provision for the inheritance of the land in his will.[108] In Uganda, the courts have also upheld the male primogeniture rule in cases involving customary land tenure systems. In the case of *Vicent Tamukedde v Serunjogi (High Court Civil Suit No. 85 of 1995) [2002] UGHC 36 (29 October 2002)*, the court held that under Buganda customary law, the eldest son had a right of inheritance over the family land. [109]The court noted that this rule was based on the principle that the eldest son was responsible for caring for his siblings and the family land after the father's death.

There have been some instances where the courts have deviated from the male primogeniture rule in East Africa. For example, in Tanzania, the court in the case of *Chagula v. Chagula [2002] TZHC 10* held that the male primogeniture rule was discriminatory and violated the principle of equality guaranteed under the country's constitution.[110] In this case, the court ruled that the deceased father's property should be divided equally among all his children, regardless of gender. [111]

The execution of the male primogeniture rule in East African countries has been shaped by various factors, including the influence of the English law on customary law, the country's legal system, and changing social attitudes towards gender and inheritance. While the courts have generally upheld the rule, there have been instances where it has been challenged or modified, reflecting a dynamic and evolving legal landscape in the region.

In Zimbabwe and South Africa, the rule of primogeniture has been applied by courts; the petitions prompted by the widows that the principle of primogeniture is contrary to the

[108] Karanja (n 59).&Makena, Ann B. Women and Land Rights in Kenya: The Development of a New Legal Framework. Ottawa: International Development Research Centre, 2003

[109] Asiimwe and Crankshaw (n 49).& Peronaci, Pamela Anyoti. "Customary Law in Uganda: The Male Primogeniture Rule and its Implications for Women's Land Rights." In Women, Land and Justice in Tanzania, edited by Helen Dancer and Saskia Vermeylen, 48-62. Leiden: Brill, 2016.

[110] Helen Dancer, 'An Equal Right to Inherit? Women's Land Rights, Customary Law and Constitutional Reform in Tanzania' (2017) 26 Social & Legal Studies 291. & Dancer, Helen. "The Gendered Impact of Land Rights: The Case of Tanzania." In Land, Law, and Politics in Africa, edited by Jan Abbink and Mirjam de Bruijn, 139-158. Leiden: Brill, 2006

[111] Garance Genicot and Maria Hernandez-de-Benito, 'Women's Land Rights and Village Institutions in Tanzania' (2022) 153 World Development 105811.& Vollbehr, Sigrid. "Inheritance and Customary Law in Tanzania: Gender and Intergenerational Relations." Uppsala: Nordic Africa Institute, 2006, 72.

constitutionally recognized rights of equality without any form of discrimination. In South Africa, the landmark case was *Mthembu v Letsela*,[112] the petitioner was the customary wife of the intestate, and she was challenging the deceased's father's claim over her husband's property; the applicant did not have any male child, so the deceased's father, claimed that him, being the male elder in the family, was entitled to the properties left behind by the deceased, including the family matrimonial properties. The applicant questioned the validity of South Africa's indigenous laws because they were against the written laws of South Africa. The applicant argued that the main feature of primogeniture, the maintenance of the people under his care, had been taken away by the then South African interim Constitution of 1993 and that the discriminatory rule of primogeniture was no longer applicable.

Justice Le Roux framed the question touching on the Constitution as *"Whether this succession regulation results in gender-based discrimination,"*[113] which was decided that acceptance of the responsibility of maintenance which includes the provision of shelter, as an essential part of duty under primogeniture, it was not to compare the non-discrimination guaranteed by the South African Constitution of 1993, under Article 8. In turn, the rule of primogeniture was declared to be not discriminative to women and not against public policy or the Law of nature.[114] The court further asserted that the rule of primogeniture was not against human dignity as envisaged by Constitution in Article 10 of the South African.

In making the above decision, the South African court emphasized the responsibility of taking care of the people the male head is in charge of, and as pointed out by *Maithufi*, the court errored in passing the above judgment and that the gender-based discrimination, which was sanction by the customary law is not discriminatory as far as women are a concern.[115] The decision

[112] Nelson Tebbe, 'Inheritance and Disinheritance: African Customary Law and Constitutional Rights' (2008) 88 The Journal of Religion 466.

[113] GJ van Niekerk, 'A Common Law for Southern Africa: Roman Law or Indigenous African Law' (1998) 31 Comparative and International Law Journal of Southern Africa 158. & Van Niekerk, Gardiol. "State Initiatives to Incorporate Non-State Laws into the Official Legal Order: A Denial of Legal Pluralism?" *The Comparative and International Law Journal of Southern Africa*, vol. 34, no. 3, 2001, pp. 349–61. *JSTOR*, http://www.jstor.org/stable/23251042. Accessed 25 Jul. 2022.

[114] Bennett, 'Legal Pluralism and the Family in South Africa' (n 97).

[115] TW Bennett, 'Re-Introducing African Customary Law to the South African Legal System' (2009) 57 The American Journal of Comparative Law 1.. *JSTOR*, http://www.jstor.org/stable/20454662. Accessed 25 Jul. 2022.

of the court, seemingly back then, ignored the fast urbanization of African cities and the abandonment of the traditional laws/ customs by the Africans, and the embracement of the western system of Law, the assumption that the conventional duty of a man is to support the people entirely he is in charge of under the primogeniture rule was not well thought out and made out of ignorance of the reality. In response or rather comment on the decision made in *Mthembu v Letsela*, the law commission of South Africa stated that the reality on the ground is that widows and children are left destitute by the people the customs bestows responsibility on to take care of them.[116] The Law Commission of South Africa, in commenting on the decision in the above immediate case, further stated that the best way to guarantee the complete protection of widows and minors, especially girl children, is by granting them rights of inheritance that can be claimed in the court and beyond the customary provision of giving the male proprietary right and bestowing them the duty of maintaining the widows and minors,[117] and would grant women some freedom from dependence on their male- head which according to customary laws, requires them, in order to get the support/ maintenance, must stay with the head of the household in the same compound, which has become very hard considering the congestion in urban centres and the houses being too small to accommodate the whole family.

According to *Maithufi*, the court errored in the judgment in the above case by failing to consider the value of the Constitution and the rights guaranteed while interpreting the received laws and the traditional indigenous succession law, and the court was unable to assess the impact of the decision on the widow and minors and the rights granted to them under in the Constitution. The decision made in *Mthembu v Letsela* was a surprise to many, and the legal scholars commented on it that it was a failure by the court not to consider sections 35(1) and 39(1)(b) of the Constitution while interpreting the Bill of rights and that the decision made on male primogeniture in the above case did not take into consideration the international conventions and laws dealing with women rights.[118]

---

[116] Kult (n 2).Kult, "Intestate Succession in South Africa."

[117] Harald Sippel, 'Die Bedeutung Afrikanischen Gewohnheitsrechts Im Nationalstaat: Entwicklungen in Tanzania Und Südafrika' (1998) 33 Africa Spectrum 39. *JSTOR*, http://www.jstor.org/stable/40174763. Accessed 25 Jul. 2022.

[118] Frances Raday, 'Culture, Religion, and Gender Roundtable: An Exchange with Ronald Dworkin' (2003) 1 International Journal of Constitutional Law 663.

In 1999, the highest court in Zimbabwe made a landmark judgment in regard to male primogeniture in the matter of *Magaya*; the deceased was polygamous; he left behind two wives, the first one had a daughter and the second one a son as the firstborn, the daughter moved the court to be allowed to take over the management of the property of her late father, and the respondent the second wife's son, even though had refused to take over the management, was directed to do so by the court, the court stated that the first wife's daughter could not be the apparent heir because of her gender.[119] While making the decision, the magistrate in charge made the following quote by Bennett: " In addition to the deceased's assets, *an heir also assumes the responsibility of supporting any surviving dependents in the family."*[120] The court agreed that the decision was discriminatory in accordance with the Zimbabwean Constitution, based on the requirement to adhere to international laws in regard to gender equality without any form of discrimination; however, at the same time, the court relied on the old Zimbabwean Constitution under Section 23(3) and interpreted it to mean that it does not cover the matter dealing with male primogeniture specifically and Succession in general (it suffice to note that Zimbabwe has a new constitution that came in force in 2013 and corrected the lacunae that were in the 1979's Constitution). The court made a surprising decision that male primogeniture does not violate Zimbabwe's legal majority Act of 1982.[121] The court further explained that in the opinion of the court, the legal majority Act was not meant to grant women the managerial power in the estate that has survived the intestate when there is a male heir and that women married under customary laws are not granted full rights over their property left behind by the deceased husband. When the matter was appealed, the appellant court, in its decision, stated that discrimination based on gender in which men were prioritised over women in terms of inheritance and management of property should be done away with and that urbanization has made African societies less patriarchal. However, the court also advised that when African customary laws are involved, they must be considered.[122]

---

[119] Venia Magaya v Nakayi Shoniwa Magaya, Zimbabwe Supreme Court Civil Appeal No 635/92 & Gubbay Cj and others, 'NAKAYI SHONHIWA MAGAYA'.

[120]Tamar Ezer, 'Forging a Path for Women's Rights in Customary Law' (2016) 27 Hastings Women's Law Journal 65. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/haswo27&i=79.

[121]Felicity Kaganas and Christina Murray, 'The Contest between Culture and Gender Equality under South Africa's Interim Constitution' (1994) 21 Journal of Law and Society 409.

[122] EK Quansah, 'Legal Implication of Death of a Spouse in a Divorce Situation in Botswana Case Note' (1999) 43 Journal of African Law 244.

Seemingly, the decisions were based on the assumption that customary laws have been the guiding principles upon which African people have based their lives, and getting rid of them entirely would not be prudent and would disturb the status quo, most so of the senior men who would lose the position they have held as elders in the society, this fear is not tenable as it subjugates a section of the society based on gender discrimination.

2.7 Harmonization of indigenous African laws and common Law of Succession

Due to westernization due to colonization, the complete adherence to the cultural rules in deciding the role and place of women is no longer the case. As a result, women have shunned cultural practices that put them down and stifled their development.[123] Customary Law is essential to African laws; the judicature Act and the Constitution recognize its applications in Kenya.[124] Customary Law is a" stand-alone" that the Constitution recognizes and encourages its application if it is not repugnant to any written law, has common sense, and has a good conscience.[125]

The recognition of the customary laws by the written laws in Kenya leads me to suggest that the traditional courts should be strengthened to execute the customs of various tribes under the customary laws and the practices in the line of male primogeniture in recognition of the reliance on traditional dispute resolutions in Kenya and the use of it by many people to grant speedy justice.[126] Natives in Africa comprehend the conventional systems of dispute resolution better than the common laws system[127] A study conducted by *Kgopotso Maunatlala* reveals that the indigenous people found in southern parts of Africa prefer the decisions made by the traditional councils to those made by the law courts, especially in matters dealing with the issues such as male

[123] Evadne Grant, 'Human Rights, Cultural Diversity and Customary Law in South Africa' (2006) 50 Journal of African Law 2.

[124] Tabeth Masengu, 'Customary Law Inheritance: Lessons Learnt from Ramantele v. Mmusi and Others Special Issue: Women and Poverty: Human Rights Perspectives' (2016) 24 African Journal of International and Comparative Law 582.

[125] Constitution of Kenya (2010), Articles 2 (4)

[126] Kariuki Muigua and Kariuki Francis, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' (2015) 1 Strathmore Law Journal 1. & Francis Kariuki. *Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems*, Strathmore University Law School, 2011, page. 15

[127] Onneweer (n 34).

primogeniture. The distortion of customary succession laws and their interpretation had mainly focused on the patriarchal side of it and ignored the communalism part of it, making it seems like a bad law that is meant to work against women, mainly the over-the-top interpretation of the male primogeniture part which has ignored the positive side of it, as it was meant to ensure the existence and complete protection of the clan, the misinterpretation of African customary laws, was seemingly due to their view of seeing every system that existed before colonization as bad and needed to be either corrected and or abolished.

Customary Law is a fluid framework that seeks consensus and is responsible for all it refers to. It can be seen in the decisions made by the courts in the matter of intestate estate as they adhere to the customary formal rules and to avoid the conflicts that arise when a dispute between common and customary laws is brought up in deciding succession cases, the harmonization of the two systems usually takes place, which means that both customary and common laws should be applied as long as they are not conflicting in any way and matters dealing with intestate Succession, are better understood and dealt with by the custom of the parties.[128]

In South Africa, a landmark judgment in *Bhe v Magistrate,* Khayelitsha, advised the South African parliament to pass appropriate legislation recognizing and guaranteeing women's rights under customary laws.[129] In this case, the South African court decided to try and harmonize the customary and common laws in dealing with intestate Succession; this brought about the reworking of customary laws dealing with Succession in that country; this resulted in the 2009 establishment of the *Reform of Customary Law of Succession and Regulation of Related Matters Act*, in which section 2 of the Act states as under;

> *According to subsection (2), if an individual governed by customary law passes away when the current law is in force and their assets are not distributed according to their wishes,*

[128] Babatunde Fagbayibo, 'Towards the Harmonisation of Laws in Africa: Is OHADA the Way to Go' (2009) 42 Comparative and International Law Journal of Southern Africa 309.

[129] 'Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004)' <http://www.saflii.org/za/cases/ZACC/2004/17.html> accessed 19 April 2021. & 'Bhe and Others v. Magistrate of Khayelitsha and Others/Shibi v. Sithole and Others/South African Human Rights Commission and Another v. President of the Republic of South Africa and Another Judicial Decisions - Constitutional Law: South Africa' (n 88).

then their assets, or a portion of them, will be distributed according to the Intestate Succession Act's regulations for distributing assets when there is no will.

According to Rautenbach, the application of intestate Succession in South Africa is viewed as a defeat of the Customary Law and a failure to bring the two laws together for the sake of intestate Succession, and even though the courts have tried to apply customs to align with the Constitution, it is still seen as forcing the common laws to deal with problems that can be well dealt with by the customary laws.[130]

The strides made by East African countries, in ensuring that the enjoyment of cultural rights and upholding of the rule of Law, is appreciable, The Kenya's 2010 constitution under Article 1,is highly commendable and shows the direction the country has taken in harmonizing customary and common laws, the interpretation of the laws across Africa, has also shown that the balance between the two systems have been maintained and that the vulnerable persons in the society are protected against any unjust customary / cultural practices that might deny them the enjoyment of their rights,[131] however, a cautionary tale is that when dealing with the Succession Act, care must be taken to solve customary issues with a complete understanding of the custom, particularly as the continent attempts to navigate the murky waters of male primogeniture, because generally, away from the cities, the villagers do not use the laws in place that have attempted to do away with male primogeniture, especially where the dissent is powerful.[132]

The institution of marriage has added to the rise of the indigenous law that governed Succession; in traditional marriage setup in most African countries, a woman would transfer her reproductive capacity to her husband's home from her parent's home to bring forth a successor of the husband, who would inherit the management of the household, upon the death of a father,

[130] Chista Rauterbach, 'South African Common and Customary Law on Intestate Succession: A Question of Harmonisation, Integration or Abolition The Boundaries of Unity: Mixed Systems in Action' (2008) 3 Journal of Comparative Law 119.

[131] Chuma Himonga, 'The Advancement of African Women's Rights in the First Decade of Democracy in South Africa: The Reform of the Customary Law of Marriage and Succession' (2005) 2005 Acta Juridica 82.

[132] 'Bhe and Others v. Magistrate of Khayelitsha and Others/Shibi v. Sithole and Others/South African Human Rights Commission and Another v. President of the Republic of South Africa and Another Judicial Decisions - Constitutional Law: South Africa' (n 88).

children belonged to the father.[133] The primary purpose of marriage was childbearing, and childless marriage was not fathomable.[134] The reality in Africa was that most women got married very far from home and not within the same clan and would integrate into the husband's clan, which meant that she would not be available to inherit the leadership in her parents' home or the clan she came from. As stated above, the primogeniture philosophy was based on the principles of accountability and duty, which demonstrates the aim of the head of the clan or family as the person capable of advancing the family's future and must be present to perform his duties.[135] The mother and the children gained inheritance rights in the husband's home, and the union established the matrimonial home as an economic body.[136]

2.8 Safeguarding the cultural practices along with equality rights

Cultural practices and equality rights are essential aspects of human rights, and it is recognized and protected by numerous human rights organs both within the countries being studied and outside their jurisdictions. In Kenya, Uganda, and Tanzania, efforts have been made to safeguard this right and promote equality through various legal and policy frameworks. For example, the Constitution of Kenya 2010, under article 44, recognizes and protects cultural rights, including the right to practice culture, language, and religion. The Constitution in article 56 also protects the rights of marginalized communities, such as indigenous peoples and ethnic minorities.[137] The Kenya National Commission on Human Rights (KNCHR) has also been working to protect and promote cultural rights through research, advocacy, and capacity-building

[133] Chukwuemeka George Nnona, 'Customary Corporate Law in Common Law Africa' (2018) 66 The American Journal of Comparative Law 639.

[134] JH Driberg, 'The African Conception of Law' (1934) 16 Journal of Comparative Legislation and International Law 230.

[135] Mireku (n 90).

[136] WC Ekow Daniels, 'The Interaction of English Law with Customary Law in West Africa' (1964) 13 International and Comparative Law Quarterly 574. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/incolq13&i=600

[137] Kihato, Caroline Wanjiku. "Indigenous Peoples and Human Rights in Kenya." In Indigenous Peoples' Rights in Australia, Canada, and New Zealand, edited by Paul Havemann, 163-181. Auckland: Pearson, 2010. & Jérémie Gilbert, 'Indigenous Peoples, Human Rights, and Cultural Heritage: Towards a Right to Cultural Integrity' in Alexandra Xanthaki and others (eds), *Indigenous Peoples' Cultural Heritage* (Brill 2017) <https://www.jstor.org/stable/10.1163/j.ctv2gjwsw2.5> accessed 9 May 2023.

programs. For example, the KNCHR has worked with indigenous communities to document their cultural practices and promote their recognition and protection.

Article 21 of the 1995 Ugandan Constitution recognizes and protects cultural rights, including the right to practice and enjoy cultural diversity. The Constitution, in article 21(2), also prohibits discrimination based on ethnicity, race, gender, religion, and other characteristics. The Uganda Human Rights Commission (UHRC) has been promoting and protecting cultural rights and equality through various initiatives, including public awareness campaigns, capacity-building programs, and research. The Constitution of the United Republic of Tanzania 1977 (as amended) in article 8 recognizes and protects cultural rights, including the right to practice and enjoy cultural diversity. [138]In addition, the Constitution in article 9 also protects the rights of marginalized communities, such as indigenous peoples and ethnic minorities. The Tanzania Commission for Human Rights and Good Governance (CHRGG) has been promoting and protecting cultural rights and equality through various initiatives, including research, advocacy, and public awareness campaigns.[139]

According to *Maluleke,* culture is similar to an umbrella shielding people from the rain and scorching sun, but it is unnecessary when it is not hot or rainy.[140] Maluleke used the euphemism to call out people who hide behind culture to discriminate against other members of society and get away with it; the statement is also meant to indicate how to deal with the problem of deciding the right that should prevail in case of disagreement of rights between culture and equality. Anthropologists define culture as people who think and behave the same way. It includes ideas, beliefs, knowledge, and values passed down from generation to generation and the basis for social

[138] Uche U Ewelukwa, 'Post-Colonialism, Gender, Customary Injustice: Widows in African Societies' (2002) 24 Human Rights Quarterly 424.& Okoh, A. G. "The Impact of Colonialism on African Cultural Values." Journal of Pan African Studies 4, no. 4 (2012): 81-97

[139] Elifuraha Laltaika, 'Indigenous Peoples Rights in Tanzania and International Human Rights Law' (2012) 1 Tuma Law Review 142.& Kessy, Flora Lucas. "Human Rights, Cultural Diversity, and the Law in Tanzania." In Culture, Rights and Development in Africa, edited by Aili Mari Tripp, 137-157. London: Zed Books, 2017.

[140] Victoria Bernal, 'Gender, Culture, and Capitalism: Women and the Remaking of Islamic "Tradition" in a Sudanese Village' (1994) 36 Comparative Studies in Society and History 36.& Bernal, Victoria. "Gender, Culture, and Capitalism: Women and the Remaking of Islamic 'Tradition' in a Sudanese Village." *Comparative Studies in Society and History*, vol. 36, no. 1, 1994, pp. 36–67. *JSTOR*, http://www.jstor.org/stable/179326. Accessed 25 Jul. 2022.

actions.[141]Thus, culture can be defined as a standard style of life for a specified collection of individuals, which comprises an assemblage of beliefs and attitudes, common understanding, and behaviour that permits people to live in tranquillity and distinguishes them from other groupings.[142] The preamble and article 11 of the 2010 Kenya constitution recognize Kenyan's pride in their culture.[143]

Equality is comprised of non-discrimination of any person based on gender and permits full realization of the rights and freedoms provided by the Constitution, the Constitution is against discrimination unless in justifiable and fair issues, [144] and article 24 of the 2010 constitution of Kenya permits limitation of rights, it states as follows: -

The Bill of Rights guarantees certain rights and fundamental freedoms, which can only be restricted in accordance with the law, and even then, only as long as the restrictions are rational and can be defended in a society that permits the practice of freedom and promotes and protects human rights, equality, and dignity. To determine the validity of any such restriction, all relevant factors must be considered, such as

a) The type and significant of the rights or fundamental freedom being limited. b) The significance of the restriction purpose.
c) The extent and nature of the restriction.
d) The need to safeguard the enjoyment of rights and fundamental freedoms of all individuals without infringing upon the rights and fundamental freedoms of others.
e) The relationship between the restrictions and its intended utility, as well as, if an alternative exists, which is not such restrictive manners to achieve the same objective. ''

The above shows no absolute rights: all rights are limited. The Constitution of Kenya also protects the rights to culture by extending the right to take part and enjoy the cultural practices of

[141] United Nations High Commissioner for Refugees, 'Refworld | General Comment No. 18: The Right to Work (Art. 6 of the Covenant)' (*Refworld*) <https://www.refworld.org/docid/4415453b4.html> accessed 26 April 2021.

[142] Omar Salah and Christa Rautenbach, 'Islamic Finance: A Corollary to Legal Pluralism or Legal Diversity in South Africa and the Netherlands' (2015) 48 Comparative and International Law Journal of Southern Africa 488.

[143] 'Kenya Law: The Constitution of Kenya' <http://kenyalaw.org/kl/index.php?id=398> accessed 9 May 2023.

[144] Kenya Law: The Constitution of Kenya,2010, Chapter 4, Article.19-s 24

a person,[145] and that a person should not be forced to participate in the cultural practices of another tribe or group,[146] which means that the norms and beliefs of one cultural group, should not be imposed on another group, if one group practices male primogeniture, and another does not, then the second group should not be forced to follow the cultural practices of the first one. There is no simple hierarchy of rights that can clear the doubt on the relationship between cultural rights and equality; however, as it can be seen in the preamble and Articles 19 to 59 which deals with the Bill of Rights of the 2010 Constitution of Kenya, the main aim of it is to guarantee and protect the equality of rights, and so any law or practices that are against that is not enforceable or applicable to the extent of it goes against the constitution.[147] Cultural practices can no longer be an excuse to discriminate against people and avoid scrutinizing actions by the Constitution.[148] For that reason, if the validity of a cultural practice is in question regarding its consistency with any written law, including the Constitution and the rights provided by the constitution, especially against discrimination, then the equality that the Constitution guarantees will prevail.[149] In *Bhe v Magistrate, Khayelitsha* case, the South African Constitutional court declared male primogeniture discriminatory as it is against the Constitution in dealing with the equality guaranteed by their Constitution.

Furthermore, the rights guaranteed to citizens and the laws in place, be they customary or statutory, must be in accordance with the Constitution,[150] and the right to culture and language can be enjoyed in accordance with the proviso under the rights declared by the constitution, which elevates the right to equality over the right to cultural practices.[151] Although a decision in the

[145] The Constitution of Kenya,2010, Article.44

[146] The Constitution of Kenya,2010, Article. 44 (3)

[147] Else A Bavinck, 'Conflicting Priorities: Issues of Gender Equality in South Africa's Customary Law' (2013) 5 Amsterdam Law Forum 20. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/amslawf5&i=148

[148] Rautenbach, Plessis and Pienaar (n 107).

[149] Catherine Albertyn, 'The Stubborn Persistence of Patriarchy: Gender Equality and Cultural Diversity in South Africa' (2009) 2 Constitutional Court Review 165.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/conrev2&i=165.

[150] The Constitution of Kenya,2010, Article. 2(4)

[151] E Kofi Abotsi, 'Customary Law and the Rule of Law: Evolving Tensions and Re-Engineering' (2020) 37 Arizona Journal of International and Comparative Law 135.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/ajicl37&i=161.

Southern part of Africa, in the matter of *Shilubana v Nwamitwa*,[152] recognized women claim to be given priority, or at least equal rights with men in a matter of inheritance, in this case, the taking over of the leadership of the *Valoyi clan* was based on male primogeniture which was later dropped when the elders changed the customs and allowed the leadership to be able to pass to female members of the clan. It was done in accordance with the South African written Constitution.

Culture and recognition of gender equality can be reconciled, culture is evolving, and a case-to-case study on its practice and the constitutional requirement of equality must be taken to find out the extent to which it has reconciled with the rights guaranteed to humans and the Constitution-mandated equality and the way it can be transformed to respond to the demand for equality.[153]

Even though through the Constitution, Kenya, in specific, and East Africa, in general, have made an appreciable stride in ensuring that equality is granted and guaranteed to everyone, the misunderstanding of African culture and over-emphasis on male primogeniture have brought about the culture being seen as discriminatory, hence the war on African culture.[154]

2.9 POLYGAMY

The practice of polygamy is common in Africa, especially in upcountry and small towns; Kenyan Marriage Act 2014, in section 10, permits polygamous marriages –a marriage in which a man has more than one wife. Tanzania and Uganda also have practiced polygamy in their laws, The law of Marriage Act 1904 in Uganda, which has been amended severally, permits polygamy

[152] B Mmusinyane, 'The Role of Traditional Authorities in Developing Customary Laws in Accordance with the Constitution: Shilubana and Others v Nwamitwa 2008 (9) BCLR 914 (CC) Notes' (2009) 12 Potchefstroom Electronic Law Journal 135.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/per2009&i=468.

[153] Victoria Bronstein, 'Confronting Custom in the New South African State: An Analysis of the Recognition of Customary Marriages Act 120 of 1998 Notes and Comments' (2000) 16 South African Journal on Human Rights 558.

[154] Norah H Msuya, 'Challenges Surrounding the Adjudication of Women's Rights in Relation to Customary Law and Practices in Tanzania' (2019) 22 Potchefstroom Electronic Law Journal 1.

in section 6,[155] and the 1971 Marriage Act in Tanzania, in section 13, allows a man to have more than one wife.[156] So this type of marriage is widely practiced in the three East African countries of Kenya, Uganda, and Tanzania. In traditional African societies, polygamy is often seen as a symbol of wealth, status, and power, as well as a means of increasing the size of one's family and ensuring more descendants. The motivations for polygamy can vary, but it is often viewed as preserving cultural and social traditions. However, it can also lead to tension and conflict within families and is often controversial in some societies.[157] It can take two forms: polygyny (one man with multiple wives) and polyandry (one woman with multiple husbands).

Polygyny, specifically, is about one man having multiple wives at the same time. This is the most common form of polygamy and is widely practiced in many societies, including some African cultures.[158]

In contrast, polyandry refers to the practice of a woman having more than one husband at the same time. This form of polygamy is much less common and is primarily found in certain indigenous societies in India, Tibet, and Nepal.

Both forms of polygamy can have cultural, social, and economic motivations, leading to complex family dynamics and relationships. However, polygyny is more widely practiced and more widely recognized than polyandry. With the advent of colonisation, polygamous marriage in Africa has been attacked as anti-women and barbaric; the coloniser brought monogamy to Africa, and there have been campaigns against polygamy as oppressive to women.[159]

---

[155] Richard Lusimbo and Austin Bryan, 'Kuchu Resilience and Resistance in Uganda: A History' in Richard Lusimbo and others (eds), *Envisioning Global LGBT Human Rights* (University of London Press 2018) <https://www.jstor.org/stable/j.ctv5132j6.20> accessed 30 May 2023.

[156] Larry OC Chukwu, 'The Metamorphosis of Polygamy in Private International Law' (2014) 6 KNUST Law Journal 67.

[157] Lea Mwambene, "What is the Future of Polygyny (Polygamy) in Africa," Potchefstroom Electronic Law Journal 20 (2017): 1-33Lea Mwambene, 'What Is the Future of Polygyny (Polygamy) in Africa' (2017) 20 Potchefstroom Electronic Law Journal 1.

[158] Penelope E Andrews, 'Who's Afraid of Polygamy - Exploring the Boundaries of Family, Equality and Custom in South Africa Symposium: New Frontiers in Family Law' (2009) 2009 Utah Law Review 351. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/jlfst11&i=313

[159] Lyimo Polygamy in Sub-Saharan Africa and the Munus Docendi: Canonical Structures in Support of Church Doctrine and Evangelization (Doctoral dissertation, Université Saint-Paul Canada, 2011).Prosper B Lyimo, 'Polygamy In Sub-Saharan Africa And The Munus Docendi: Canonical Structures In Support Of Church Doctrine And Evangelization'.

2.10 The head of the family

The head of the family was primarily a man duty bound to provide utmost care to the whole family and control the family's estate. The property under the customary African Law was divided into a house, personal, and general property, and the general property was not allotted to any specific house, especially in cases of polygamous marriage; a house property consisted of property that was assigned to one house, and it belonged to the children and wife of that specific house; and personal property, was individually acquired but under the control of the head of the family.[160] Under customary laws of Africa, the rules of intestate Succession were aligned with the interest of saving the family property and safeguarding the name upon the death of the head of the family.

Even though the head of the family had much power regarding the management of the family, he could not act impulsively; he had to consult with the rest before acting upon any matter touching on the family. However, it was his responsibility to support and maintain the whole family.[161] The family head had to pay any damages, fines, and debts legally imposed on the family; family members were to act through the head, and any legal matters were initiated through him. The head of the family had to be respected by the other members and accorded all the necessary respect and honour.[162]

[160] IP Maithufi and JC Bekker, 'The Recognition of the Customary Marriages Act of 1998 and Its Impact on Family Law in South Africa' (2002) 35 The Comparative and International Law Journal of Southern Africa 182. http://www.jstor.org/stable/23252206.

[161] TW Bennett, 'The Cultural Defence and the Custom of Thwala in South African Law' (2010) 10 University of Botswana Law Journal 3. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/unbotslj10&i=3.

[162] Radcliffe-Brown, A. R. *Africa: Journal of the International African Institute* 11, no. 3 (1938): 364–66. https://doi.org/10.2307/1155657.

2.11 The order of Succession in African customary Law and factors affecting it

Succession under the traditional Law is affected by the following

2.11.1 Gender of the heir

The gender of an apparent hair is very significant when deciding the devolvement of the property.[163] Women were not allowed to inherit; they were categorised along with minor children and placed under the care of either the father or the husband, depending on the women's marital status.[164] Succession was a reserve for men, most so the eldest in the family; women could not be the head of the family under the customary Law of Africa, and the main reason for that was her gender. It suffices to state that, under constitutionalism, and as will be discussed in the succeeding chapters, this is no longer the case; inheritance and Succession have been accorded to everyone without discrimination based on sex or gender.[165]

2.11.2 The family Class

In cases of polygamy, many houses are under the head of one man, and in each household, members are ranked as per their status of birth and gender, and at the same time, they have ranked in accordance with their status at birth in the whole polygynous family set up, for instance, a man could be the first born to his mother who is the second wife of his father, that would still not make the said man, the head of the family, if the first wife has sons, upon the death of their father.[166] It is important to note that if the first wife had given birth to only girls, then the sons born by the

---

[163] Johanna E Bond, 'Gender, Discourse, and Customary Law in Africa' (2009) 83 Southern California Law Review 509.. *HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/scal83&i=515.

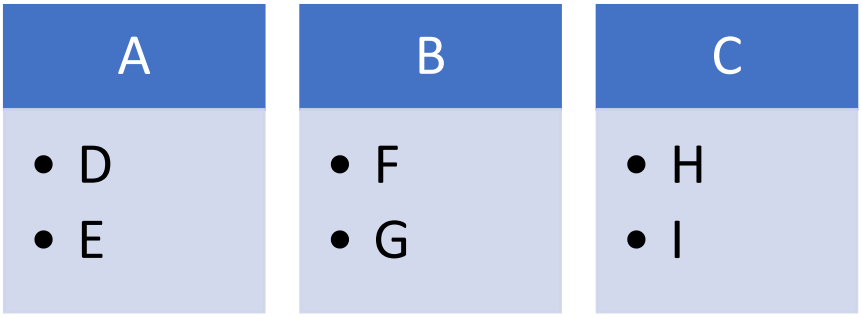
[164] J Osogo Ambani and Ochieng Ahaya, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospect of Customary Law in the New Constitutional Era' (2015) 1 Strathmore Law Journal 41.. *HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/strathlj1&i=53.

[165] MC Schoeman-Malan, 'Recent Developments Regarding South African Common and Customary Law of Succession' (2007) 10 Potchefstroom Electronic Law Journal 1.. *HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/per2007&i=103.

[166] Etienne Patin and others, 'Dispersals and Genetic Adaptation of Bantu-Speaking Populations in Africa and North America' (2017) 356 Science 543.& Beidelman, T. O. (1982). [Review of *The Bantu-Speaking Peoples of Southern Africa*, by W. D. Hammond-Tooke]. *The International Journal of African Historical Studies*, *15*(3), 537–538. https://doi.org/10.2307/218174

second or third wife would still be the ones to succeed their father; women were not permitted to lead or inherit the status of their fathers.[167]

In cases of a huge extended family, the class or position of a child depends on that of his father. For instance, if the father were the firstborn, then all his children, especially his son, would rank higher than the children of his brothers, even if those of his brothers were older than his.[168]Under traditional African Law, the main or great wife was the first to be married; the succeeding wives and their children accorded her the ultimate respect. The first wives' children, especially sons, were the apparent heir of their father's property.[169] This can be explained using the following diagram.



Because of the nature of the family set up in African customary Law, the above diagram represents only male heirs; A, B, and C are brothers, and A is the firstborn, followed by B and C, making A the apparent heir from their father. These three brothers each have two sons; A has D and E as his sons; so, according to family ranking, upon the passing of A, his sons D and E would be the ones to take over from him and not his brothers, B and C, even if B and C are older than A's children. If A has no male heirs, B would be the next in line, and his sons would rank higher than C's, even if C's sons are older than B's.

[167] Grant (n 123). http://www.jstor.org/stable/27607953

[168] W Bertelsmann and others, 'Developments in the Law and Administration of Justice of the Bantu: Survey of 1971 and 1972' (1974) 37 Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law) 70. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/tyromhldre37&i=78.

[169] Lloyd A Fallers, 'Changing Customary Law in Busoga District of Uganda' (1956) 8 Journal of African Administration 139. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/jrnlafa8&i=141.

2.11.3 The house ranks

In a family group, every house is ranked hierarchically, especially in cases of polygamous marriages, in which each marriage constitutes a different rank in the hierarchy; however, all households have one head, that is, the husband; the ranks of each household are based on the time the marriage was solemnised and the main or great wife's descending group.[170]

The first wife of the head of the family was known as the great or main wife, or in accordance with the *luo* culture, a tribe in Kenya; they were also known as *mikayi*; their children were given priority in terms of inheritance.[171] Therefore, the children of Mikayi/ great/ main wife were ranked higher, even if the other wives had children older than the first wife's children.

The house rank also depended on the family the woman came from before marrying the man if her father was wealthy and powerful. In some African tribes, the second wife could be ranked higher than the first wife if the second wife is a descendant of royalty. The position of the mother would determine the rank of the children.[172]

2.12 Special and General Succession

Under the existing custom, the African succession system can be grouped into special and general Succession to provide for a specific house and general successors. General Succession refers to the Succession of the whole property, including the house left behind by the deceased, meaning the successor takes over managing the entire family property left behind by the deceased. Special Succession, on the other hand, gives the successor an entitlement to the estate from their house only, so in cases of polygamous marriages, the son from the second wife can inherit the

[170] Edwards, G. Franklin. Review of *Cultural Change*, by I. Schapera. *The Journal of Negro Education* 13, no. 1 (1944): 88–90. https://doi.org/10.2307/2292930.

[171] Betty Potash, 'Some Aspects of Marital Stability in a Rural Luo Community' (1978) 48 Africa: Journal of the International African Institute 380. *JSTOR*, https://doi.org/10.2307/1158803. Accessed 1 Jul. 2022.

[172] YO Jansen, 'Unifying Babylon - Can Post-Colonial States Successfully Unify a Plural (Legal) Society - A Case Study of the Uganda Law Reform Commission's Efforts to Reform Family Law in Accordance with International Law and Its Effect on Women's Property Rights' (2006) 16 Widener Law Journal 71. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/wjpl16&i=79.

property belonging to their house only but not those of the whole family left behind by the head of the family. [173]

2.13 The responsibilities and authority of the successor

Under the African customary Law, the benefits, titles, and duties devolved to the successor; that is, upon the passing of the head of the family, the successor, in case of general Succession, takes over all the power and duties held by the deceased head of the family, on the other hand in the care of special Succession, the successor, takes over the authorities, responsibilities, and rights of the head of the family, to a specific house.[174] The duties of the house successor are:

a) Collection and payment of family debts
b) Taking care of the family members and giving them support where necessary.
c) Helping unmarried siblings get required items for the same, for instance, helping younger brothers pay dowry and sisters with the wedding garment.
d) Taking care of the widow and children is minor.

The successor of a specific house, however, has the following rights:

a) The part or whole of the earnings by the minor and widow left under his care.
b) The dowry or bride price paid to the family for the marriage of their daughter under the customary Law.
c) Any debt that was owed to the family head and paid after the passing of the head of the family.[175]

[173] Christa Rautenbach, 'Indian Succession Laws with Special Reference to the Position of Females: A Model for South Africa?' (2008) 41 The Comparative and International Law Journal of Southern Africa 105.
[174] Shelly Kreiczer-Levy, 'Religiously Inspired Gender-Bias Disinheritance- What's Law Got to Do with It Symposium on Estate Planning: Moral, Religious and Ethical Perspectives' (2009) 43 Creighton Law Review 669.. *Hein Online*, https://heinonline.org/HOL/P?h=hein.journals/creigh43&i=675.

[175] L Amede Obiora, 'Reconsidering African Customary Law Customary Law: Problems and Possibilities' (1993) 17 Legal Studies Forum 217.

The responsibilities of the general heir, who takes over the general authorities, responsibilities, rights, and duties that the head of the family had before passing, especially in cases of polygynous families, are; he assumes the entire duties the family head had before generally passing, including controlling the general property of the polygynous family; payment of the family debt left behind by the father and collection of the debt owed to the family, and most importantly, it is his duty to perform the rituals for the family.[176]

The successor takes over the property and assets, including the debt the deceased owed, even if the debt is more than the assets; however, the debt owed was not from the pocket of the successor, but the assets left behind by the deceased, that is, the family estate left behind, not from the personal property of the successor. The heir was held accountable for the deceased's sins; however, the responsibility was limited to those that arose before the passing of the head of the family, or if he acknowledged the sins before passing, the sin here included money owed for causing the death of a person or engaging in adultery, etc., these liabilities were limited to the level the estate could comfortably afford.[177]

The successor is duty-bound to protect and provide for the widow left behind; the widow has a right of residence, and the heir's duty is to give her a house for the same. The widow has a right to utilize the assets left behind by the deceased for her and her children if she does not leave the deceased's home and does not get remarried. The successor is not permitted to sell the family house used by the widow without consulting the widow, and the sale must be for the good of the children of the deceased and the widow.[178]

Under the African customary Law, a widow could approach the chief of the village in case the successor failed to provide for and protect her and her children; the chief would then allow the

[176] See Christa Rautenbach, 'Modern Day Impact of Customary Succession Laws in South Africa' [2004] International Journal of the Humanities 673.

[177] JC Bekker and M Buchner-Eveleigh, 'The Legal Character of Ancillary Customary Marriages' (2017) 50 De Jure 80.

[178] Catherine A Hardee, 'Balancing Acts: The Rights of Women and Cultural Minorities in Kenyan Marital Law Note' (2004) 79 New York University Law Review 712.

widow to establish her own home, and someone would be appointed to take care of her and her children; this shows that mistreatment of a widow was not allowed.[179]

2.14 The order of Succession

Under the traditional laws or customary Law in East Africa, intestate Succession was determined by primogeniture, Succession on death, and Succession by men in their lineage only. Even though polygamy was common under the African setup, there were cases of monogamous marriages, too, and the customary laws of Africa provided for the way the property could devolve under both polygamous and monogamous marriages. The devolution of property in those two types of marriages (polygamy and monogamy) differs, and they are discussed as under: -

2.14.1 Monogamous marriages, order of Succession

a) The firstborn son, if he is no more, then his firstborn son.
b) If the firstborn son did not leave behind a son, then the property and title devolve to the second-born son and his male children according to birth.
c) If the deceased did not have sons or the sons had passed on before him, the deceased's father would take over his entire property if he were still alive.
d) If the deceased's sons and father died before him, then his oldest brother would inherit the property and titles of the deceased.
e) If the eldest brother also died before the deceased, then the eldest brother's son would succeed the deceased, that is, the deceased nephew.
f) If the deceased nephew is no longer alive and died before the deceased and the brothers and father of the deceased have no other known male heir, then the deceased's grandfather or any male heir of the grandfather would succeed the deceased's property and titles.

[179] Juanita Jamneck, 'The Problematic Practical Application of Section 1(6) and 1(7) of the Interstate Succession Act under a New Dispensation' (2014) 17 Potchefstroom Electronic Law Journal 972.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/per17&i=933.

g) In case no heir is available to succeed the deceased, even after many generations, the traditional ruler or the chief would take over his property and titles and care for the widow and children left behind.
h) And the government would take the property under colonial times in an area with no known traditional ruler.[180]

2.14.2 Polygamous marriages, order of Succession

In situations in which a man was polygamous, that is, he had multiple wives at the same time, every marriage created a different house, and the husband was the head of all the houses. The house was ranked based on the order of marriage, not age, so even if the first wife were younger than the second one, the first one would still rank first.[181] Polygamous marriages can be categorised into complex and simple forms.

Succession under simple polygamous marriage is very similar to the monogamous marriage, in which the eldest son of the first/senior wife succeeds the father; if the first-born son predeceased the intestate, then his male descendants, but if he did not have any male descendants then the second son of the senior/first wife, or his sons, would succeed the father. Likewise, if there were a lack of male heir from the first wife, then the male heirs from the second wife would succeed the father.[182]

In a complex polygamous marriage, the rank of a wife is significant in terms of inheritance; the great or main wife being the first one to get married, is accorded the ultimate respect and priority in everything, and all other wives must show her respect because they are subordinate to her. In terms of Succession, the main or great wife's firstborn son succeeds the father and any

[180] GJ van Niekerk, 'A Common Law for Southern Africa: Roman Law or Indigenous African Law' (1998) 31 Comparative and International Law Journal of Southern Africa 158.& JMT Labuschagne, "A Sourcebook of African Customary Law in Southern Africa," De Jure 25, no. 2 (1992): 524-525

[181] Chigozie Nwagbara, 'Recognition of Polygamous Marriages under the English Law' (2014) 26 Journal of Law, Policy and Globalization [i].

[182] AS Welsh, 'Native Customary Law in the Union of South Africa' (1958) 10 Journal of African Administration 83.

property that has not been given to any specific house, while the eldest sons of the rest of the house can only inherit the property allotted to their house by the father.[183] In case the succeeding houses do not have a male heir, then the firstborn son of the great/ main house would inherit the whole property, including that of the inferior house; at the same time, if the tremendous/ first wife has no son, then the eldest son from the succeeding or inferior house would succeed the father and take over the whole property.[184]

2.14.3 Taking care of heirless successor

In accordance with the traditional laws of Africa, marriages were entered into for one main reason: the continuity of the man's name and to appease the ancestral spirits; a man is expected to have children, most so sons, to maintain his lineage beyond him. Under the indigenous African system, descendants are significant because it would mean the deceased has someone to take over his position and look after his household and widow upon his passing; however, in some cases, the parties fail to have children. According to customary marriage, the dowry or bride price paid to the father of the bride for her hand in marriage is an exchange for her to reproduce children for the man.[185] For that reason, if one of the parties to the marriage cannot sire a child, then a substitution will take place, in that in case the woman cannot give birth, the man would be given a new wife from the clan of his wife,[186] and if it is the man who cannot give birth, then the man's brother or a close male relative would help him have an heir.[187]

---

[183] Celinhlanhla Magubane, 'The Imposition of Common Law in the Interpretation and Application of Customary Law and Customary Marriages' (2021) 15 Pretoria Student Law Review 336. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/pslr15&i=346.

[184] Patricia G Kameri-Mbote, 'Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences' (2002) 35 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 373. http://www.jstor.org/stable/43239047.

[185] Joycelin Chinwe Okubuiro, 'Application of Hegemony to Customary International Law: An African Perspective' (2018) 7 Global Journal of Comparative Law 232.*HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/glojoucl7&i=242.

[186] TW Bennett and NS Peart, 'The Dualism of Marriage Laws in Africa' (1983) 1983 Acta Juridica 145. *HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/actj1983&i=155.

[187] R JEAN CADIGAN, 'Woman-to-Woman Marriage: Practices and Benefits in Sub-Saharan Africa' (1998) 29 Journal of Comparative Family Studies 89. http://www.jstor.org/stable/41603548.

In several segments of Africa, under the traditional Law, there is a practice of sororate or, in other words, " the seed-raiser": when the wife cannot give birth, the custom of many Africa permits him to take the sister of the wife of someone from her side, to have heirs with, the children will be considered as his and his barren wife children.[188] Sororate takes place as follows:

1. If the first wife cannot give birth, the man can marry a seed raiser as a substitute; a second or subsequent marriage does not need a sorority.
2. Sororate can be taken if the wife dies without giving the man an heir.
3. The wife is beyond the fertility age and has not given birth to a son.
4. The marriage ended due to divorce, repudiation, or desertion, and no son was born during the subsistence of marriage.
5. The woman leaves behind young children due to her death, divorce, or desertion.[189]

In cases where there is an already son, or if the woman was still within the childbearing age, sororate was not allowed. The statutes of the wife, which were very important, especially in inheritance, could not be altered and replaced with that of the sororate; that is, the sororate was not even allowed to take over the house of the wife who could not give birth to a son. The seed raisers mostly were from the clan of the wife and the performance of customary marriage rites; at the ceremony, the statues of a seed raiser were declared and made clear to avoid confusion. The children of the seed raiser were considered that of the wife who could not bear children, and they had inheritance rights as if they were born by the main or great wife.[190]

Levirate is recognized under the traditional African laws; indigenous African laws permitted a male sibling or relative of the deceased to lay with the widow, and the children born

[188] EE Evans-Pritchard, 'Marriage Customs of the Luo of Kenya' (1950) 20 Africa: Journal of the International African Institute 132.

[189] AEMJ Pans, 'Levirate and Sororate and the Terminological Classification of Uncles, Aunts, and Siblings' Children' (1989) 28 Ethnology 343.

[190] Edwin W Smith, 'A Survey of African Marriage and Family Life' (1953) 5 Journal of African Administration 102.. *HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/jrnlafa5&i=104.

were considered to belong to the deceased in case the deceased did not leave an heir behind.[191] This shows that the passing of the spouse did not dissolve a marriage under the customary laws of Africa; the man's death was not the end of a marriage; the wife would be taken care of by the deceased's brothers and male relatives, and the children born were considered to be that of the deceased, this practice is still going on among the Nilotic tribes in East Africa.[192] The widow was not allowed to leave the homestead of her deceased husband.[193] Widow inheritance among *luos*- a tribe/ group of people that live in Kenya, Uganda, Tanzania, Rwanda, Burundi, Congo, and South Sudan is known as *"tero dhako,*" and the following principles guide it.[194]

1. Only a close relative of the deceased can inherit his widow; a son of the deceased cannot inherit any of the widows.
2. In some cases, a widow was permitted to choose from among the deceased's brothers and cousins, but in some cases, the elders would choose for her.
3. The widow had to consent to the union and was allowed to terminate the union any time she wanted.
4. The ceremony of the union was performed by the family of the deceased, which included the slaughtering of a male sheep or cow.
5. Older women were not expected to enter another union upon the passing of their husbands.
6. After the ceremony, the widow could choose to stay in her deceased husband's house or move in with the one who inherited her, but the deceased husband's estate would take care of her.
7. Children born by the widow's inheritor were those of the deceased and acquired entire inheritance right from the deceased's estate.

[191] Alison Redmayne and Christine Rogers, 'Research on Customary Law in German East Africa' (1983) 27 Journal of African Law 22.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/jaflaw27&i=28. & Harald Sippel, 'Customary Family Law in Colonial Tanganyika: A Study of Change and Continuity' (1998) 31 The Comparative and International Law Journal of Southern Africa 373.

[192] Regine Smith Oboler, 'Is the Female Husband a Man? Woman/Woman Marriage among the Nandi of Kenya' (1980) 19 Ethnology 69.. *JSTOR*, https://doi.org/10.2307/3773320. Accessed 17 Jun. 2022.

[193] Stamp (n 30).

[194] Aloys Ojore, 'LEVIRATE UNIONS AMONG THE LUO' <https://www.academia.edu/29779374/LEVIRATE_UNIONS_AMONG_THE_LUO> accessed 17 June 2022.

The *Bantus*, especially *Zulus* in the Southern and eastern parts of Africa, practice what is known as *Ukuzalela:-* this is a case in which the deceased left a male heir, and in case the widow is still within the childbearing age, a male relative of the deceased, would lay with her and have more children for the deceased.[195] The union had to be approved by the members of the deceased's family.

2.15 Provision of dependents and successors under the African customary Law

In polygamous marriages, a son from one house could be a successor in another house under some circumstances; for instance, if one of the wives did not have a son, a son from any other house can be appointed to succeed the house of the woman without a son, and the appointed son would cease from succeeding from his biological mother's house, however, in case a male heir is born, the appointed son would go back to his biological mother's house. But, first, the family had to approve moving a legitimate son from one house to another.[196]

Indigenous laws of Bantus permitted a man who had sired a son out of wedlock to bring the illegitimate son and make him an heir of the house without a male successor. The head of the house had to pay some damages in the form of a head of cattle to the family of the mother of his legitimate son; however, if the man married the woman, later, the illegitimate son would become legitimate hence a legal successor.[197]

If he did not have sons, the head of the family could adopt a son from one of his close relatives; the adopted child had to be related to the head of the house by blood and could be a nephew or some other relative within the clan. The adopted son could be of any age: a young child or an adult male. The family had to sanction the adoption and approve the son before the head of

[195] Maithufi and Bekker (n 160).

[196] Leonard Lazar, 'Review of Bantu Law in South Africa' (1970) 19 The International and Comparative Law Quarterly 733.*JSTOR*, http://www.jstor.org/stable/758406. Accessed 20 Jun. 2022.

[197] Ewelukwa (n 138).

the house could bring him home. The man of the house would sometimes pay the parent of the person to be adopted in the form of cows. The adopted son would then be the successor.[198]

2.15.1 *Inter Vivo* Asset disposition

Succession comes into effect after the death of the head of the household, but in some cases, the man of the house could distribute his wealth/ assets before his passing; this has to be done either in accordance with the traditional customs or final disposition that resembles the modern-day wills, as it will be seen in the succeeding chapters, the Kenyan, Ugandan, and Tanzanian succession laws, permitted disposition of assets *inter vivos* and deathbed distribution of assets.

On his deathbed, the head of the family can declare the assets and distribute them before passing; this can be done even when he is still in good health. However, in distributing the assets, customary laws must still be followed; for example, according to traditional laws that governed Succession, the family head could not grant property to the daughters while disinheriting the son; he had to follow the rule of primogeniture; the head of the family, could not change the status and ranking of a different house, in favour of another; could not arbitrarily, exclude an heir from an inheritance, unless doing so was sanctioned by the customary laws.[199] The wishes of the head of the family on his deathbed had to be well communicated to the whole family, including the successors and the family council; these wishes were respected and honoured. However, anyone who did not agree with the decision of the family head was allowed to make it known at that time and lodge a complaint in traditional courts.

[198] Anthony C Diala, 'Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa Focus: Twenty Years of the South African Constitution' (2014) 14 African Human Rights Law Journal 633.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/afrhurlj14&i=650.

[199] TW Bennett, 'Conflict of Laws - The Application of Customary Law and the Common Law in Zimbabwe' (1981) 30 International and Comparative Law Quarterly 59.. *JSTOR*, http://www.jstor.org/stable/759375. Accessed 22 Jun. 2022.

2.15.2 Disinheritance of a son

The head of the family was allowed to not give the son apparent hair and property under some circumstances, as per the customary Law. Disinheritance because of the following:[200]

a) If the son had been found guilty of theft, prodigality, or any other serious criminal offense.
b) The apparent heir being disobedience to the father, physically harming or chasing the father out of the homestead and having sexual intercourse with a member of the family, for instance, the younger wives of the father or cousins.
c) If the son is mismanaging the family wealth, being extravagant with the family property.
d) If the son is illegitimate, born by someone else who is not the head of the family.
e) If the son suffers from insanity
f) If the son has refused to take part in contributing to the maintenance of the family

The man of the house (the leader) must convene a family meeting and publicly declare the intention to exclude the son from inheritance; in the same meeting, the son who has been disinherited has a chance to defend himself; the family council would consider both sides, then make a report to the local chief regarding disinheritance.[201] In modern courts, the disinherited son can appeal the decision of the family tribunal, but the court can meddle only if the family's customary law procedure is not adhered to. The head of the family can also decide to reinstate the disinherited son at any time and allow him to take part in the distribution of the property.[202]

[200] Shelly Kreiczer Levy and Meital Pinto, 'Property and Belongingness: Rethinking Gender-Based Disinheritance' (2011) 21 Texas Journal of Women and the Law 119. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/tjwl21&i=121

[201] Mala Htun and S Laurel Weldon, 'State Power, Religion, and Women's Rights: A Comparative Analysis of Family Law Symposium: Part II: Claims in Context' (2011) 18 Indiana Journal of Global Legal Studies 145.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/ijgls18&i=149.

[202] Tia Venter and Jeanne Nel, 'African Customary Law of Intestate Succession and Gender (In)Equality' (2005) 2005 Journal of South African Law 86.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/jsouafl2005&i=92.

2.16 Conclusion

I have covered terms essential to succession under the traditional African Law, which is very common in east Africa. The chapter covers the responsibilities of the head of the family, male primogeniture, and polygamous marriage. I have also covered the devolution of the duties and rights of the head of the family upon the passing of the occupant of that position. Finally, the chapter explains the rule of customary Law and how gender and house rank form parts of Succession under the customs of various African states.

Chapter 3: THE RECOGNITION, IMPLEMENTATION, AND EVOLUTION OF INTESTATE SUCCESSION IN KENYA AND THE INFLUENCE OF COLONIZATION ON THE CUSTOMARY LAWS

3.1 Abstract

The concept of succession has existed for centuries and refers to the transfer of title and rights over property through the customs and laws of distribution and descent. However, the specific process of succession can vary significantly between different communities and societies and is often shaped by cultural norms and practices. For example, in communities where same-sex marriage is recognized, the term "spouse" may include same-sex couples, while in societies that permit polygamy, the process of property division may differ from those that practice monogamous marriages.

In Kenya, the right of a girl child to inherit from her father's estate is often contingent on whether or not she is married. In some cases, even if she has been previously married and divorced, she may still be entitled to inherit from her father's estate, but only if her father returned the dowry paid for her to her former husband. Such variations in the succession process highlight how different societies approach the transfer of property rights and responsibilities from one generation to the next.

3.2 INTRODUCTION

A singular, overarching law does not regulate the inheritance process in Kenya. Despite the widespread acceptance of inheritance as a means of transferring property from a deceased individual to their living beneficiaries, there exists a diversity of laws dealing with inheritance in Kenya. This variation can be attributed to the different tribes and communities that inhabit the country, each with its cultural norms and practices that inform their approach to inheritance. Although the Succession Act and the Constitution of Kenya provide equal weight to all laws pertaining to succession, there is no distinction between old and new laws, even though during British colonialism in Kenya, laws were categorized as either old or new. As a result, the

indigenous laws of Africa were deemed outdated and referred to as old, while laws received from England were considered modern. Even after Kenya gained independence, this categorization persisted. Therefore, the laws governing inheritance in Kenya are diverse and multifaceted, reflecting the cultural diversity of the country and the complexities of its history.[203]

It is wrong to aver that succession laws dealing with inheritance started in Kenya with the advent of colonisation; the communities living in Kenya had a system that was in place before the English colonised Kenya, a system that outlived the colonialisation, just because the English could not understand the system does not mean it did not exist or that it was inferior. There were efforts to consolidate all the laws and customs that dealt with Succession in Kenya when England directly ruled Kenya, but it did not stop with the independence; the trend continued even when Kenya was a free independent nation.[204] However, the succession law in Kenya has been written in line with the system in England, and the African customary laws/ indigenous laws dealing with Succession are used when the English Law is silent on an issue.

The laws and institutions dealing with succession in Kenya need to realize three core realities and pressure: modernizing the applicable laws and institutions dealing with succession in Kenya. The idea to bring all matters of succession to modernity- this has been in discussions since the times of colonialisation, even though the English government in Kenya, promoted the application of received- western laws and preferred them to customary/ indigenous African customs; however, the promotion of personal laws were basically around marriage and not succession, especially the idea of monogamous marriage, which in most cases brought a lot of confusion as many African converts celebrated marriages under different regimes, that is, under Christian regime which permitted only monogamy and also customary marriage which permitted polygamy; the confusion occurred when the first marriage was under civil or Christian marriage regimes and the subsequent marriage under a customary regime, this meant that in the event of

[203] Audrey Wipper, 'The Maendeleo Ya Wanawake Organization: The Co-Optation of Leadership' (1975) 18 African Studies Review 99.. / Juma, Laurence. "Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes." *St. Thomas Law Review*, vol. 14, no. 3, Spring 2002, p. 459-512. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/stlr14&i=469.

[204] Gibson Kamau Kuria, 'English Law - The New Dimension: A Review Article' (1976) 12 East African Law Journal 267.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/easfrilaj12&i=271.

intestacy, the second wife and her children would be locked out of inheritance, as was the case in *Re Ogollas' Estate (1978) KL.R.18) and Ruenji's estate Miscellaneous Civil Case 136 of 1975* (both discussed in detail later in this chapter)

3.3 Background of the Chapter

Kenya is a country of unity in diversity. It is the home of many tribes and communities. Apart from the legally recognized 45 tribes in Kenya, other communities seeking recognition are coming up now and then; *the Makonde, Nubians, and Vumbi* are waiting for recognition by the laws of Kenya, and every tribe has a different set of customs and rules governing their personal lives including inheritance. The intention behind the 1981 Succession Act was to harmonise all the laws governing inheritance and put them together to govern all the people in the country; as it will become apparent in this chapter, this failed.[205]

The comprehensiveness of the Act (Law of succession 1981) can be seen by the way it has tackled the testate and intestate succession issues. The Act has given guidelines on how the matters dealing with polygamy, cohabitees, and concubines are to be dealt with regarding inheritance, and the Act has also covered the issues of the gender of the heir, how the property of the deceased is to be devolved to all his children without gender-based discrimination. The Succession Act 1981, however, is not fully clear on the issue of intestacy; part V of the Act, which is the basis of this thesis, has not only left out some communities from its application but also has pushed some communities to resort to customary laws to deal with intestacy matters.

3.4 Applicable Law

The succession Act of 1981, which came into effect on 1st July 1981, is the primary succession law governing all the succession issues in Kenya and covers most of the communities living in Kenya, except the Muslims. As it will become clear later in this chapter, four different sets of laws dealt with succession under the colonisation era; there were laws for every community

[205] *Succession Act 1981 section 2(1),and the preamble of the Act.*

in Kenya, a different set of laws governing succession issues for Africans, Europeans, Indians, and Muslims.[206]

The universality of the Act can be seen in section 2(1), which states that *unless there is a clear statement to the contrary in the Act or any other legal document, the rules and regulations outlined in the Act will be considered part of Kenyan law. Furthermore, these regulations will apply comprehensively to all cases of inheritance, whether intestate or testamentary, of individuals who pass away after the commencement of this Act. Additionally, the regulations will apply to the management of the estates of such individuals. Therefore, this Act serves as a universal framework for managing estates and inheritance in Kenya, providing clear guidelines for the distribution and management of property consistently. It is important to note that any other legal document must explicitly indicate that it supersedes or modifies the regulations outlined in this Act to take precedence over it.* The intention of the framers of the Act can again be seen in section 2(2), in which the property of those who died before the Act came into effect and was exempted from its application; however, the parties involved were given leeway to decide to use the Act to deal with the devolution of the property.[207]

3.5 The laws of succession in Kenya during the English rule

English common law and colonial statutes heavily influenced the succession laws in Kenya during English rule.[208] These laws governed the transfer of property and assets from a deceased person to their heirs. The succession laws in Kenya have undergone significant changes over time, reflecting societal and legal developments. Before the arrival of the British in Kenya, the local communities had their customary laws of succession. However, during the colonial period, English common law was introduced and applied to all communities in Kenya, regardless of their cultural

[206] Duncan Okelo, "The Law of Succession in Kenya: A Critical Analysis of the Legal Regime," Journal of African Law 59, no. 2 (2015): 221-235 & Mumbi Mathangani, 'Women's Rights in Kenya: A Review of Government Policy Recent Developments' (1995) 8 Harvard Human Rights Journal 179.

[207] 'Kenya: Succession, Customary Law Judicial Decisions' (2012) 38 Commonwealth Law Bulletin 571.&Tom Kabau, "Customary Law and the Law of Succession in Kenya," East African Journal of Peace and Human Rights 25, no. 1 (2019): 120-138

[208] Winnie Luseno, "Intestate Succession in Kenya: A Critical Analysis of the Law of Succession Act," African Journal of Legal Studies 11, no. 1-2 (2019): 1-18

and religious backgrounds.[209] The English common law recognized two types of property: real property (land) and personal property (everything else). The laws of succession for real property were governed by the doctrine of primogeniture,[210] which meant that the eldest son inherited all the land upon the father's death. However, this doctrine was not widely applicable in Kenya, as some communities did not have a tradition of primogeniture.

The colonial government introduced various statutes to govern the succession laws in Kenya. One of the most significant was the Administration of Estates Act of 1902, which established a system of probate and administration of estates. This law required that a court administer all estates of deceased persons and that the court appoints the executor or administrator. The Act also set out the rules of succession for personal property based on English common law principles.[211]

In 1928, the colonial government passed the Wills and Intestacy (Amendment) Ordinance, which amended the succession laws for personal property. This law introduced the concept of statutory next of kin, which meant that if a person died without a will, their property would be distributed among their next of kin in a specified order. The distribution order was based on the kinship relationship to the deceased, and the law recognized spouses, children, parents, siblings, and other close relatives as next of kin.[212]

In Kenya, the diversification of various laws dealing with family matters has also brought about confusion in succession laws;[213] there has never been a specific law governing everyone in

[209] Richard D Waller, 'Witchcraft and Colonial Law in Kenya' [2003] Past & Present 241.& Gilks, Brian G. "Succession Law in Colonial Kenya." Journal of African Law, vol. 13, no. 1, 1969, pp. 37–47. JSTOR, www.jstor.org/stable/745634.

[210] Manisuli Ssenyonjo, 'Culture and the Human Rights of Women in Africa: Between Light and Shadow' (2007) 51 Journal of African Law 39.

[211] Robert Martin, 'The Kenya Law of Succession Act, 1972 Comment' (1974) 10 East African Law Journal 93..

[212] Jackton B Ojwang and Emily Nyiva Kinama, 'Woman-to-Woman Marriage: A Cultural Paradox in Contemporary Africa's Constitutional Profile' (2014) 47 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 412.

[213] Adam H Bakari, 'Africa's Paradoxes of Legal Pluralism in Personal Laws: A Comparative Case Study of Tanzania and Kenya' (1991) 3 African Journal of International and Comparative Law 545.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/afjincol3&i=569.

the country regarding family matters.[214] As a result, towards the end of the 20th century, many African countries had to re-evaluate their intestate succession, Kenya included; however, this chapter focuses entirely on Kenya and the influence of English law on succession.

Until First June 1963, Kenya was an extension of the English government, and the laws and administration were done by the leadership of England, other than African customary laws, which existed before colonisation; however, indigenous laws were also later regularised under the Order-in-Council in 1897.[215] As a result, the laws dealing with succession matters in Kenya have always been divided into various segments: on the religious basis (Hindu and Muslim), African tribes (Customary/ indigenous laws), and statutory laws; this went on even after Kenya had attained her independence.[216]

The succession matters in Kenya were dealt with under four different laws and regimes before the succession Act of 1981 came into force, and they were as follows:

1. The Europeans in Kenya were governed by the Indian Succession Act of 1925; this Act was brought to Kenya by the English colonisers who had also colonised India then.
2. The people who practiced the Islamic faith had Islamic laws deriving from the Quran and the teaching of Prophet Mohamed, governing their family and succession matters; however, under the English system in Kenya, this was codified into the Mohammedan marriage and divorce Act 1920.
3. The Kenyans of Asian descent (most so from undivided India) who had chosen Kenya as their home, matters dealing with succession were governed by The Hindu Succession Act 1956.

[214] Raylene Keightley, 'Law of Succession (Including Administration of Estates) and Trusts Chapter 16' (2003) 2003 Annual Survey of South African Law 528. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/assafl2003&i=578.

[215] Eugene Cotran, 'The Development and Reform of the Law in Kenya' (1983) 27 Journal of African Law 42.. *JSTOR*, http://www.jstor.org/stable/745622. Accessed 24 Nov. 2022.

[216] Bruce J Berman and John M Lonsdale, 'The Labors of "Muigwithania:" Jomo Kenyatta as Author, 1928-45' (1998) 29 Research in African Literatures 16. & George Bennett, 'The Succession in Kenya' (1968) 24 The World Today 333.

4. For native Africans, apart from the customary law which governed all Africans, especially those who did not convert to Christianity, there was also the Africans Will Act of 1961, which gave the Africans power to make wills and transfer the ownership of their estate as they deemed fit.

The above is expounded in the forgoing paragraphs.

3.6 The acknowledgment of African Indigenous Laws in Kenya

The Constitution of Kenya recognizes the importance of African Indigenous/Customary laws and provides for their recognition and application in the country. Article 159 of the Constitution provides for the administration of justice, and it recognizes the diversity of Kenyan culture and the need to promote customary law. Specifically, Article 159(2)(d) *states that one of the principles of judicial authority is to "promote alternative forms of resolving disagreements, and traditional dispute resolution mechanisms is part of it as long as consistent with this Constitution.*" Article 159(2)(e) further provides that another principle of judicial authority is to "*apply international treaties and conventions ratified by Kenya to which it is a party, and any rules of international law applicable to Kenya*." The recognition of customary law is further reinforced in Article 2(5) of the Constitution, which provides that "*the international law as accepted by the family of nations across the world would be part of the Kenyan law after they are ratified*." This means that customary international law, which recognizes the importance of customary law in resolving disputes, is also recognized as among the laws that are applicable in Kenya.[217]

The Constitution recognizes that customary law can coexist with statutory law, as provided in Article 159(2)(a), which states that judicial authority "is sourced from the masses/ citizens and has to be applied in respect with the constitution and other written legislations."[218] The acknowledgment of African Indigenous laws is provided for in the Constitution of Kenya, which was promulgated in 2010. Article 11 of the Constitution recognizes culture as the nation's

[217] Chanan Singh, 'The Republican Constitution of Kenya: Historical Background and Analysis' (1965) 14 The International and Comparative Law Quarterly 878..

[218] Odenyo (n 75).

foundation and the Kenyan people's cumulative civilization. This recognition includes the traditional and indigenous laws of the various tribes that comprise the country. On top of this, the judiciary is bound by the Constitution under article 159 to protect the constitution and other legislations and ensure that the rule of law takes centre stage in Kenya, including the customary laws that are not against morality, Constitution, and justice and morality. The Constitution, therefore, acknowledges the customs of various tribes in Kenya as part of laws applicable in Kenya, subject to certain limitations.[219]

According to Article 78 of the Constitution, the National Assembly must enact legislation to give effect towards the recognition of indigenous law and regulate its usage in the formal justice system. The legislation is supposed to safeguard and acknowledge the traditional law, interests, and rights of individuals, communities, and groups. It is also required to ensure that customary law is consistent with the Bill of Rights and the Constitution. The Constitution also recognizes the role of alternative dispute resolution mechanisms, including indigenous law, in resolving disputes. The courts are duty-bound by Article 159 (2) (c) for the promotion of other ways of resolving conflict: mediation, conciliation, traditional dispute resolution mechanisms, and arbitration. In addition to the constitutional recognition of customary law, the Kenyan government has also taken steps to safeguard and market the rights of indigenous communities in the country. For example, the government has established the National Cohesion and Integration Commission, which includes promoting and protecting the entitlements of all communities in Kenya, including indigenous communities. The Commission is also responsible for promoting tolerance and understanding among communities and addressing issues of discrimination and marginalization. The constitutional recognition of African Indigenous/Customary laws in Kenya provides a legal framework for protecting and promoting the rights and interests of indigenous communities. However, it is essential to note that the usage of indigenous laws is subject to certain limitations and must respect the Bill of Rights and follow the Constitution.[220]

[219] Richard L Abel, 'A Bibliography of the Customary Laws in Kenya' (1970) 6 East African Law Journal 100.

[220] Abra Lyman and Darren Kew, 'An African Dilemma: Resolving Indigenous Conflicts in Kenya Forum: Sacred Earth: People Land Conflict' (2010) 11 Georgetown Journal of International Affairs 37.

The Judicature Act, in chapter 8, recognises customs of various tribes in Kenya as one of the origins of laws in Kenya; however, the caveat is that it is applicable only if it is not repugnant or contrary to the constitution or any written law; it also must not conflict with justice and morality. The Succession Act 1981 recognizes customary law exits and permits its application under the following circumstances.

1) Properties of the deceased who passed on before coming into effect of the succession Act 1981
2) Devolution of property, provided by the deceased under his will, is covered by the deceased's customary law.
3) Section 33 of the Succession Act 1981 provides for customary law application under certain circumstances provided in section 32, such as livestock, agricultural land, and some crops belonging to some nomad tribes, which the minister may specify as such.

Under the indigenous / African customary laws, land, which is the primary measure of wealth, is assumed to belong to the whole clan, headed by the eldest male member of the family; upon the death of the head, the second most senior man takes over the leadership; women were not considered equal to men in terms of administration or holding of property. Testamentary dispositions of the property were not recognized.[221] Some tribes in Kenya, like *Luos, Kalenjins, Luhya, and Kisii*, did not recognise women's rights to inherit from their fathers and husband property.[222] African Customary law tends to favour men over women. However, there is a perfect explanation for why some parts of the indigenous African laws side with men over women. The volatility of the traditional law makes it susceptible to judicial manipulation; there are numerous cases where the court has decided against the tribal customs or made a decision not in consonant with the customary laws.[223] There is no specific law dealing with customary succession in Kenya,

[221]Lisa Owino, 'Application of African Customary Law: Tracing Its Degradation and Analysing the Challenges It Confronts' (2016) 1 Strathmore Law Review 143.

[222] Orinda Shadrack Okumu, 'The Concept of Intangible Cultural Heritage in Kenya' in Anne-Marie Deisser and Mugwima Njuguna (eds), *Conservation of Natural and Cultural Heritage in Kenya* (1st edn, UCL Press 2016) <https://www.jstor.org/stable/j.ctt1gxxpc6.10> accessed 11 May 2023.*JSTOR*, https://doi.org/10.2307/j.ctt1gxxpc6.10. Accessed 24 Nov. 2022.

[223] Kaganas and Murray (n 121).

as every tribe has its customs, but in all customs, there are some similarities, majorly, the idea of equality and communal ownership of wealth, that is, everyone has a right to use the communal land. A stranger or an outsider could not inherit or use the communal property.[224]

A family is a unit that breeds life; in Kenya, under customary law, only family members can be heirs; the definition of family in the setup of indigenous Africa, in the line of patrilineal, which most Kenyan tribes are, is inclusive of the spouse left behind by the deceased, children, parents and siblings of the deceased, all of them must be from common ancestry. While the tribes where matrilineal are prominent, like the *Duruma* and the *Digo*, the idea of the family is seen in terms of the woman's side of the family.[225]

The tribe of *Gikuyu,* an erstwhile matrilineal tribe that has over time become patrilineal, created an establishment known as "*muramati"* whose responsibilities included looking after the property and transferring them to the heirs after the passing of the man of the house. A *muramati* was a trustee for the deceased. He was to follow the wishes of the deceased or the customs of *Agikuyu* in distributing the property to the heirs. Under the *Agikuyu* indigenous customary laws, only the old and frails could make an oral will; the young were not permitted to do so, and the mentally challenged or insane persons were not permitted also because the capacity to make a will included the ability to understand what a person was saying and the content of the statement, since the wishes of the deceased were highly respected. The making of the oral will by the old was done publicly, and the *muramati* was appointed at the same gathering; this was done to avoid any doubt. In case the deceased died intestate, it was upon the elder to appoint a *Muramati,* and undoubtedly that would be the eldest son of the deceased, and in case of polygamy, the eldest son of the first wife would be appointed, daughters were not appointed as *muramati* even if they were older than the son.[226]

---

[224] Gibson Kamau Kuria, 'Christianity and Family Law in Kenya' (1976) 12 East African Law Journal 33.*HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/easfrilaj12&i=35.

[225] Eugene Cotran, 'Integration of Courts and Application of Customary Law in Kenya' (1968) 4 East African Law Journal 14.. *HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/easfrilaj4&i=16.

[226] Anne-Marie Peatrik, 'Le Singulier Destin de "Facing Mount Kenya". "The Tribal Life of the Gikuyu" (1938) de Jomo Kenyatta: Une Contribution à l'anthropologie Des Savoirs' [2014] L'Homme 71.& Kenyatta, Jomo., Facing Mount Kenya, Heinemann Books 1970

As mentioned in chapter two above, the devolution of the property in case of intestacy was based on the type of marriage, whether it was polygamous or monogamous. In a monogamous marriage, the sons shared the property upon the deceased's passing. The widow had only the right to use the land until either her death, remarriage, or if she decided to go back to her ancestral home where she was born upon the death of her husband. A widow could opt for a levirate union, that is (getting married to a brother of the deceased husband); in that case, she would be permitted to continue using the communal land and other property until her death, upon the death of the widow, her sons would inherit the property held by her. In case of livestock, the division was made only after the sons were grown and married.[227] On the other hand, unmarried daughters had only usage right over the land; that is, they could only cultivate and use the property but could not own them, and upon marriage, they would lose all the rights over the land.

In polygamous marriages, each house had an equal share of the deceased property regardless of the number of children; however, all personal and household effects were given to the first wife. In general, any contribution to sons during the father's lifetime was regarded in all African civilizations. An unmarried man's property would be inherited by his closest relatives, beginning with his father and including him. In addition, he has step-relatives on his father's side. A widower inherited all his late wife possessed.

3.7 Law of succession under Islam in Kenya

The independence constitution of Kenya, under section 82, recognised Islamic law as a foundation of the laws that are operational in Kenya for those professing the Muslim religion; this is in line with the constitution's provision of non-discrimination; however, as it pertains to Islamic law, its application is limited cases where both the parties are devoted Muslims. The amended succession Act in 1990 brought the estate of a deceased Muslim exclusively to Muslim law.

[227] Rose Maina, VW Muchai and SBO Gutto, 'Law and the Status of Women in Kenya Symposium on Law and the Status of Women' (1976) 8 Columbia Human Rights Law Review 185.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/colhr8&i=189.

The succession law dealing with inheritance in the Muslim community has religious connotations. Therefore, the Muslim community is asked to study and spread the Quranic teachings about inheritance law in the Quran.[228] In Muslim succession law, the distinction between personal and real property is not there; the entire property of the deceased is put together and distributed to the heir. Under the Sharia law, the heir includes the blood relations, those considered enslaved people, and their master.

Islamic law covers both intestate and testate succession; however, the part that a will can distribute is less than a third of the entire property owned by the deceased, and the rest is dealt with in accordance with the Quran, which identifies the heirs and allocates the portion of the property to them. The heir under Muslim law is the widower, the widow, the children, the father, and the deceased's mother. The only time grandparents are permitted to inherit is when no other immediate heir is left. Like customary/traditional African law, the Quran favours men over women, as men take twice in inheritance as their female counterparts.[229]

According to the decision made in *the Khajoorunnissa V Mussamut Roushan Jehan (1876) L.R. 31.A.291),* a Muslim can dispose of his property as he wishes while he is still alive, but he is not permitted to leave a will disposing of all his property, disinheriting his heirs. But on the other hand, a wife of the deceased is allowed to inherit up to a quarter of the deceased net wealth in case there is no other heir left behind, but if the deceased left living children, then the wife can only take up to an eighth of the property left behind.

The Quran favours sons over daughters, and it permits a son of the deceased to inherit two times more than the daughter; this is stated clearly in sura 4 verse 11 as follows; "*regarding your offspring, Allah decrees that the male shall receive a part equal to that of two females. Therefore, if there are two or more female offspring, they receive two-thirds of the inheritance*."

[228]MY Mudawi, 'Succession in the Muslim Family Book Review' (1972) 6 Nigerian Law Journal 186.. *HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/nlj6&i=190.

[229] Ahmed Safwat, 'The Theory of Mohammedan Law' (1920) 2 Journal of Comparative Legislation and International Law 310.*JSTOR*, http://www.jstor.org/stable/752850. Accessed 1 Nov. 2022.

Quran permits anyone over 15 to make a will, and he should also be sane. The will can be oral or written, but there is no requirement for signature or attestation. As mentioned above, a testator cannot bequeath more than a third of his property without the heirs' permission; the permissible third is given to the non-heir. Quran has shown some level of equality by permitting a woman the right to dispose of her property without her husband's consent, and any interference by the husband is a ground for a divorce.

3.8 The inheritance law, according to the Hindu in Kenya

To develop infrastructure in Africa, the English government brought Indians from their colony in India to help build railways across the English-controlled east African of Kenya, Uganda, and Tanzania; this was done in 1896, upon the completion of the construction, the Indians chose Kenya as their home[230] , and their personal lives, especially in matters concerning succession, were governed by the same laws that were applicable in India for instance, the Hindu Succession Act.[231]

To govern the Indians in Kenya well, the English government introduced the Indian Wills Act of 1898 specifically for those professing the Hindu religion, but the Act was not effective as it left out the intestate succession, which at that time was still under the Hindu Customary laws; this was not corrected until 1956 when the government enacted the Hindu Marriage, Divorce, and Succession Act, which governed only the Hindus in Kenya; for one to be under this law, he had to be professing Hindu, living in Kenya, and was married under the system of marital laws in Kenya.[232] The requirement that a person under the 1956 Act had to be married under the system in Kenya came up for decision in the *Bessan Kaur v. Rattan Singh 25 KLR 24*; a widow had sued her son, who was the sole heir of the deceased and she sought to be allowed to inherit part of her deceased husband property, under the Act, the court held that her marriage having been solemnized

[230] J Duncan M Derrett, 'The Administration of Hindu Law by the British' (1961) 4 Comparative Studies in Society and History 10.. *JSTOR*, http://www.jstor.org/stable/177940. Accessed 24 Nov. 2022. & ibid.

[231] Chanan Singh, 'Hindus and Hindu Law in Kenya Rejoinder' (1971) 7 East African Law Journal 69.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/easfrilaj7&i=71.

[232] Singh, 'The Republican Constitution of Kenya' (n 217).

outside Kenya, the Act did not apply to them. Hence, the Hindu Customary law was applicable, and the son was entitled to the deceased's estate.[233]

The English government later divided *the Hindu Marriage, Divorce and Succession Act* into two parts, that is, *the Hindu Marriage and Divorce Ordinance*, which governed marital matters of Hindus in Kenya, and the *Hindu Succession Act 1956*, which granted the Hindus, testamentary rights and dealt with the intestacy succession of Kenyans who professed the Hindu religion. The 1956 Hindu succession Act outlines the heirs in the following order.

The first class comprises the deceased's son, daughter, his widow, son of the predeceased son, daughter of the predeceased son, children of the daughter who died before getting officially married, widow of a predeceased son, children of a predeceased son of a predeceased son, widow of a predeceased son of a predeceased son, children of a predeceased daughter of a predeceased daughter, daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son.

The second class of heirs consists of I. Father. - II. (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister. - III. (1) Daughter's son's son, (2) daughter's son's daughter, (3) daughter's son, (4) daughter's daughter. - IV. (1) Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter. - V. Father's father; father's mother. - VI. Father's widow; brother's widow.- VII. Father's brother; father's sister. - VIII. Mother's father; mother's mother. - IX. Mother's brother; mother's sister.[234]

Class I was given precedence if there was no survivor, Class II was considered, and Class III was the last to be considered.[235]

---

[233] Prakash Chand Jain, 'Women's Property Rights Under Traditional Hindu Law and the Hindu Succession Act, 1956: Some Observations' (2003) 45 Journal of the Indian Law Institute 509.*JSTOR*, http://www.jstor.org/stable/43951878. Accessed 24 Nov. 2022.

[234] J Duncan M Derrett, 'The Hindu Succession Act, 1956: An Experiment in Social Legislation' (1959) 8 American Journal of Comparative Law 485.. *JSTOR*, httpss://doi.org/10.2307/837692. Accessed 24 Nov. 2022.

[235] ibid.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/easfrilaj5&i=23.

Family is highly regarded under the Hindu religion; the edicts of the Hindu religion promote an extended family, the belief that a person cannot live a fulfilling life without a family; they also do not believe in the individual ownership of the property, that every wealth belongs to the family, and all these are connected to religion. When a person practicing the Hindu religion dies, all his property is inherited by the heirs left behind unless he left a valid and enforceable will, while a property owned jointly is not part of the distributed wealth upon the death of the testator.[236] The widow of the deceased has a right of maintenance from the estate left behind, *Mitakshara sect*, however, does not permit a widow to inherit the deceased property if there is a male heir left behind, but if there are no male issues left behind, then the widow can take a percentage of the estate, in barring of the unmarried daughters. According to the decision made in *Godrnee (Mussumat) V Domrao Kronwer (Mussumat) (1886)1 Agra H. C. 149),* a widow cannot inherit from anyone else other than the husband, that includes anyone whom her husband would have been considered as heir to.

In Hindu, a male heir is considered as a fresh stock; when the property devolved to him, that means his heir can inherit the property since the property inherited becomes his fully; on the other hand, a female heir is not a fresh stock, since she cannot bequeath the property inherited to whomever she pleases.[237]

3.9 Common law applicable in Kenya During colonialization

During the colonial period in Kenya, the common law of succession was the primary legal system governing the distribution of an individual's property upon death. Common law refers to a legal system developed in England that relies on previous court decisions and legal principles for future rulings. As a former British colony, Kenya inherited much of its legal system from England, including the common succession law. The Europeans in Kenya were under the governance of the common law dealing with succession, in which the testator had an absolute right to bequeath his

[236] Derrett, J. Duncan M V Chinta Moni Dassi (1903) 31 Calc 214

[237] Khub Lal Singh V. Ajodhya Misser (1915) 43 Cal. 574.

property to whomever he pleased.[238] However, in case of intestate succession, the property would devolve to only blood relatives, excluding the widow; the customs created these rules dealing with intestacy, then the court later affirmed them; the inheritance was based on lineal descendants, that is, the first priority was given to the children before grandparents could be considered; male children were prioritised over female, and in some cases, unmarried daughters could only inherit from the parents, if there were no known male heir.[239] Without children or other lineal descendants, the property would devolve to paternal relatives.

The European living in Kenya then was governed by the Indian succession, passed by the English government in India and brought to Kenya. The intestacy succession is enshrined in the Act, from sections 25- 45, granted a widow and one-third of the deceased property if there were other issues left behind, and the two-thirds would devolve to the lineal descendants of the deceased.[240] If the deceased left only a widow behind, with no children of his own, the widow would inherit half of the property, and the relative of the deceased would take the remaining. If the deceased left no widow and children, the relatives would take over the whole of his property. The *principle of bona-vacantia* will apply if there is no known relative of the deceased- that is, the state would take over the property.

There was no discrimination of children based on gender; the children of the deceased inherited the property equally, and the same was with the grandchildren and those on lineal descendants; however, the priority was given to the widow over other relatives in the case where no children of the intestate. Among the intestate's parents, the father was prioritised over the rest, but after the widow of the deceased, then the mother.[241] The brothers and sisters of the deceased had equal rights to his estate.

---

[238] Robert Martin, 'The Age of Majority and the Kenya Law of Succession Act, 1972 Comment' (1973) 9 East African Law Journal 77.

[239] Kenneth Kaunda Kodiyo, 'Intestacy Laws and the Influences of Colonialism - The Case of Kenya, in Comparison with the English and Australian Laws of Succession' (2021) 71 Zbornik Pravnog Fakulteta u Zagrebu 93.

[240] Simon Roberts, 'The Recording of Customary Law: Some Problems of Method' (1971) 3 Botswana Notes and Records 12.

[241] Njeri Thuku, 'A Comparative Analysis of Judicial Councils in the Reform of Judicial Appointments between Kenya and England' (2013) 19 Annual Survey of International & Comparative Law 45.

3.10 The development of succession law in Kenya during and after independence

3.10.1 Among Africans

According to the order of 1897 given by the council, under British rule in Kenya, the natives were to be governed by the African customs/ indigenous laws dealing with succession. However, there was a caveat that it should not be against morality and justice. However, the Africans who had embraced Christianity were equated to the Indian Christians and governed by the same succession law as provided for by Article 64 of the Native court regulation, passed in 1897.[242]

When the East African Marriage Ordinance was enacted in 1902, it permitted Africans to get married under the Act, thereby discarding their African ways of life and embracing the western, and if they did so, their succession would be governed by the western law under section 39, applicable in Kenya at that time. However, in 1924, with the enactment of the Native Christian Marriage Ordinance, an order was given that every African, no matter their religious belief, was to be governed by the ordinance regarding succession matters. Finally, the Wills Act of 1961 gave Africans equal rights with the Europeans in Kenya to make a will.[243]

The decision made in *Re Maangi (1968 E.A. 637)* essentially brought Africans under the governance of the Probate and Administration of Estates Act, which applied to Indians and Europeans only, in the said case, the deceased had left a widow, and under his tribal customs, women could not be appointed as administrators, only men in the family, that is either the son, father or the brother of the deceased. Although the widow sought to challenge this as she did not have any son to administer her late husband's estate, the court directed that the widow be allowed to administer the deceased husband's property.[244]

---

[242] Robert M Kibugi, 'A Failed Land Use Legal and Policy Framework for the African Commons: Reviewing Rangeland Governance in Kenya' (2008) 24 Journal of Land Use & Environmental Law 309.

[243] Ambreena Manji, 'Commodifying Land, Fetishising Law: Women's Struggles to Claim Land Rights in Uganda Special Issue: Divining the Source: Law's Foundation and the Question of Authority' (2003) 19 Australian Feminist Law Journal 81.

[244] Ambreena Manji, 'The Politics of Land Reform in Kenya 2012' (2014) 57 African Studies Review 115.

The court's decision in the *Re Maangi (1968 E.A. 637)* highlighted the disagreement between the African indigenous laws and the received/codified/statutes laws. The case Re Ruenji (High Court Miscellaneous Civil Case No.136 of 1975) is the perfect example of conflict; the deceased had three wives, one married following *the African Christian Marriage and Divorce Act* ((Cap. 151 of the Laws of Kenya) in 1941 and the two married under the customary; he died intestate; the court was asked to determine if the two marriages under the ordinary law were legal and if the children left behind could inherit the deceased property. It was held that the two subsequent marriages were illegal since, in accordance with *the African Christian Marriage and Divorce Act* 1941, only monogamous marriages are permitted, and so the children born by the wives under the customary law were not legal heirs of the deceased; hence they could not inherit the property of the deceased.

The same matter came again for determination in the case of *Re Ogolla (1978) K.L.R,* where the deceased had two wives; the first was solemnised in accordance with the *Christian marriage and Divorce Act* and the other under African law. The court decided that the subsequent union was null and void; hence the children born were not considered heirs of the deceased and could not inherit the deceased's estate. While reading the court's decision, in this case, justice Simpson; stated that "an African does not need to get married under the Christian marriage and Divorce Act. However, if he chooses to do so, then all his relations and family matters, including the devolution of his estate after his death, would be dealt with under the written laws, and since the marriage Act does not recognise polygamy, any other marriage after the Christian marriage will be considered null and void."[245]

In a twist of matter, the conflict between the African customary and Christian laws dealing with succession came into play again in the case of *Samuel Hopewell Gacharamu's* estate. Samuel had two wives from two different tribes; the first, a Kikuyu, was married under Agikuyu, and the second wife, a Kamba lady, married under the customs of Akamba, however; the deceased went ahead and registered the second marriage under the African Christian Marriage Act. The petition

[245] Bond (n 163).

seeks clarification from the court if the second union was the only lawful one and if the subsequent registration of the second marriage nullified the first one.[246] The court held that registration of the second marriage did not change its status, and both the women were still considered as wives of the intestate under the African Indigenous laws; hence both had rights to claim the estate left behind by the deceased.

The cases discussed above show the then colonisers' attempts to "civilize" the natives and India by pushing for monogamy, any marriage celebrated under the guise of the *African Christian marriage Act* and nullifying all other marriages under any other system at that time. Although Africans were generally polygamous, and under the customary laws, it was rare to see an African man with just one wife, the coloniser considered polygamous marriage backward and sought to change it.

The attempt to change the way the customs of Africa were taken to the land ownership tenure. In most African tribes, land ownership was communal and not individualized as in western Europe. The whole community had the right to use the land, and no one individual had a claim over a piece of land; however, with colonisation, the English government sought to register land in individual names and issue title deeds, but the natives did not well receive the move. However, even with land registration in one person's name, the community continued using the land. The classic case of *Esiroyo V. Esiroyo [1973] E.A. 388*, in which a father registered a family land under his name in accordance with section 143 of the Registered Land Act (cap. 300); his sons challenged the registration of the land, citing the Luhya customary laws, which provide for a communal usage of land; the sons wanted to continue using the land unhindered. The court ruled that the land was validly registered, and the son had no claim. However, the decision made in *Muguthu V. Muguthu Civil Case No. 377 of 1968* recognised the nature of customary law under the Muramati system; even though the land was registered under one of the sons, the other sons were allowed to continue using the land. The introduction of land registration in Kenya by the then coloniser failed to protect the women, as the father or only the male descendants could be registered as the representatives

[246] Tatsuro Kunugi, 'State Succession in the Framework of GATT' (1965) 59 American Journal of International Law 268.

of the family, but in some cases, the male elders would disinherit the mother and female in the family.[247]

3.10.2 The laws that applied to Muslims in Kenya

During colonialism in Kenya, Muslims were subject to various laws and policies regarding succession, which determined how property and wealth were distributed after a person's death. These laws were often discriminatory and aimed at marginalizing Muslim practices and customs related to inheritance. The customary law system was based on the British colonial administration's interpretation of African and Islamic traditions.[248] As a result, customary law governed many aspects of Muslim life, including inheritance and succession. However, these laws often conflict with Islamic law, which has its own rules and principles regarding inheritance. For example, under customary law, women and children were often excluded from inheritance and succession, which disadvantaged Muslim women and children who were dependent on male relatives for their livelihood.

Moreover, customary law often favoured the eldest son as the primary heir, contrary to Islamic law, which divides the estate among all the heirs according to a specified formula. The British colonial administration also introduced various laws that restricted Muslim practices related to succession. For example, the Wills and Succession Ordinance of 1902 required all wills to be written in English, which was not the language of many Muslims. This requirement made it difficult for Muslims to create legally binding wills and ensure their property was distributed according to Islamic law.[249]

The British colonial administration also attempted to regulate Muslim practices related to inheritance and succession through the court system. The courts often used customary law to

[247] Martin (n 238).

[248] Robert J Miller and Olivia Stitz, 'The International Law of Colonialism in East Africa: Germany, England, and the Doctrine of Discovery' (2021) 32 Duke Journal of Comparative and International Law 1.

[249] Kenneth Kaoma Mwenda, 'Labia Elongation under African Customary Law: A Violation of Women's Rights?' (2006) 10 International Journal of Human Rights 341.

determine succession cases, favouring male heirs over female heirs and undermining the authority of Muslim leaders who had traditionally resolved disputes related to inheritance and succession. [250]During colonialism in Kenya, Muslims were subject to various discriminatory laws and policies regarding succession, which often conflicted with Islamic law and undermined the authority of Muslim leaders. These policies had long-lasting effects on Muslim communities in Kenya and contributed to the ongoing marginalization and discrimination they face today.

In 1897, section 87 of the Native Courts Regulations acknowledged the presence of Muslims in Kenya and accorded them the right to be governed by Islamic laws. In 1907, the Islamic courts were created in Kenya; by virtue of the Native Courts Ordinance, the jurisdiction of this court was limited to family law matters, especially related to succession and personal law, in accordance with Islamic laws.[251] If any party disagrees with this court's decision, they could take the matter to the higher court for consideration in this instant, the High court. The power of the court to hear appeals from the Islamic courts was reinforced in 1920 with the passage of the Mohammedan, Divorce, and Succession Ordinance; this ordinance recognized Islamic personal matters and allowed the application of the Quranic doctrines and edicts to solve any issue that may arise. Section 4 of the Ordinance on Mohammedan Divorce ad Succession limits its application to when the parties were married under Islamic law and if the party was born under Islamic marriage.[252]

3.10.3 The laws that applied to Hindus

Indians were bought to Kenya by the English government to help construct the railway, and most chose Kenya as their home. However, the then English government did not provide a legal framework to govern the Hindus in Kenya, so the customary Hindu laws continued to operate

[250] Odenyo (n 75).

[251] Chanan Singh, 'The Republican Constitution of Kenya: Historical Background and Analysis' (1965) 14 The International and Comparative Law Quarterly 878.. *JSTOR*, http://www.jstor.org/stable/757055. Accessed 25 Nov. 2022.

[252] Ahmad Ali Khan, 'Rights of Women under the Islamic Law of Succession' (1999) 20 Journal of Law and Society (University of Peshawar) 1.

among the Indians in Kenya.[253] However, in 1946, an ordinance dealing with Hindu marriage, divorce, and succession was enacted, which gave Indians domicile in Kenya, a legal framework for dealing with their personal life and succession; this ordinance failed to separate intestate from testate succession; so the Hindu Wills Act, 1870 continued to govern the will writing by the Indians in Kenya. The 1961 amendment of the 1946 ordinance separated succession from marriage issues in the Hindu legal framework applicable in Kenya.

3.10.4 Laws that governed European

The Europeans in Kenya were under the governance of the *Probate and Administration of Estates Act 1881* and the Indian Succession Act; they brought the Act from India, where they had colonised. The two Acts gave the testator the freedom to dispose of the property without any reservation; he could even disinherit his whole family. In the case of intestacy, the family members were given priority over anyone else. During the British rule in Kenya, they thrice amended the Indian Succession Act; they removed the period required for a gift made in contemplation of death to be valid. Although initially, it was 12 months, that period was removed by the 1932 amendment under order number 12. In 1941, another amendment was made to the Act to improve how Wills are written. Finally, the cause of Action that dies with the deceased was removed by the 1956's amendment, in which if the deceased left an ongoing course of Action in court, it would continue even after his death.

3.11 The law of succession after independence

After Kenya gained independence from Britain in 1963, the country enacted the Succession Act, which came into force in 1972 and repealed the {Act of 1963. The Succession Act of 1972 applies to all Kenyans, regardless of religion or ethnicity. Under the Law of Succession Act, the estate of an intestate person is divided into movable and immovable property. The movable property includes cash, bank accounts, and personal belongings, while immovable property includes land and buildings. If the deceased person had a will, the executor of the will is

[253] Harrop A Freeman, 'An Introduction to Hindu Jurisprudence' (1959) 8 American Journal of Comparative Law 29.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/amcomp8&i=39.

responsible for carrying out the wishes of the deceased as stated in the will. However, if the deceased person did not leave a will, the estate is distributed according to intestacy rules.[254]

It was first amended in 1981; it was the first attempt by Kenya to bring all succession matters under one umbrella and to cover everyone within the republic of Kenya; however, by the 1990's amendment, which came into force in 1991, the Muslims in Kenya were excluded from the application of the 1981 Succession Act.[255] The Muslim community contended that the Act was unconstitutional as far as their religion was concerned as it embodies secularity, which was against their religious edicts, and that it went against the Constitutional rights of freedom of worship, which was guaranteed under Article 78 of the defunct Kenyan post-independence constitution; even though Article 82(4)(b) of the defunct constitution supported the succession Act.[256] Although however, the government of the day conceded to the Muslims' pleas and the amendments were made to cater to their request, the move by the government was criticised for favouring one community over the rest, even though some parts of the Act were also against the Christians, Natives, Hindus. Section two of the Act makes it applicable to all succession matters that commence or occur after the commencement of the Act, apart from those touching on the Muslim community.[257]

The process of giving Kenya the 1981 succession Act was because of a tireless work of a commission that the then government created; the commission's intention of one Act for the whole country, even though it did not bear fruits, can be seen throughout the Act, it endeavoured to eliminate the gender-based discrimination that existed under various customary laws. Their proposal to amend the intestate and testate succession brought into focus equality before the law, devoid of gender-based discrimination.[258]

---

[254] LR Patel, 'Notes on the Law of Succession in Three Kenya Coastal Tribes: Wadigo, Wadruma and Wagiriama' (1965) 1 East African Law Journal 184.

[255] Johanna E Bond, 'Gender, Discourse, and Customary Law in Africa' (2009) 83 Southern California Law Review 509.

[256] Kameri-Mbote, 'Gender Dimensions of Law, Colonialism and Inheritance in East Africa' (n 184).

[257] Martin (n 211).

[258] Maina, W.M., Marriage and Succession: A Conflict Precipitated by the Inclusion of Section 3(5) into the Law of Succession Act Cap. 160. Laws of Kenya. LLB. Dissertation University of Nairobi, 1992 & Nelson Gachuki, 'Is

The 1981 succession Act envisages two types of succession, that is testate and intestate succession; they are covered as under:

3.11.1 Testate Succession

When the will left behind by the deceased is valid and enforceable and clearly shows the deceased's intention regarding his property, then it is said that they died testate, and the property will be dealt with in accordance with his wishes.[259] A will gives the deceased absolute control over his property; the properties go to the intended persons/ heir upon death. The will is only enforceable if it agrees with the law, which is why it is advisable to have a lawyer assist while framing the will.[260] A Will is not just a document for the disposal of the deceased person's property; it can also provide direction by the deceased on how his body will be dealt with upon his passing and whom to administer the estate. The salient features of a will are as follows.[261]

1) It comes into operation upon the death of the testator.
2) It expresses the intention of the testator.
3) It is ambulatory, meaning it covers the properties acquired after it is written and signed.
4) The testator or the court can revoke it.

The following must form part of a will to be valid.

3.11.1.1 The testator must have the capacity to make a WILL.

The 1981 Succession Act in Kenya provides guidelines on the capacity of a testator, which refers to a person who makes a valid will. The Act outlines the legal requirements that a person

There a Conflict Between Section 3(5) of the Law of Succession Act Cap 160 and Section 9 of the Marriage Act, Laws of Kenya?' (31 July 2018) <https://papers.ssrn.com/abstract=3482410> accessed 11 May 2023.

[259] Bakari (n 213).

[260] Dr Patricia Kameri-Mbote, 'The Law of Succession in Kenya' 26.

[261] Samuel Cohn, 'Renaissance Attachment to Things: Material Culture in Last Wills and Testaments' (2012) 65 The Economic History Review 984.

must meet to have the capacity to make a will.[262] Under Section 6, it is provided that anyone who is not insane or has a mental illness and has attained the age of 18 or is a married woman may make a will. In other words, for a person to have the capacity to make a will, they must be of sound mind and be at least 18 years old or be a married woman.[263] According to the Act, "sound mind" refers to a person with the mental capacity to understand the nature of the act of making a will, the extent of their property, and the claims of the persons who may be entitled to inherit their property. In the precedent of *Nderitu & Anor v. Gitau [2017] eKLR,* the court held that for a testator to have the capacity to make a will, they must have "sufficient mental capacity to understand the nature and extent of their property, the scope of their testamentary act and the effect thereof."[264]

Additionally, the testator must make the will voluntarily, without being coerced or influenced by anyone. Section 7 of the Act states that a will is invalid if made under duress, fraud, or undue influence. In the case of *Kabaiku v. Kang'ara [2016] eKLR,* the court held that a testator must make a will voluntarily and without undue influence. [265]The court further stated that undue influence could be established if there is proof that a person had a relationship of influence with the testator and used that relationship to pressure the testator into making the will in a particular way. The capacity of a testator, according to the 1981 Succession Act in Kenya, requires that the person making the will must be of sound mind, at least 18 years old, or a married woman must understand the nature of the act of making a will and must make the will voluntarily without being coerced or influenced by anyone.[266] This is because he should understand the action he is taking in writing the will, and his memory must be clear about the time the will was written. The soundness of mind is essential as the testators should not ignore his moral duty to provide for his heir and other dependants.[267] If the testator leaves out any dependant for any reason, the Act under

[262] FD Homan, 'Inheritance in the Kenya Native Land Units' (1958) 10 Journal of African Administration 131.

[263] John Hubback, 'A Treatise on the Evidence of Succession to Real and Personal Property and Peerages' (1845) 48 Law Library [xix].

[264] Kameri-Mbote, 'The Law of Succession in Kenya' (n 260).

[265] Kameri-Mbote, 'Gender Dimensions of Law, Colonialism and Inheritance in East Africa' (n 184).

[266] TW Bennett, 'The Conflict of Personal Laws: Wills and Intestate Succession' (1993) 56 Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law) 50.

[267] David M Doubilet, 'Soundness of Intellect as a Criterion for the Validity of a Will Notes' (1967) 13 McGill Law Journal 336.

section 26 asks the defendant to ask the court to provide for them under the will and out of the estate left behind by the testator.[268] A dependant under the Act can be.

1) The deceased's wife, in case of polygamy, wives, children, and they are dependants even if the deceased did not maintain them before his death.
2) Immediate extended family, like parents, grandparents, children, brothers and sisters, grandchildren, half-brothers, and half-sisters, must have been dependent on the deceased immediately before his passing.
3) Husband of the deceased, only if the wife maintains her husband before her passing.

The wording of the will, even though it is more of male centred, provides in section 5(3) that when it comes to the writing of a will, there is no gender discrimination; women, as well as men, can do so if they have the capacity to do so.

The capacity issues were tested before the court of law *in the case of James Ngengi Muigai's estate, Nairobi High Court, Succession Cause No. 523 of 1996*, in which the testator before making the will was physically incapacitated because of hypertension, the witness who agreed with the will stated that the deceased was normal and aware of his action at the time of making the will, the petitioners failed to prove that he was incapacitated, Justice Koome denied the petitioners' request and allowed the will to be validated.[269]

The second requirement for a will to be valid is *whether the testator made it voluntarily*; that is, there was no undue influence, duress, mistake, or coercion. Third, the will's contents must be those of the testator's intention; there should not be an outside influence or threat to compel the

[268] Akua Kuenyehia, 'Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa 2006 Brigitte M. Bodenheimer Lecture' (2006) 40 U.C. Davis Law Review 385.

[269] Susan N Gary, 'The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy Symposium: The Uniform Probate Code: Remaking American Succession Law' (2011) 45 University of Michigan Journal of Law Reform 787.

writing of the will. Finally, section 7 of the Act makes the will void due to fraud or other means that deny the testator free will.[270]

Under the Act (Succession Act 1981), in section 8, a will can be made in any form, be it written or oral, and as provided under section 9, an oral will is valid if the following are fulfilled.

1) At least two completed witnesses must witness it.
2) And it is valid if a testator dies within three months of making an oral will.

On the other hand, a written will is validated as follows.[271]

1) The testator must sign it, put some mark like a thumb stamp, or allow someone he trusts to do so in his presence.
2) The signature placed on the document must show that the testator intended to make the will valid.
3) At least two witnesses must also sign the will in the testator's presence.

The 1981 Succession Act has endeavoured to be gender neutral; the words used in section 5 of the Act are inclusive of everyone and anyone, as it states that anyone can make a will if they have the other requisite capacity as of sound mind and that the Will can be either oral or written, which does not include gender; section 5 subsection 2 of the Act, clearly gives women the right equal to men, in making a will.[272] Therefore, a woman is allowed to make a Will covering the property owned by her. However, even though the natives have embraced western systems and laws, in most cases, the land is still being registered in the name of the husband even if both parties contributed to acquiring it, so in case of dissolution of marriage, the division of the property tends to be hectic, leading to a denial of women the right to equal share of the matrimonial property.

[270] Jill Wilson and others, 'Cultural Considerations in Will-Making in Australia: A Case Study of Islamic or Sharia-Compliant Wills' (2016) 41 Alternative Law Journal 23.

[271] OK Edu, 'A Critical Analysis of the Laws of Inheritance in the Southern States of Nigeria' (2016) 60 Journal of African Law 141.

[272] Edwins Laban Moogi Gwako, 'Widow Inheritance among the Maragoli of Western Kenya' (1998) 54 Journal of Anthropological Research 173.

While deciding the case of *Kivuitu V. Kivuitu (1991) 2 K.A.R. 241),* the court directed that safeguards should be placed to share joint ownership, even when the direct financial constitution is lacking, especially in cases of marriage, so that the husband would not disinherit a woman. [273]

In the traditional African system, sons were favoured over daughters, and property would be devolved to them upon the death of the father, as have been discussed in chapter two above; the justification was that daughters would leave and get married somewhere else and would not be around to protect the family heritage; however, the person who took control of the property was expected to use for the benefit of all members of the family, including women, however, if the arrangement for devolution of the property has left out any family member, section 26 of the succession Act 1981 permits such members to petition the court to include them.[274] This section covers everyone, no matter the gender of the person, including the woman, and the section applies whether the bequeathment was under a written Will, under the rule of intestacy, or was done in the form of a gift in contemplation of death. The court has power in sections 27 and 28 of the Succession Act 1981 to make any order it deems fit to provide for the dependant; the dependants include but are not limited to a widow, former wife and children of the deceased, whether they were in communication immediately before his passing or not, parents of the deceased, his grandparents, step-parents, grandchildren, adopted children, siblings, half-siblings, but only if he was maintaining them before his passing.[275] On the other hand, a husband can claim to be dependent on his late wife if she maintained her before her death.

3.11.2 Intestate succession

Section 34 of the succession Act 1981 defines the intestate as a person who died without leaving behind a will as to how his property are to be dealt with. However, a person can also declare to have died intestate if the will he left behind has been declared invalid by the high court of Kenya or the if the revoked will by the testator was not revived before his passing. It is important

[273] 'In the Matter of the Estate of Rufus Ngethe Munyua. The Public Trustee v. Florence Wambui, Esther Njoki and Jane Nyakaru' (1978) 22 Journal of African Law 188.

[274] Martin (n 211).

[275] Singh, 'The Republican Constitution of Kenya' (n 251).

to note that intestate succession only favours those with blood connection to the deceased, other than a spouse.[276]

Properties that a will cannot dispose of cannot be brought under the coverage of intestacy. For that matter, the following property is not part of intestacy disposal.[277]

1) A jointly owned property passes to the survivor; for instance, a matrimonial property passes to a surviving spouse if both own it.
2) If the nominator has nominated someone else to receive his funds, this occurs in cases of nomination where the nominator directs their investor to pay the proceed to a third party who could be not a member of his family upon the nominator's death. That nomination cannot form part of the estate of the deceased.
3) Where the deceased gifted some of his property as he was preparing for his death, that is a gift in contemplation of death.

The succession Act 1981 deals with intestacy succession in part 5. However, the Act does not cover the whole country;[278] areas that are majorly agriculturists and livestock farmers are exempted from its coverage, most so the northern counties in Kenya, like Pokot, Wajir, Marsabit, Turkana, Lamu, Tana River, Mandera, Marsabit, Kajiado, Isiolo and Garissa. In the case of intestacy, the areas mentioned are permitted to use their traditional/ indigenous laws in dealing with their livestock and agricultural land.[279] Although the framers of the Act intended to recognize the equality of women and men, when it comes to inheritance, under section 35 of the 1981 Succession Act, a widow, especially in a monogamous union, inherits the deceased property, she is mainly considered as the better-placed person to administer the property of the deceased, something that is away from the traditional African laws and the Hindu succession laws; however, the caveat is that the widows can only inherit up to 10% of the deceased's spouse's property and

[276] Earl M Jr Curry, 'Intestate Succession and Wills: A Comparative Analysis of Article II of the Uniform Probate Code and the Law of Ohio' 34 OHIO STATE LAW JOURNAL 86.

[277] Armistead M Dobie, 'Dependent Relative Revocation of Wills' (1915) 2 Virginia Law Review 327.

[278] Bakari (n 213).

[279] Kameri-Mbote, 'The Law of Succession in Kenya' (n 260).

upon remarriage, the estate reverts to the other heirs of the deceased; this shows that even the Act is still favouring the blood heirs over marriage heirs and it promotes the retention of the property in the man's family and bloodline.[280]

The widower is not fully favoured by the Act, either, because for him to take a life interest in the deceased wife's property, under section 26 of the Act, he must prove that he was maintained by the wife immediately before her passing. Section 29 of the Act puts a wife of the deceased at a higher level than other heirs, while the husband is considered an heir of a deceased wife only if he was a dependant immediately before the deceased's passing.[281] In case no surviving children can be found, then the spouse that survives is allowed under section 36 to take the personal and household effects of the deceased wholly and twenty percent or 10,000 Kenya shillings of the remainder of the estate left by the deceased and the life interest of whatever is left after that, all these returns to other heirs in case the woman remarry.[282]

On the matter of polygamous marriages, the succession Act comes into effect only if the marriages were conducted under a system that favours that kind of marriage, for example, the customary law; [283]the Act, under section 40, categorises houses into units and the percentage of inheritance is dependent on the number of children per unit; the more the children, the higher the percentage. The 1981 Succession Act in Kenya has endeavoured to treat all children equally and has not, in part of the Act, differentiated or defined the term "children" to leave out anyone based on gender.

The Act has been amended severally to deal with lacunae and protect every heir without discrimination, as was witnessed in the case *of Njeru Kamanga Estate Succession Case No. 93 of 1991*, where the magistrate refused to grant the daughter permission to have a share of the property of her deceased father, citing that married daughters and disqualified to have a claim over their

[280] Kuenyehia (n 268).

[281] Barbara Kelley, 'The Kenyan Constitution and the Question of Succession: The Influence of a Strong Leader' (1973) 1 Iustitia 43.

[282] Charles H Ambler, 'The Renovation of Custom in Colonial Kenya: The 1932 Generation Succession Ceremonies in Embu' (1989) 30 The Journal of African History 139.

[283] 'Native Labour in Kenya in 1933 Reports and Enquiries' (1935) 32 International Labour Review 104.

deceased father's estate. The decision did not consider an earlier decision made by a high court in the matter of *Richard Martin Kibisu Estate High Court Miscellaneous Application No. 272* of 1985, where the will left behind by the deceased had clearly indicated the wishes of the deceased for his land not to be subdivided and directed that any of his children could farm the land if they had meant; however, the sons sought to disinherit the daughters; the court directed that the wishes of the deceased be followed and honoured and that the children had equal rights to access and use their deceased's father's property.[284]

To stop the disinheritance of dependants due to a subsequent marriage conducted under other systems of laws, especially a customary marriage, celebrated either after or before a civil or Christian marriage, section 34 of the 1981 Succession law was amended, and section 3(5) was included in the Act, in order to allow children born to a subsequent marriage to inherit their father's estate in case of intestacy; before the amendment, in case a man celebrated another marriage under customary law which permitted polygamy and another under another system of which were against polygamy, the one under customary was considered as void ab initio, and the wife and children bore out of that union were not viewed as the heir of the deceased, in case of intestacy. [285]This amendment was necessary because, up to now, many African marriages are a combination of more than one system; most of them include dowry payment under traditional African law, followed by a white wedding in church.[286] However, the amendment has also been criticised for promoting the destruction of monogamous marriages and denying women voice and security in their marriages, primarily when the subsequent marriages were conducted in secrete, and the other woman and children appear when the husband has died, leading to fights and squabbles over the deceased's property.[287]

The case in point to explain the above paragraph is of Reuben Mutua Nzioka's estate; Probate and Administration Cause No. 843 of1986 (H/Court); in which the late Mutua allegedly

[284] Redmayne and Rogers (n 191).

[285] Singh, 'The Republican Constitution of Kenya' (n 251).

[286] Kuenyehia (n 268).

[287] Tom Kabau and Chege Njoroge, 'The Application of International Law in Kenya under the 2010 Constitution: Critical Issues in the Harmonisation of the Legal System' (2011) 44 Comparative and International Law Journal of Southern Africa 293.

celebrated two marriages, one to his first wife Theresa under the Marriage Act, which was conducted in 1961; during the funeral of Mr. Reuben, a woman by the name Josephine, approached the family and claimed that she was also Mutua's wife, that their marriage was conducted under the traditional African law of the Kamba's community, in 1980. Josephine has three children with Mutua; they contested the Will, claiming they should have been part of the heirs under the will. The court decided that the subsequent marital union to Josephine was illegal as the first one to Theresa was under the Marriage Act, which does not permit polygamous marriages; hence Josephine and her issues had no entitlement to the estate of the late Reuben. [288]

In a twist of the matter, a subsequent case with similar issues was presented for a decision in a different court but with the same level and rank, and a different decision was given. In the case of *Duncan Kiiru Karuku's estate Succession Case No. 74 of 1987*, the court allowed the second wife, whose marriage was conducted under the customary law, even though there existed the first marriage under the Marriage Act, to proceed to be added as heir along with her issues to the property/estate of the intestate. According to Maina in his article Maina, W.M., Marriage, and Succession: A Conflict Precipitated by the Inclusion of Section 3(5) into the Law, the decision by the court in Duncan Kiiru Karuku promotes adulty and encourages the destruction of the institution of marriages, breaching the marriage contract, knowing very well that they law covers the children born out of that adulterous union.[289]

Karanja V. Karanja [1976] K.L.R. 356 argued that the amendment of section 3(5) leaves the widow without any protection and ignores her contribution to the property acquisition even though it could be in her husband's name. That the contribution made by the wife could be both financial and other means, and her taking care of the home, children, and husband are important contributions that should not be ignored; another woman should not appear from anywhere claiming the right to the estate she did not help build.[290]

[288] Curry (n 276).

[289] Cohn (n 261).

[290]Kameri-Mbote, 'The Law of Succession in Kenya' (n 260).

Even though section 3(5) is intended to protect women married under other systems of law that permit polygamy, the woman seeking that protection must show that the rites to be followed under the customary/ traditional law have all been followed to validate that marriage, this is according to the decision given in the probate case of *Evanson Gikamu Karania alias Ngario Muthemba alias Evanson Karanja's estate Cause No. 644 of 1987*. Moreover, in cohabitation, the parties must show that they have stayed together for a long time, which would make anyone who knows them assume they are married.[291]

As to who is supposed to administer the estate of the deceased, the question is no longer about gender, and in cases where there is no dispute as to who was the legitimate wife of the deceased, and the family has accepted all members and heirs of the deceased as such, the letter of administration has always been given to the person named in the will, in some cases the widow has been preferred over the eldest son (as dictated by the customs/traditional laws of many tribes in Kenya); this is a case in both systems of testate and intestate succession. For example, in *Nemchand Kanji Lalji Shah's estate, High Court Succession Cause No. 1298 of 1992,* the deceased's Will was respected, and the widow was granted a letter of administration over the sons.

3.12 Intestate Succession Mechanism Established Under the 1981 Succession Act

In 1972, Kenya embarked on consolidation of all various laws dealing with succession, and there was a need to codify the succession law to govern everybody in Kenya; there were, however, multiple amendments for the Act to meet the need of every community living in Kenya; the Act began operation on first July 1981.[292] The influence of English laws can be seen in the Act, in that it consists of all of the laws that were enacted in Kenya by the English Government and the ones brought to Kenya by the same coloniser's government, for instance, the laws dealing with Hindu's property were brought to Kenya by the English leaders, the same was the case in regards to the laws governing the European in Kenya.

[291] Catherine A Hardee, 'Balancing Acts: The Rights of Women and Cultural Minorities in Kenyan Marital Law Note' (2004) 79 New York University Law Review 712.

[292] Martin (n 211).. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/easfrilaj10&i=95.

Upon commencement of the application of the Act, the Muslim community opposed it on the basis that it was against their personal laws and beliefs and that the Quran and teachings of Prophet Mohamad were enough to govern their personal lives;[293] they went ahead to claim that it was against the freedom of religion guaranteed by the Kenyan constitution.[294] In 1990, the succession Act was amended to exclude its operation on Muslims, giving them leeway to be governed by the Quran. It is important to note that before the amendments took place between 1981 and 1990, the Succession Act governed everyone within the republic of Kenya, including the Muslims.[295]

The research focuses on the intestate part of the succession, and for the sake of this chapter, part V of the Succession Act is the central area of coverage. The revised edition of the succession Act defines intestate succession as when a person passes on without leaving behind a will detailing the way the property left behind is to be dealt with or where the Will left behind has been declared void or invalid by the court of law.[296] Although part V of the Act intends to identify the heirs of the deceased in case of intestacy,[297] it covers only intestate succession that arose after it came into force.

The Succession Act 1981 majorly considers the bloodline as an heir;[298] however, a widow is conferred with the right of inheritance, and cohabitees, on the other side, are not considered an

[293] Hassan J Ndzovu, 'Muslim Politics in the Legislative, Judicial, and Constitutional Arenas', *Muslims in Kenyan Politics* (Northwestern University Press 2014) <https://www.jstor.org/stable/j.ctt22727nc.10> accessed 25 November 2022.*JSTOR*, http://www.jstor.org/stable/j.ctt22727nc.10. Accessed 25 Nov. 2022.

[294] HWO Okoth-Ogendo, 'The Politics of Constitutional Change in Kenya since Independence, 1963-69' (1972) 71 African Affairs 9.. *JSTOR*, http://www.jstor.org/stable/720361. Accessed 25 Nov. 2022.

[295] Ronald J Daniels, Michael J Trebilcock and Lindsey D Carson, 'The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies' (2011) 59 American Journal of Comparative Law 111.*JSTOR*, http://www.jstor.org/stable/25766182. Accessed 25 Nov. 2022.

[296] See Succession Act, 1981, section 34.

[297] See, 'Succession Cause 2678 of 2001 - Kenya Law' <http://kenyalaw.org/caselaw/cases/view/75383> accessed 12 May 2023.AngAwa J's analysis of Part V in In the Matter of the Estate of Benjamin Mugunyu Kiyo (deceased) Nairobi HCSC No. 2678 of 2001, http://kenyalaw.org/caselaw/cases/view/75383

[298] See Succession Act, 1981, section 26.

heir.[299] Kenyan Law of succession borrowed heavily from the English counterpart, as they cover only the properties that the deceased could have disposed of by a Will and leave any or all property jointly owned and passed on under the survivorship principle.

Section 35 of the 1981 Succession Act grants the widow a life interest in the deceased property. The section states that *If the dead's spouse, children, or child survives, the spouse is entitled to the intestate's personal and domestic possessions solely, as well as a life interest in the residual of the deceased property, which terminates when the widow remarries or dies*; however, the widower has not been accorded the similar right and duties, as he can still retain the life interest even upon getting remarried. According to section 36 of the Act, if the deceased left behind a spouse but no child, then, in that case, the spouse has a right to all the household property and the first ten thousand Kenya shilling or twenty percent from the remainder of the estate, whichever is greater of the two and on top of all these, the surviving spouse is entitled to a life interest of the remainder.

Section 2(1) of the succession Act covers only intestacy matters that arose after the Act came into force. However, to comply with the Act, customs that are not opposed to morality and justice might be applied to incidents that occurred before the Act; this is in accordance with section 2(2) of the Succession Act. The government is empowered by Section 32 of the Act to limit or exclude some areas and property from the operation of the Act, for instance, the nomadic communities like *Marsabit, Narok, Tana River, Samburu, West Pokot, Turkana, Isiolo, Mandera, Wajir, Garissa, Lamu, and Kajiado* are allowed to use their customary laws to deal with their intestacy succession.[300] The exemption is because of the communal ownership of land and livestock, and because of their nomadic activities, the tribes tend not to settle in one area.[301] In the

[299] Khalil Badbess, 'Till Death Do Us Part: The Ailment Affecting the Widow's Life Interest in Kenyan Intestate Succession' (2019) 4 Strathmore Law Review 1.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/strathlwrv4&i=6.

[300] Winifred Kamau, 'Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya' (2015) 2015 East African Law Journal 140.*HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/easfrilaj2015&i=150.

[301] Ishmael I Munene and Sara Ruto, 'Pastoralist Education in Kenya: Continuity in Exclusion in Arid and Semiarid Lands (Asal)' (2015) 32 Journal of Third World Studies 133.*JSTOR*, http://www.jstor.org/stable/45195115. Accessed 25 Nov. 2022.

estate *of Mwathi vs. Mwathi and another 1 EA 229*, the High Court of Kenya was confronted with the need to interpret section 32 of the Act regarding exemption. The case facts are as follows: The deceased was unmarried and left behind a will; he had left behind sisters and a brother. The Will was declared invalid by the court, and a direction was made for the deceased's property to be dealt with under the intestacy rules, and the brothers and sisters were to share them equally. The brother was unhappy with the high court's decision and appealed to the court of Appeal, and the appellant court upheld the High Court's decision of declaring the Will invalid and went further to direct that the customary laws of the deceased apply and not the 1981 Succession Act.

In the case of the Estate of *Benson Kagunda Ngururi Estate of Benson*, 62 Cal.App.2d 866, 145 P.2d 668 (Cal. Ct. App. 1944), the deceased, even though he was from the exempted community, had left property within the region not exempted, and he had died before coming in to force of the 1981 Act. Therefore, the court was asked to decide if the customary laws or the succession Act 1981 applied to the deceased's estate. The court held that even though the deceased had passed on before the Act came into force, the estate left behind was governed by the Succession Act of 1981, and because Nakuru was not within the exempted region, the property could not be governed by the customary laws but the succession Act[302].

The exemption of the regions mentioned above by the legal notice no.94 of 1981 came up for determination again in *Elijah Mhondo Ntheketha (deceased)'s estate Nairobi Hcsc No. 193 of 1997*. The presiding judge Justice Koome clarified that the Act had excluded its application to those regions under section 32. The controversy surrounding the exemption of those regions continued and came up again for determination in the case of *Rono v. Rono (2005) 1 EA 363*, in which the petitioners' asked the court for interpretation of both sections 32 and 33 of the Act and the court decided that the clarity of the sections can be seen in the Act. Therefore, the legal notice

[302] Laurence Juma, 'Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes' (2001) 14 St. Thomas Law Review 459.

No. 94 of 1981, the Act mentions the exempted regions, and any other region not mentioned is not exempted and comes within the jurisdiction of the Act.[303]

3.12.1 Probate and letter of grant

The Succession Act 1981, under section 47, grants the high court powers to deal with probate matters. In Testamentary succession, the testator writes a Will; in the will, he can name the executor or executrix. The primary responsibility of the executor is executing the wishes of the deceased by distributing the estate as outlined in the Will and paying off any debt the deceased might have had.[304] The Will must be certified by the court for the issuance of the *certificate of probate*- this is the duty of the executor to process the certification of the will, which begins with the filing of the Will in the high court, to prove that it is valid and the contains the wishes of the deceased. The executor has the right to reject the appointment; in that case, the court would appoint an administrator as the replacement.[305]

On the other hand, in case of intestate succession, the heirs of the deceased (these are children only if they are over 18, surviving spouse, and other beneficiaries), creditors, and public trust can apply to court and petition for the appointment of an administrator and the grant of *letter of administration*. [306]However, the letter of administration can only be granted to a maximum of four people; other than the public trust, it cannot be granted to a corporate body. The administrator has similar responsibilities as the executor/ executrix, which include payment for the funeral of the deceased, collection of the money owed to the deceased, payment of the debt the deceased may

[303] Joy K Asiema, 'Gender Equity, Gender Equality, and the Legal Process: The Kenyan Experience Symposium: Africa in the Third Millenium: Legal Challenges and Prospects' (2000) 10 Transnational Law & Contemporary Problems 561.

[304] 'Native Labour in Kenya in 1933 Reports and Enquiries' (n 283).

[305] SeeWellingtone Edaki, 'Kadhis' Court Jurisdiction Conundrum; Interfaith Marriage and Legal Conflict in the Union' (1 July 2020) <https://papers.ssrn.com/abstract=3656201> accessed 12 May 2023., Chelanga vs juma 2002 1 klr 339 etyang j swaboa No. 2258/1996

[306] J Harris, 'High Court of Kenya - In the Matter of the Estate of Rufus Ngethe Munyua - The Public Trustee v. Florence Wambui, Esther Njoki and Jane Nyakaru Cases' (1978) 22 Journal of African Law 188. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/jaflaw22&i=192.

have left behind, and performance of any other task as the court may direct regarding the deceased's property.[307]

For both the appointment of the administrator and the grant of a letter of probate, the court must protect the interest of the deceased and the heir, and that dictates that the administrator and the executor/ executrix must be subjected to a thorough oath and a minimum thirty days period notice must be given in the official gazette so that, anyone who may want to object to the grant can come forward and do so. In addition, the person seeing the grant of letter probate must show that they are significant (over 18), of sound mind, and have not been declared bankrupt.[308] Upon granting the letter of administration of the letter of probate, the executor/ executrix or the administrator can legally distribute the deceased's property. However, after six months, the court must confirm the letter upon application by the administrator. At that point, the administrator must have outlined all the beneficiaries of the deceased estate and the portion they are entitled to.[309]

Both the executor and administrator have the following responsibilities under the Act:

1. To set off the funeral expense of the deceased.
2. Collect and assemble all the assets that belong to the deceased and pay off any debts and liabilities the deceased may have had before passing.
3. To prepare and submit to the court the list of the property owned by the deceased, including bank accounts and shares.
4. To ensure that any heir of the deceased is given their share of the estate after the setting of the debts and any other responsibility left behind by the deceased.
5. To update the court on the progress of execution of the deceased's estate within six months after the confirmation of the letter of grant.
6. To represent the deceased in any ongoing legal proceedings that may have begun before or after death or are related to the deceased's passing.

---

[307] James D Keeney, 'Review of Report of the Kenya Commission on the Law of Succession' (1971) 119 University of Pennsylvania Law Review 1071.. https://doi.org/10.2307/3311207

[308] Vreeland O Jones, 'Probate Code Conservatorships: A Legislative Grant of New Procedural Protections Comments' (1977) 8 Pacific Law Journal 73.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/mcglr8&i=91.

[309] Cohn (n 261).

7. The executor is permitted to sell any part or all of the deceased's estate to offset any debt, liabilities, or court order that requires money to offset.

As a result, an extensive procedural component under the Succession Act that tries to universally apply standards in transmitting the deceased's property to his legal heirs and debtors has been made. These regulations have helped to resolve various legal inconsistencies relating to colonial structures that were in place soon after independence.

3.13 CONCLUSION

Even though Kenya has a well-written succession law, Kenya still does not have uniformity in succession matters since section 3(5) of the Act, grants some concession to Muslims to rely on the Sharia law at the same time, the reliance on the customary law to deal with the deceased property, is making it hard to have a uniform succession law, even though customary law is not totally against women inheritance of property left behind by their fathers, the whole idea of it was that a woman would get married and leave her parents' home to set another home somewhere with her husband, and for that reason, customary law, promoted the ideology of property devolving to a son, who was then to be responsible to every member of the household and every member were to benefit from the estate left behind; however, in modern times, with the idea of property ownership, this has changed, and cases of disinheritance have gone up, making this customary law assumption to be not tenable.

Customary law, being largely unwritten, is susceptible to manipulation, especially by those left behind to manage the property; they can abuse it to their advantage and disinherit the people entitled to the property; for this reason, the Succession Act has endeared to grant equal inheritance right to everyone without discrimination based on gender. However, cultural practices of various tribes have been skewed to give a different meaning to the inheritance rights of women and men, and the Succession Act in section 2(3)(4) and 3(5) have given leeway to some of the cultural practices as far as some property and persons are concerned. As a result, these sections have been abused to deny equality regarding inheritance; they may need to be amended.

To conclude, the development and execution of the intestate succession law in Kenya have experienced substantial changes, partly affected by colonialism and the imposition of foreign legal systems. Despite this, customary rules continue to play an essential part in establishing the country's inheritance practices, with many people still depending on traditional norms to control the transfer of assets without a will. While colonization brought new legal frameworks to replace traditional practices, it also led to the repression and erasure of many old governance systems, including customary norms linked to succession. Yet, these rules have been acknowledged and integrated into Kenya's legal system throughout time, albeit with some revisions to allow for evolving community norms and values.

As we advance, the country's legal system must evolve to reflect its population's changing demands and aspirations. This entails acknowledging and honouring the role of customary rules in inheritance affairs and addressing any possible conflicts between traditional practices and the larger legal structure. Finally, the recognition, implementation, and evolution of intestate succession in Kenya are part of a broader continuing legal and cultural change process. Kenya may strive towards a future in which all persons, regardless of their history or circumstances, can inherit and pass on their possessions fairly and reasonably by recognising the effect of colonization and continuing to work towards a more equitable and just legal system.

Chapter 4: INTESTATE SUCCESSION IN UGANDA

4.1 Abstract

Intestate succession is transferring property from a deceased person to their living relatives without a will or when the will has been declared unenforceable by a court of law. Throughout history, matters relating to the family have been governed by customary law and tribal traditions. Uganda is no exception to this rule, and although there are many systems and laws governing succession matters, customary laws still hold sway in many parts of the country. However, statutory laws precede customs when customary laws conflict with written laws. In many cases, customary laws have been discarded due to their discriminatory practices towards women, particularly where women are not allowed to own property and are forced to be inherited by the male relatives of their late husbands, who in turn get to take the property left behind by the intestate. They are often expelled from their matrimonial homes if they refuse to do so. This situation usually arises when the deceased husband leaves no will. The perpetuation of these abuses towards women by in-laws following the husband's death is also due to weak and inadequate laws and legal frameworks in Uganda. Uganda's lack of strong enforcement authority exacerbates this situation, highlighting the need for rejuvenation. The primary aim of this study is to delve into the customary law of intestate succession in Uganda and how it fails to protect widows adequately. Additionally, the study aims to investigate the extent of received laws from England's permeation to the traditional laws of Uganda.

4.2 Introduction

Uganda is an East African country with a diverse ethnic population and religion. Some of the tribes living in Uganda include *the Baganda, Acholi, Lango, Bunyoro, Busoga, Lugbara, Ankole, Jopadhola, Kakwa, Jie, Bagwere, Pokot, Madi, Kumam, Bafumbira, Samia, Aringa, Lendu, Banyarwanda. Karimojong, Mvuba* among others.[310] Along with the other East African

[310] May Edel, 'African Tribalism: Some Reflections on Uganda' (1965) 80 Political Science Quarterly 357.. *JSTOR,* https://doi.org/10.2307/2147686 . Accessed 1 Feb. 2023.

states studied, Uganda was part of the English colony;[311] thus, three legal systems are currently operating in Uganda, which include African customary law, religious laws (Islamic, Hindu, etc.), and English law, which consists of the numerous ratified international laws, the Constitution of Uganda which came to force in 1995, the Succession Act, the Administrators General Act, the land Act, etc. However, the existence of African customary law and religious laws is dependent on their consistency with the Constitution[312].

Due to the superstition that writing a will speeds up one's death, many in Uganda tend to shy away from leaving behind an enforceable will, leaving their property to be dealt with under intestate succession laws, including customs.[313] Therefore, this chapter's focus includes generally studying the principles and laws that govern intestate succession and the historical development of customary laws in Uganda. The chapter also covers an investigation of the laws in place in Uganda aiming at promoting equality and widows' rights as far as intestate succession is concerned and the influence western laws have had in Uganda.

4.3 Customary law and Intestate succession

Like Kenya, in chapter four above, intestate succession in Uganda can be derived from both customary and Acts of parliament on intestate succession. The customary law of Uganda is highly based on the idea of family; the idea of family is more inclusive than the western definition of a nuclear family, which constitutes parents and children. In Uganda, just like many parts of the former British colonies like Tanzania and Kenya located in East African, the term family includes people of the same descent from a common ancestor, whether male or female; in the case of a male, they are patrilineal, while those from a common female descendant are referred to as

[311] 'British Administrators, Colonial Chiefs, and the Comfort of Tradition: An Example from Uganda on JSTOR' <https://www.jstor.org/stable/524608> accessed 8 February 2023.*JSTOR*, https://doi.org/10.2307/524608. Accessed 8 Feb. 2023.

[312] Sandra Fullerton Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' (2001) 39 The Journal of Modern African Studies 571.*JSTOR*, http://www.jstor.org/stable/3557341. Accessed 1 Feb. 2023.

[313] Bennett and others (n 50).

matrilineal; assumption to family offices and succession to the property are generally based on this inclusive definition of a family.[314]

The definition stated above shows that the laws in Uganda recognize both matrilineal and patrilineal families. Therefore, the right to inherit depends on a person's tribe and the type of family system recognized mainly by the tribe he comes from. The definition will be further explained later in the chapter.

4.4 Background of the study

In pre-colonized Uganda, just like pre- Roman times in the rest of the world, inheritance issues were governed by the patriarchal system, in which men were favoured over women. Most parts of Africa were communal in dealing with property, and the main activities involved hunting and gathering; the society ruled by men held the tools for getting the work done. During this time, the property held by the society included land and cattle; this is still the case in many villages and rural Uganda.[315] Customary law, which is the central system used in rural Uganda to deal with intestate succession, is totally against women since men dominate property ownership in the village sides, and women are mainly prevented from inheriting land because they are seen as people who will leave their homes to their husbands' homes and because it is a dictate of culture that land and animals are to be transferred from men to men.[316] The patriarchal nature of inheritance in Uganda is in place to ensure that women only have the user right over the property, but not ownership of the property; this has led many widows to be vulnerable to their in-laws.

Members of the deceased family tend to use customary laws to lay claim to the deceased property and disinherit the widow and her children; this sometimes includes the property a woman

[314] Customary Law: Its Place and Meaning in Contemporary African Legal Systems' (1965) 9 Journal of African Law 82.. *JSTOR*, http://www.jstor.org/stable/745333 . Accessed 1 Feb. 2023.

[315] Rachel C Loftspring, 'Inheritance Rights in Uganda: How Equal Inheritance Rights Would Reduce Poverty and Decrease the Spread of HIV/AIDS in Uganda Comment' (2007) 29 University of Pennsylvania Journal of International Law 243.

[316] Rasmus Hundsbæk Pedersen and others, 'Land Tenure and Economic Activities in Uganda: A Literature Review' (Danish Institute for International Studies 2012) <https://www.jstor.org/stable/resrep13396> accessed 5 February 2023.*JSTOR*, http://www.jstor.org/stable/resrep13396. Accessed 1 Feb. 2023.

acquired on her own or jointly with her husband.[317] The situation worsens when the widow cannot inherit from her late father or husband. The patriarchal custom prevents women from inheriting from both natal and marital families; however, widows could be guardians to their minor sons until they came of age and took over the ownership of their deceased's father's property. Widows in Uganda are outcasts; the moment they lose their husbands, they tend to lose everything, including their identity and property.[318] A widow is considered an outsider to the husband's clan and can only stay in the clan upon the death of the husband by allowing someone to inherit her, especially if the widow did not have a male child, a deceased's husband's brother or male relative would have to inherit her for her to remain within the clan.[319] It is not only the widow who suffers but the orphans of the deceased too; they are usually taken from their home to live with relatives, and girls are forced into early marriages to different clan, where she has to start their life and is not allowed to return to her clan, since "bride price" was paid for her hand in marriage.

The complete reliance on customary law continued until when the Britishers colonized Uganda. Uganda was under British rule from 1880 until 1962; many changes took place during this time; however, the colonial government stayed away from the family law and mostly did not touch the customs of various tribes within Uganda, but they introduced a different land tenure, in which registration of land and granting of title to it was compulsory. Succession matters were brought under various succession ordinances of 1902. This did not help alleviate the concern of women and their subjugation; in fact, it exacerbated it by granting men more rights over the land and giving them documentation to prove their ownership, and to make matters worse, the property laws in place only governed the European and natives continued to be governed by the customary laws. When Uganda gained independence, they adopted the colonialist laws of succession between 1962 and 1972; this did not alleviate the plight of women; it made it even worse. The land tenure gave men more power over the property; they could sell, lease, and dispose of it without consulting

[317] Manas Ray, 'Law as Resistance (Collected Essays in Law) Book Reviews' (2010) 6 Law, Culture and the Humanities 311. & Professor Tony Bennet: Culture and society, collected Essays, Guangxi Normal university Beijing China 2007 page 260.

[318] Asiimwe and Crankshaw (n 49).

[319] Ray (n 317).

their wives.[320] It is essential at this juncture to clarify that Ugandans have shied away from writing a will that can be attributed to illiteracy and superstition; this has, in more significant part, led to the governance of the property left behind by the deceased when there is no will be left behind.

The current Constitution in Uganda came into force in 1995, and Articles 2(2) and 21(2) outlaw any law that promotes discrimination of any nature, in age, gender, sex, race, etc. Therefore, any custom operating outside the Constitution is unenforceable as long as it does not conform to the Constitution. Furthermore, article 26 of the 1995 Ugandan Constitution promotes equality, justice, and fairness by extending the rights of women to own estates and associations.

This chapter not only studies the customary laws to intestate succession law in Uganda but also covers the effectiveness of succession laws in protecting children and widows in Uganda.

4.5 The Ugandan constitution 1995 and the Inheritance law

The 1972 Succession Act and the 1995 Constitution of the Republic of Uganda are the two central statutory enactments dealing with succession issues in Uganda; the question I attempt to answer is if the two laws provide enough ground for succession matters in Uganda and do they help solve discrimination meted on widow and girl child upon the loss of a father. The 1995 Ugandan Constitution guarantees equal rights to everyone and grants widows rights to matrimonial property upon losing their husbands. The Constitution, in Article 31(2), implores the legislatures to create laws that are appropriate enough to safeguard the entitlements of the widow and widowers to the matrimonial property and to extend that right to any property the deceased may have left behind.[321] It suffices to note that the Ugandan Constitution only guides and directs the parliament to make the necessary laws that deal with inheritance; the Constitution fails to outline the specific laws that deal with succession or its' contents; so, the guarantee given to the widows to inherit their deceased's husband's property is actualized by the inheritance law, specifically the

[320] Valerie Bennett and others, 'Inheritance Law in Uganda: The Plight of Widows and Children International Women's Human Rights Clinic Special Issue: Reports: Section V' (2006) 7 Georgetown Journal of Gender and the Law 451.

[321] Jamil Ddamulira Mujuzi, 'Widow Inheritance in Uganda Uganda' (2012) 2012 International Survey of Family Law 393.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/intsfal19&i=425.

Succession Act. Due to the inadequacy of the succession Act, the courts in Uganda still apply the archaic laws received from the British rule in Uganda, even though there have been many changes since Uganda attained independence.

4.6 The 1972 Succession Amendment Act

The Succession Act can be traced to 1904, brought to Uganda by the English; it was an ordinance in 1906 crafted from the ordinary laws of England. The 1972 Succession Act in Uganda was their way of attempting to have a unified succession law to apply to both testate and intestate succession within the republic of Uganda.[322] The 1972 Amendment of the succession Act's main agenda was to protect widows, provide equality in inheritance, and end reliance on discriminatory customary law.[323] The Act took away the power of clan elders to deal with succession matters and handed them to the courts of law- this led to the creation of inheritance rules that were not within the ambit of customary and not full statutory laws.

In Uganda, anyone over 18 can make a will; however, many Ugandans still shy away from writing a will; as the Administrator general reports, only about 5 out of 100 Ugandans make a will.[324]The justification is that most Ugandans are superstitious that writing a will would make them die sooner[325] , and some have cited other reasons as a lack of awareness and failure to realize the importance of writing a Will. The state must appoint a legal representative of the deceased to administer the property left behind but not covered by a will. The distribution schedule, fronted by the Ugandan succession Act, provides that the widow gets up to 15 percent of the real estate, the children of the deceased get 75 percent, the dependents of the deceased get 9 percent, and the legal heir gets the remaining 1 percent. The administrator must obtain a letter of administration before

[322] Jennifer Okumu Wengi and Women and Law in East Africa (Research Project : Uganda), 'The Law of Succession in Uganda ': (*Berkeley Law*) <https://lawcat.berkeley.edu/record/156295> accessed 27 June 2021.

[323] Peter Nanyenya-Takirambudde, Law Development Centre and Uganda (eds), *A Simple Guide to the Law of Succession in Uganda* (Law Development Centre 197AD).

[324] Okumu Wengi and Uganda) (n 322).

[325] Kanabahita, D., 2006 Report on Intestate Succession, Law, and Advocacy for Women in Uganda Kampala & Florence Asiimwe and Owen Crankshaw, 'The Impact of Customary Laws on Inheritance: A Case Study of Widows in Urban Uganda' (2011) 3 Journal of Law and Conflict Resolution 7.

administering the deceased's property.[326] The principal residential holding, otherwise known as a matrimonial home, is not part of the property to be distributed[327]; however, the property is kept in trust for the eldest son, the legal heir of the deceased. In the absence of a son left behind by the deceased, the next in line is any surviving male relatively close to the deceased because the legal heir is considered a male relative patrilineal to the deceased. Lineal descendants are people who hail from the same ancestry from down going up, for example, son- father – grandfather – great-grandfather, but can also be from upcoming down, that is, a father-son- grandson- great-grandson.[328] The preference for a male child in intestacy succession is seen as discriminatory to women.[329]

The succession Act (amendment)1972 seems to have continued the age-old customary laws when dealing with intestate succession in that it has elevated the position of legal heir and given that entirely to the eldest male child. It fails to protect the widow; it promotes the dominance of one man over women, as it guarantees the widow only a user right to matrimonial property and grants the eldest son ownership upon the deceased's passing.[330]

The law seems to be categorizing a widow as a dependent who needs to be taken care of and also ignoring the immense contributions of a widow in the development and acquisition of the matrimonial home; the only recourse a widow is left with is a written Will, but because many Ugandans fail to leave behind a Will, the property is dealt with under the intestacy succession, which is against the widow.[331] However, as the matrimonial property is not under the estate administrator's power to distribute, it is safe to assume that most widows are not likely to inherit a

[326] Nanyenya-Takirambudde, Law Development Centre and Uganda (n 323).

[327] Rukimirana, V.and Bateson, A., 2000 Laws of the Republic of Uganda Vol. VII, Revised Edition &'Details for: Laws of the Republic of Uganda, Volume VII : › Uganda Martyrs University Library Catalog' <https://catalogue.umu.ac.ug/cgi-bin/koha/opac-detail.pl?biblionumber=36409> accessed 12 May 2023.

[328] Florence Ebam Etta, 'Gender Issues in Contemporary African Education' (1994) 19 Africa Development / Afrique et Développement 57.*JSTOR,* http://www.jstor.org/stable/24486868 . Accessed 8 Feb. 2023.

[329] John U Ogbu, 'African Bridewealth and Women's Status' (1978) 5 American Ethnologist 241.*JSTOR,* http://www.jstor.org/stable/643290. Accessed 8 Feb. 2023.

[330] Lynn Khadiagala, 'Negotiating Law and Custom: Judicial Doctrine and Women's Property Rights in Uganda' (2002) 46 Journal of African Law 1.*HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/jaflaw46&i=11.

[331] Kuenyehia (n 268).

matrimonial property. The law is contentious because it fails to provide for the widow's rights to matrimonial property, which in most cases are owned by both wife and husband, and so upon the husband's death, the widow should inherit it. The same succession law does not provide a clear path to inheriting a deceased woman's property; it is always assumed that all the property left behind by a woman goes to her husband.

With the progressive Constitution, which provides for equality, it seems the succession law of Uganda is promoting the age-old customary laws when dealing with intestate succession; it assumes that the matrimonial property belongs to the man; the reasons it is silent on who inherits the woman's property upon her death; this is opposite to the Marriage laws in Uganda, which provides that a woman can show her contribution in the acquisition of a property in case of divorce and be granted her rights. Furthermore, the intestate succession does not differentiate between rural and urban matrimonial homes, and so when the man passes on, the whole property is given to the eldest son if there is no will left behind which in turn deprives a widow of her home and ignores her contribution to its acquisition.

The Succession Act (Amendment) 1972 in Uganda, which amended the original 1965 Succession Act, changed the order of intestate succession in Section 8 of the Act as follows :

Surviving spouse: If the deceased person was married, their surviving spouse is the first to inherit their estate. If the spouse has predeceased the deceased person, the estate will pass to the next category in the list.[332]

Children and their descendants: If no surviving spouse exists, the deceased person's children (including adopted children) will inherit their estate. If the children are minors, their share of the estate will be held in trust for them until they reach the age of majority. If any children have predeceased the deceased person, their share will pass to their children (the deceased person's grandchildren).

[332] JND Anderson, 'The Law of Succession in Uganda: An Unreported Case' (1963) 7 Journal of African Law 201.

Parents: they can only be permitted to inherit in case no child or surviving widower or widow can be found, the property will pass to the deceased's parents. If one parent has predeceased the deceased person, their share will pass to the surviving parent.

Siblings and their descendants: If there are no surviving spouses, children, or parents, the estate will pass to the deceased person's siblings and descendants. If one sibling predeceases the deceased person, their share will pass to their children (the deceased person's nieces and nephews).

Grandparents: If there are no surviving spouses, children, parents, or siblings, the estate will pass to the deceased person's grandparents. If one grandparent has predeceased the deceased person, their share will pass to the surviving grandparent.

Uncles and aunts and their descendants: If there are no surviving spouses, children, parents, siblings, or grandparents, the estate will pass to the deceased person's uncles and aunts and their descendants. If an uncle or aunt predeceased the deceased person, their share would pass to their children.

The government: If there are no surviving heirs as specified above, the estate will pass to the government.

4.7 Recent intestate Succession Law disputes

The constitution court in Uganda in 2007 declared the sections that discriminate against widows unconstitutional, especially section 27 of the Act and rule 8(a). Section 27 of the Ugandan Succession Act permitted only up to 15 % of the estate value left by the deceased to the widow, and rule 8(a) allowed the widows to give up the property inherited from their deceased's husband in case of remarriage or death.[333] The constitutional court acted following the petition by a Non-Governmental Organization known as "The law and advocacy for Ugandan Women." The decision

[333] *Human Rights NGOs in East Africa: Political and Normative Tensions* (University of Pennsylvania Press 2009) <https://www.jstor.org/stable/j.ctt3fj56n> accessed 12 May 2023.. *JSTOR*, http://www.jstor.org/stable/j.ctt3fj56n . Accessed 2 Feb. 2023.

by the court gave a reprieve to women and created enough lacunae for arguing in favours of widows. The court did its part in ensuring equality is maintained; however, the parliament has yet to amend the law to align it with the court decision and guarantee full and equal protection of widows. The matrimonial property right of a widow is still pending as the court only declared the right to remain in the property upon remarriage as legal. So, the matrimonial property is still not within the ambit of distributable property upon the death of the husband- this hinders women's right and freedom to use the property to secure a loan, making it hard to use it to earn an income out of the matrimonial property; so, in case a matrimonial property is located in a prime area, and the widow wanted to sell or lease it to get funds to start a business, and for that reason, the only right a widow has on a matrimonial property is to live on it, but not use it for any other purpose.[334]

A study by Florence Akiiki Asiimwe and Owen Crankshaw highlights the plights of women who have suffered and lost their property upon losing their husbands, who were the sole breadwinner. They studied the life of Evelyn Kalungi, who was denied the matrimonial home after the death of her husband, who left her when she was barely 30 years old. After losing her husband, Evelyn and her children were moved from the family's main house to servant quarters. The story of Evelyn is that she came from a poor background and did not get a proper education; in pursuit of a better life, she moved to Kampala, where she met her late husband, Peter, who was working with a car company. They got married in 2000 and had two daughters. However, Peter cheated on her and gave birth to a son from an extramarital relationship.

Peter had inherited land from his father but died before transferring it to himself. While the husband was still alive, they built servants' quarters while constructing the main house. The main house was a combined effort of Evelyn and Peter, and when it was done, they relocated from the servant's quarters to the main house.

Peter died Intestate in 2005, and the in-law started harassing Evelyn, demanding she hands over the car keys, that it needed to be sold to pay school fees for the children, which did not happen. The in-laws later transferred the title of the matrimonial land to her male children's names, leaving

[334] Asiimwe (n 52).

her homeless and at their mercy. The family argued that this would ensure the property remained in the husband's bloodline. However, this meant that Evelyn had only a user right over the property, but not the male children owned it.[335]

4.8 Customary patriarchal laws

Customary succession law in Uganda refers to the traditional norms, values, and practices related to the inheritance of property and the transfer of rights and responsibilities upon the death of a family member. It is based on the cultural beliefs and practices of different ethnic groups in Uganda and operates alongside the formal legal system in the country.[336]

Under customary law, inheritance is often based on the favouritism of the first male child, where the eldest son is the primary heir. However, the specific customs and practices can vary widely depending on the ethnic group and the region. Sometimes, the property may be divided among all the children, including daughters. The administration of customary succession can also involve appointing a traditional leader or a council to conduct and monitor the devolution of the property.[337]

Customary succession law in Uganda is regulated by the *Recognition of Customary Marriages Act of 1998 and the Succession Act of 1965*, which provide a framework for recognizing and administering customary law in the country.

4.9 Succession Law for Muslims under Ugandan Law

Unlike the Kenyan counterpart, the Ugandan Succession Act does not exempt Muslims from its provision. It is provided in the Succession Act, in Section 1, that unless it is by the Act or

[335] Asiimwe and Crankshaw (n 325).

[336] Renée Giovarelli, 'Customary Law, Household Distribution of Wealth, and Women's Rights to Land and Property International Development' (2005) 4 Seattle Journal for Social Justice 801.*HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/sjsj4&i=827.

[337] Soyapi (n 67).

any other law, it applies to all testate and intestate property within Uganda, which includes Muslims. Before the current amendments, the erstwhile succession Act in Uganda, under section 50(2), provided an exemption to Muslims by the following words.

"Nothing in this section shall impair the validity of any will made by a Mohamedi or an African in accordance with the requirements of the Mohamedi or, as the case may be, Customary Law."

The amendment Succession Act Cap 162 removed the exemption. However, section 334(1) grants permission to anyone in Uganda to apply for immunity to the application of the Act. In addition, the section grants the minister power to permit on application, either retrospectively or prospectively, any individual or class from the application of the Act.

The justification is given by Article 29(1)(c) of the 1995 Ugandan Constitution, which provides freedom of religion and participation in any religious ritual of one's choice. The Constitution prioritizes Muslim divorce, guardianship, inheritance, and marriage laws. In addition, Article 129(1)(d) grants judicial power to Kadhi's courts in matters touching on domestic issues like inheritance, marriage, divorce, etc.[338]

4.9.1 Succession law for Muslims in Uganda

Islamic law dealing with succession, like any other Succession law, distinguishes it into two parts: testate and intestate succession. The Muslim succession aims to diversify wealth and stop it from concentrating on one or a few individuals and share it with others.[339] In *Shalik Abdul v Shaik Elias (1915)1 FMSLR 204*, it was observed that a man could only dispose of his property up to a third of it; the rest has to be dealt with respect to Muslim intestate rules as stipulated by the Quran and Muslim is not allowed to go against the Quran and teaching of Prophet Mohammed. A

[338] Jamil Ddamulira Mujuzi, 'The Entrenchment of Qadis' Courts in the Ugandan Constitution' (2012) 26 International Journal of Law, Policy and the Family 306.*HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/intlpf26&i=312.

[339] Javed Ahmad Ghamidi, 'The Quranic Law of Inheritance' (2001) 1 Pakistan Law Review 173.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/pakislr1&i=181.

widower gets one-fourth of the deceased property, while a widow gets just one-eighth. The Quran 4.12 provides that male children are to get twice as female children of the deceased property.[340]

4.10 Does Uganda's succession legislation meet the justification for succession in Uganda?

The Constitution of Uganda, under Article 247,[341] implores the parliament to create laws that are fair, expeditious, and efficient in dispensing justice and ensuring proper management of a deceased's property and protection of the people left behind, the services of management and administration of the estate of a deceased, should be decentralized in such a way that everyone can access them from any part of the country if they need assistance.

The Ugandan parliament has followed suit and enacted several Acts to aid in protecting and managing the estate of the deceased, some of them are the Administrator General's Act Cap 157, Administration of Estates (Small Estates) (Special Provisions), and Estates of Missing Persons Act among others.

4.10.1 The Administrator General Act Cap 157

The Act establishes the office of an administrator general and grants it the responsibility of administering and managing the deceased person's estate. The Act provides that whenever death occurs, the person qualified to approach the court for a grant of letters of administration must inform the administrator that the intention is to secure the estate of a person who has died Intestate and to avoid mismanagement of the estate by the people claiming to be the heirs.[342] This can be seen in the case of *Lucy Monica vs. Michael Kilega* [1987] HDC 40 11, where the deceased other relatives wanted to disinherit the widow. However, with the intervention of the administrator general, the property was saved, and the court granted a grant of letter of administration to the widow and no other relatives of the deceased.

[340] Khan (n 252). *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/jlsup20&i=7.

[341] The 1995 constitution of the republic of Uganda.

[342] See Section 36 of the Administrator general Act.

In the case the deceased was a minor, the High Court is empowered by section 27 of the Administrator General to appoint an administrator to manage the property of the minor; the administrator can be anyone, including the father or the mother of the minor; however, the person appointed is supervised by the office of administrator general, to ensure proper management of the property.

To protect the beneficiaries from eviction upon the death of the Intestate, section 26 and rule 1 of the succession Act provides that beneficiaries are entitled to continue occupying the property once occupied by the deceased and that the residential holding is not subjected to redistribution. Rule 2 of the same Act also provides that the beneficiaries are permitted to continue cultivating and farming the land as before the deceased's passing and to do so as long as they are still residing on the property or until they die or remarry. The aim of Rule 2 was to protect the widow and children of the deceased from eviction by the relatives of the deceased.[343]

Justice Katutsi well covers the matter in Best *Kimegisha vs. Marble Komuntale (1999) KALR 813,* where the kingdom of Toro was hellbent on disinheriting the widow of the deceased and applying the custom which was against women inheriting property, the court, in citing the judicature Act, stated that any custom that is against justice, morality, and a good conscience and against the written law is not applicable; hence, the custom that prevented a woman from inheriting and administering her deceased's husband's property was not good and could not be applicable, the court granted the widow the right to inherit her husband's estate.

4.11 The concept of matrimonial property in Uganda

In Case *Republic v Ruguru (1970) E.A 55*, it was held that this law applies to those who are or were legally married, which means it does not cover most Ugandans who are cohabiting. [344] *Justice Bbosa in Muwanga Vs. Kintu High Court Divorce Appeal No. 135 of 1997* defined

[343] Ugandan Succession Act cap 162, second schedule.

[344] Kes, Aslihan, Krista L. Jacobs and Sophie Namy. "Gender, Land and Asset Survey Uganda." (2011).'Empower Women - Gender, Land and Asset Survey Uganda Gender Differences in Asset Rights in Central Uganda' (*EmpowerWomen*) <https://www.empowerwomen.org/en/resources/documents/2015/11/gender-land-and-asset-survey-uganda-gender-differences-in-asset-rights-in-central-uganda?lang=en> accessed 12 May 2023.

matrimonial property as the property that the couple chooses to call home and the property acquired by the couple during their marriage, but the property held by the husband in trust for a clan does not form part of the matrimonial property.

In *Basheija v Basheija & Anor Divorce Cause No. 12 Of 2005*, justice B. Kainamura clustered property into different categories, and the first category is those property acquired during the continuation of marriage by the parties jointly; the second category includes the matrimonial home of the spouse; the third category include property jointly owned by the parties; the fourth category is the property acquired by the parties before marriage, and the fifth category is the property held in trust by either the parties for others. Categories 1, 2, and 3 form parts of matrimonial property.

Kisaakye, a Judge of the Supreme Court of Uganda, in *Rwabinumi Vs. Hope Bahimbisomwe SCCA No.10 of 2009* faulted the court of appeal assertion that parties to the marriage were equally entitled to the matrimonial property if the marriage ended without considering the part contributed by each party. Justice Kisaakye did not ignore Article 31(1) of the Ugandan Constitution, which guarantees equality to both parties to a marriage; however, the judge went ahead to state that not all property, whether acquired individually or jointly, is subjected to an equal distribution in case of divorce.

4.11.1 The rights attached to matrimonial property.

The matrimonial property provides security of occupancy on the family land, and the rights attached to that are to stop it from being sold, the right to use, live on it, and fully have access to it.[345] Section 39 of the Land Act does not allow any of the parties to the marriage the right to sell, mortgage, exchange, lease, or do anything to it without the consent of the other.

[345] Section 38A(2) and (3) of the land Act Cap 227

Justice Bashaija K, in *Inid Tumwebaze V Mpweire Stephen & Another*,[346] confirm that section 39 of the land Act is paramount and that doing anything on the matrimonial property without the other spouse's consent is illegal and hence avoided from the start.

The subsequent decisions made by the court have attempted to address equality. For example, in *Basheija v Basheija & Anor*,[347] the court decided that both parties to a marriage are equally entitled to the share of matrimonial property, which includes any property acquired jointly during the subsistence of marriage.

4.12 The influential elements of Violation of Women's Succession Rights in Intestate Succession

4.12.1 Customs, culture and tradition

Culture/ customs have played a crucial role in running the affairs of Africans, especially social and personal matters, including inheritance, before, during, and even after the colonialization; the reason intestate succession is still very much prevalent in Uganda to date as compared to testamentary succession. Before the received English laws were introduced to Africa-Uganda, customary laws ruled Uganda, and most, if not all, customs/ traditional/ Indigenous laws were patriarchal; they reduced women to a lower status, equal to children.[348]

Women and girls were considered outsiders, people who would come from another clan or move to another clan for marriage, and their primary responsibility was to give birth; formal education was denied to them. The nature of patriarchy was very sound that it denied women the right to have an opinion regarding inheritance. They (women) were not considered qualified enough to inherit their husband's and fathers' property because they were seen as outsiders.[349]

[346] Hct-05-Cv-Ca-0039-2010 (At Mbarara High Court)

[347] Court of appeal Civil Appeal No.30 of 2007

[348] Nanyenya-Takirambudde, Law Development Centre and Uganda (n 323).

[349] Bennett, 'Re-Introducing African Customary Law to the South African Legal System' (n 115).

Widows were even in a worse position; upon the husband's death, they would suffer a double loss, losing both the property and the family, since in most cases, the in-laws would disinherit her and take her children away, leaving her with nothing. In some cases, the property would be left to male children, leaving out female children, who would then force into early marriage; however, women had a user right over the land; they could use it for farming and other activities but were not allowed to own it.[350]

Much did not change with the colonialisation regarding the entitlements given to women regarding inheritance and their status in Uganda. The reprieve to women came with the promulgation of the 1995 Constitution, which finally recognized the right of women and that everyone is equal before the law, including women and men, regarding ownership of property.[351] However, the 1995 Ugandan Constitution did not stop at that; it declared any custom and customary laws not conforming to the Constitution, morality, good conscience, or any other legislation unenforceable.[352] Furthermore, article 33 of the same Constitution mentions any custom repugnant to the Constitution or against women's rights as illegal and unenforceable.

Even with the existence of law and enshrinement of women's rights in the Constitution, women are still very much subjugated and denied equal rights when it comes to inheritance, especially in the village areas, which still heavily rely on culture and customary laws in dealing with the property of an intestate.

4.12.2 The Flaws in the legal structure

The succession Act,[353] the primary legal structure governing inheritance matters, has some loopholes that promote discrimination. Even though the law includes women as beneficiaries and

[350] Uganda Women's Network (ed), *Gender Audit of Key Laws Affecting Women in Uganda* (Uganda Women's Network 2006)./ Elijah Dickens Mushemeza, 'Contribution of Women in Influencing Legislation and Policy Formulation and Implementation in Uganda (1995-2005)' (2009) 34 Africa Development / Afrique et Développement 167.

[351] Article 26 of the 1995 constitution of Uganda

[352] Article 2 of the Constitution.

[353] See, Section 1 Cap 162 .https://ulii.org/akn/ug/act/ord/1906/1/eng%402000-12-31.

a considerable portion is assigned to the primary beneficiary, the same law allocates only 15% of the Intestate's estate to the widow.[354] In Uganda, polygamy is still highly practiced, and in case the deceased left behind more than one wife, then all of them have to share the 15% of the estate left behind; however, this has been declared void by the Constitutional court, following a petition filed by the Advocacy of women Uganda.[355] Even though the court has declared some parts of the Act discriminatory to women, the law still operates as it was initially enacted. To make matters worse, the law is not being practiced in the village side, and women are still very much ignored and, in some instances, chased out of their matrimonial homes and even lost 15% of the estate as directed by the law. The Act is also silent on the cohabitees; they are not provided for anywhere and are not entitled to 15% of the property.

The Matrimonial property rights are only enjoyed by the widow who was married to the husband at the time of his death; if there was a separation of at least six months before the death, then the widow is not entitled to the residential holding.[356] The children, boys under 18 and girls under 21, are permitted to live in the residential holding; however, upon marriage, they give up the rights to live there.[357]

The Succession Act is discriminative as it only provides for the mechanism for the distribution of a man's property while ignoring the property of a female intestate, essentially meaning that after the passing away of the wife, the husband takes all of the estate left behind by the deceased's wife.[358] This could be interpreted to mean that society still views women as not qualified to own property; hence they don't leave anything behind upon their death, or whatever is left behind belongs to the man.

[354] Section 27(2) ibid

[355] *Law Advocacy for Women in Uganda v Attorney General (Constitutional Petition No. 13 of 2005) [2007] UGSC 71 (5 April 2007)* (2007) <https://ulii.org/akn/ug/judgment/ugsc/2007/71/eng@2007-04-05> accessed 12 May 2023.

[356] See Section 26 succession Act.

[357] See Section 29, Second Schedule to the Succession Act.

[358] See 8 Section 27 of cap 162.

4.12.3 Religious Practices

Religion has contributed to the subjugation of widows in Uganda; for instance, the Muslim religion, which is practiced in some parts of Uganda, in accordance with Sharia laws, not all property can be bequeathed by will, and the estate of the deceased is not equally distributed to beneficiaries,[359] as discussed above, male children get more than female and widower gets more than a widow.[360] Only about two- third of the deceased property can be distributed to the beneficiaries; the rest of the estate is given out to the owner and comes into effect upon his death. It is essential to state that going against the Quran and the Prophet Mohamed's teaching is considered a sin, and Muslims rarely do that.[361] Islamic law has been cited as discriminative towards women regarding inheritance in Uganda.

4.12.4 Interfering with an intestate's estate

There are numerous instances in Uganda where relatives of the deceased disinherit the widow and her children and grab all that is left behind by the deceased. Although intermeddling is illegal following the Succession Act,[362] it is an act of anyone who is neither a beneficiary nor an administrator/ executor, dealing with the property in a way that is not following the interest of the deceased and is against the rights of the beneficiaries. This has been cited as one way of abusing women's entitlements to claim the deceased's husband's estate.[363]

The intermeddling and grabbing of the property are the worst; in some cases, the brothers and parents of the late husband forcefully take the estate belonging to women. They leave the widow and her children stranded and have no other option but to be destitute or be married off, in

[359] Anshul Parashar, 'Nikah under Muslim Law' (2021) 2 Jus Corpus Law Journal 432.*HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/juscrp2&i=5612.

[360] Koran 4:12

[361] Akmal Hidayah Halim and Mohamad Asmadi Abdullah, 'Women's Rights to Succession in Unregistered Marriages: A Reference to the Instrument of Wasiyyah' (2008) 16 IIUM Law Journal 125.

[362] See Section 268 of the succession Act.

[363] 'Law Reports of the Commonwealth Editorial Review 2009 - The Commonwealth through the Case Law Judicial Decisions' (2010) 36 Commonwealth Law Bulletin 729.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/commwlb36&i=739 .

the case of young girls. Intermeddling sometimes occurs even after the appointment of the administrator/ executor.

4.12.5 The population has a low degree of awareness

Many Ugandans, especially upcountry, are not aware of their right to make a Will, and those who are, are afraid that writing a will, will hasten their death, so they avoid it; as a result, there are numerous cases of intestate succession, and since in most cases, women are left behind, they tend to face much suffering at the hands of relatives of the deceased. But on the other hand, if Wills were to be written and left behind, the deceased's estate would be managed well, and the relatives would not interfere with the beneficiaries since many Ugandans are superstitious and fear angering the dead.[364]

In accordance with tribal customs, upon death, the property left behind is under the management of the deceased parents and relatives, and in most cases, they tend to disinherit the children and widows. Therefore, even though the problem is more significant than mere will writing, writing a will can reduce the problems associated with intestacy succession, so there should be a sanitization of will writing, especially in the village.

Many people in Uganda are unaware of the benefits of having a will, and as a result, a significant number of estates are left in the hands of the government to be distributed according to the laws of succession. This can lead to delays, disputes, and a lack of control over the distribution of assets. In addition, without a will, the assets may not be distributed according to the deceased's wishes, leading to misunderstandings and conflicts among surviving family members. To address this issue, organizations and government agencies in Uganda have been working to raise awareness about the importance of writing a will.[365] This includes educating the public about the benefits of having a will, providing information on writing a will, and working with lawyers and other professionals to help individuals create a will that accurately reflects their wishes. In conclusion,

[364] Michael Twaddle, 'Some Implications of Literacy in Uganda' (2011) 38 History in Africa 227.. *JSTOR*, http://www.jstor.org/stable/41474551. Accessed 5 Feb. 2023.

[365] Ewelukwa (n 138).

the lack of awareness about the importance of writing a will in Uganda is a significant concern, as it can result in several negative consequences for individuals and their families. Increasing public awareness about the benefits of having a will makes it possible to help individuals to make informed decisions about their estate planning and ensure that their assets are distributed according to their wishes.

4.12.6 Women have fewer economic chances than males.

Since time immemorial, before, during, and even after colonialization, women have had fewer chances to own and acquire property to promote equality in Uganda.[366] The relatives have always taken over the property owned by men upon the man's death; in some cases, the ones owned by women are also taken over when the man dies. In Uganda, women face limited economic opportunities due to cultural, social, and institutional barriers.[367] These barriers include gender discrimination, lack of education and skills, lack of access to finance, and limited ownership of property and assets. As a result, women in Uganda are often excluded from participating in the formal economy and are relegated to informal and low-paying jobs.[368]

In addition, women in Uganda are often responsible for caregiving duties and household chores, limiting their ability to participate in paid employment. This, in turn, perpetuates the poverty cycle and reinforces the country's gender-based economic disparities.

To address these issues, the government of Uganda and various organizations have implemented programs and initiatives to empower women economically.[369] This includes providing access to education and training, offering microfinance and other financial services, and promoting entrepreneurship and business ownership among women.

---

[366] Pedersen and others (n 316).

[367] Julie L Arostegui, 'Gender and the Security Sector: Towards a More Secure Future' (2015) 14 Connections 7.*JSTOR*, http://www.jstor.org/stable/26326406. Accessed 5 Feb. 2023.

[368] Yan Sun and others, 'Forests: Gender, Property Rights and Access' (Center for International Forestry Research 2012) <https://www.jstor.org/stable/resrep01905> accessed 5 February 2023.http://www.jstor.org/stable/resrep01905 .

[369] Article 33 of the 1995 constitution as amended.

In conclusion, limited economic opportunities for women in Uganda is a significant issue that must be addressed to promote gender equality and improve the country's overall economic well-being. However, providing women access to education, training, and financial services can empower them economically and help break the cycle of poverty and gender-based discrimination.

4.13 Various agencies, including the Ugandan government, work to bridge the gap and eliminate gender discrimination based on intestate succession.

4.13.1 Ministry of Gender Labour and social development.

The Ministry of Gender, Labour, and Social Development in Uganda is responsible for promoting gender equality, protecting workers' rights, and addressing social development issues in the country.[370] The following are some of the essential duties and responsibilities of the Ministry:

Gender equality: The Ministry promotes gender equality by implementing policies and programs that address gender-based discrimination and empower women and girls. Labour rights: The Ministry protects workers' rights and promotes safe and fair working conditions. This includes regulating the employment of minors, protecting the rights of migrant workers, and ensuring that workers receive fair wages and benefits. Social protection: The Ministry is responsible for addressing social development issues in the country, including poverty, unemployment, and inequality. This includes implementing programs to reduce poverty, promote healthcare access, and improve living standards for vulnerable populations. Child protection: The Ministry protects children's rights, including their right to education, healthcare, and a safe and secure childhood. Disabilities: The Ministry is responsible for promoting the rights of people with disabilities and ensuring equal access to opportunities and services. The Ministry in Uganda, which deals with labour, Gender, and Social Development, plays a crucial role in marketing gender equality, safeguarding the entitlements of workers and vulnerable populations, and addressing social

[370] 'Labour, Employment, Occupational Safety And Health – Ministry of Gender Labour & Social Development' <https://mglsd.go.ug/labour-employment-occupational-safety-and-health/> accessed 12 May 2023.https://mglsd.go.ug/labour-employment-occupational-safety-and-health/

development issues in the country. By fulfilling its duties and responsibilities, the Ministry is working to create a more inclusive and equitable society for all citizens.[371]

Even with the efforts put forth by the Ministry, there are still numerous cases of gender imbalance and discrimination meted on women as inheritance is a concern. Women are still disinherited and subjected to inhuman treatment upon losing their husbands. The policies put forth by the ministries seem not to be working; perhaps there is a need for policy changes that can be easily enforced at the village level.

4.13.2 The Judiciary

The Main duty of the judiciary is to interpret the laws. Courts are recognized constitutionally in Uganda, empowered to interpret the laws, give justice without fear or favour, and be impartial in discharging their duties.[372] Although the Constitutional Court has been instrumental in safeguarding the entitlements of women connected to inheritance in Uganda, there have been significant pronouncements and decisions made by the courts in that regard, especially in the line of declaring some sections of the Succession Act as discriminative against women and repugnant to the Constitution, as was in the case of Law and Advocacy for Women in Uganda versus Attorney General[373] and the court declared some sections of the Divorce Act, to be against women and for that matter as null and void in the case of Uganda Association of Women Lawyers versus Attorney General.[374]

---

[371] Dereje Wordofa, 'Poverty-Reduction Policy Responses to Gender and Social Diversity in Uganda' (2004) 12 Gender and Development 68.. *JSTOR*, http://www.jstor.org/stable/4030603. Accessed 5 Feb. 2023.

[372] See Article 126(1) of the Constitution of Uganda 1995

[373] 'Law & Advocacy for Women in Uganda v. Attorney General' (*LII / Legal Information Institute*) <https://www.law.cornell.edu/women-and-justice/resource/law_advocacy_for_women_in_uganda_v_attorney_general> accessed 12 May 2023.Law & Advocacy for women in Uganda v Attorney General (Constitutional Petition 8 of 2007) [2010] UGSC 4 (28 July 2010).

[374] *Law Advocacy for Women in Uganda v Attorney General (Constitutional Petition No. 13 of 2005) [2007] UGSC 71 (5 April 2007)* (2007) <https://ulii.org/akn/ug/judgment/ugsc/2007/71/eng@2007-04-05> accessed 12 May 2023.Law Advocacy for Women in Uganda v Attorney General (Constitutional Petition 13 of 2005) [2007] UGSC 71 (05 April 2007).

The magistrate and High courts in Uganda have been empowered to deal with matters touching in succession; they are limited to the extent of pecuniary jurisdiction. The family court, established in Uganda in 2005 and located in the capital city of Kampala in Uganda, is an extension of the high court that deals majorly with family matters within the jurisdiction of Uganda. The courts have been at the forefront of providing women protection and making significant decisions. Whenever an executor or an administrator wants to administer the property of an intestate,[375] they must obtain a grant of letter of administration from the court to grant them authority to act in that line.[376]

The importance of the judiciary can be seen in how the court has handled many inheritance cases. When a woman is disinherited, she has recourse in court, where she can go to and get justice, and quite often, the court restores what has been stolen from her.[377] However, even though courts are hailed as the justice dispensing organ and have, in many instances, been instrumental in providing justice, the downside has always been the delay in delivering justice and the expenses the litigants have to incur to obtain it, especially in terms of court fees and lawyers' fees. The delay results from the backlog, underfunding, and inadequate judiciary staff.[378]

4.13.3 Local councils

They were established under the Local council ACT of 2006 to operate in small towns, villages, sub-counties, and divisions.[379] The court comprises a chairman, who presides over the court, and other members appointed by the local council. [380]The exact number of members can

[375] Kabumbuli, Robert. "Joint Ownership of Family Land in Uganda: Examining the Responses, Challenges and Policy Implications." *African Sociological Review / Revue Africaine de Sociologie*, vol. 20, no. 1, 2016, pp. 67–86. *JSTOR*, http://www.jstor.org/stable/90001846. Accessed 5 Feb. 2023.

[376] Section 5 of The Administrator Generals Act cap 157.

[377] 'Judicial Committee of the Privy Council - Adel Boshali v. Allied Commercial Exporters Ltd. - Sulay Seisay v. Pa Sheka Kanu and Others - United Marketing Company v. Hasham Kara - Sir Abubakar Tafawa Balewa v. Doherty and Others Case' (1963) 7 Journal of African Law 192.

[378] Manji (n 243).. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/afemlj19&i=91.

[379] Section 3 of Local council courts Act

[380] JCD Lawrance, 'The Position of Chiefs in Local Government in Uganda' (1956) 8 Journal of African Administration 186.

vary, but the court generally includes representatives from different local communities and stakeholders, such as village leaders and representatives from women's and youth groups. The chairman and court members are responsible for resolving disputes and enforcing customary laws within their jurisdiction.[381]

The duties of Local Council Courts in Uganda are defined by the Local Council Courts Act of 2006. The primary responsibilities of the court include:- Resolving disputes: The court is responsible for resolving disputes brought before it, including disputes related to customary law, property rights, and other local matters.[382] Enforcing customary laws: The court is responsible for enforcing customary laws within its jurisdiction, which includes ensuring compliance with traditional practices and resolving disputes between individuals and communities. Protecting rights: The court is responsible for protecting the rights of individuals and communities within its jurisdiction and ensuring that justice is served. Maintaining peace and order: The court is responsible for maintaining peace and order within its jurisdiction and ensuring that disputes are resolved peacefully and orderly. Adjudicating cases: The court is authorized to hear and adjudicate claims brought before it, including cases related to customary law, property rights, and other local matters. The duties of the Local Council Courts in Uganda are essential for maintaining respect for rules and ensuring access to justice for communities and individuals in rural areas.[383]

Even though the local courts have been hailed as fast in dispensing justice, they do not lack downsides. The fact that men dominate the courts makes it hard to fully grant justice to women in the line of intestacy succession since the decisions are based on a patriarchal mentality. Culture, Customs, and tradition influence men, and their choices are mainly based on that, leading to injustice against women as a culture tends to stereotype women as property.[384]

[381] See Section 4(3) of the local council courts Act.

[382] Rose Nakayi, 'The Role of Local Council Courts and Traditional Institutions in Resolving Land Disputes in Post-Conflict Northern Uganda' (2013) 7 Malawi Law Journal 119.

[383] Khadiagala (n 330).& Lynn Khadiagala, The Failure of Popular justice in Uganda, Local Councils and Women's property Rights, school of international service, American University Washington Dc, 2001

[384] Lynn S Khadiagala, 'Justice and Power in the Adjudication of Women's Property Rights in Uganda' (2002) 49 Africa Today 101.*JSTOR*, http://www.jstor.org/stable/4187500. Accessed 6 Feb. 2023.

The Local courts have been accused of a high level of corruption, and since a majority of members of the court are laypeople, they tend not to understand legal matters, which constitutes poor decisions and injustice to a widow. Moreover, there are cases where they have been accused of interfering with the deceased's property instead of assisting the beneficiaries in getting justice.[385]

4.13.4 The police force of Uganda

The Uganda Police Force (UPF) is Uganda's primary law enforcement agency. It is responsible for maintaining law and order, protecting life and property, and enforcing the country's laws. The UPF is organized into various departments, including criminal investigation, traffic control, and community policing.[386] The force operates under the authority of the Ministry of Internal Affairs and is tasked with providing a safe and secure environment for all citizens of Uganda. In addition, the UPF collaborates closely with other security agencies, such as the military, to address security challenges and maintain stability in the country.[387]

A Probation and Social Welfare Officer in Uganda is a professional who works within the criminal justice system to assist individuals convicted of crimes and on probation. The officer's prominent role is to provide support, guidance, and supervision to these individuals to help them reintegrate into society and reduce the risk of reoffending. [388]The duties of a Probation and Social Welfare Officer in Uganda may include Assessing the needs of individuals on probation, developing rehabilitation plans, monitoring the progress of individuals on probation, and ensuring that they comply with the conditions of their probation. In addition, they provide support and

[385] Stella Nyanzi, Margaret Emodu-Walakira and Wilberforce Serwaniko, 'The Widow, the Will, and Widow-Inheritance in Kampala: Revisiting Victimisation Arguments' (2009) 43 Canadian Journal of African Studies / Revue Canadienne des Études Africaines 12.. http://www.jstor.org/stable/20743792.

[386] Elizabeth Clarkson, 'An Overseas Consultant in the Probation Service of Uganda: An Experience on in-Service Training' (1971) 14 International Social Work 34.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/intsocwk14&i=34.

[387] See part v of the police Act 1993

[388] Aili Mari Tripp, 'A New Look at Colonial Women: British Teachers and Activists in Uganda, 1898-1962' (2004) 38 Canadian Journal of African Studies / Revue Canadienne des Études Africaines 123.*JSTOR*, https://doi.org/10.2307/4107270. Accessed 5 Feb. 2023.

guidance to individuals on probation, including assistance with finding employment, housing, and education and maintaining regular contact with individuals on probation, including visiting them at home, work, or school. Finally, they provide regular reports to the court on the progress of individuals on probation and recommend changes to their probation conditions if necessary. The Probation and Social Welfare Officer is vital in promoting public safety and reducing recidivism by helping individuals on probation reintegrate into society. On matters touching on intestate succession, women denied their inheritance rights are more open to reporting to probation officers because many members are female.

4.13.5 The duties of religious leaders

Religion is an essential part of the life of ordinary people in Uganda. As a result, Ugandans trust religious leaders more than their partners. This gives religious leaders much authority in society. Regarding the deceased property, the role of religious leaders begins when the death occurs, continues during funeral services, and even after the burial in advising the bereaved. [389]

In the case of those who profess the Islamic faith, the religious leaders are involved in the devolution of the property left behind when there is no will to show the wishes of the late; in some cases, this is where the disagreement begins, and women tend to be overlooked since a male child is given twice the amount given to the female, and the widow also gets less than the widower. In case of dispute, only imams and Kadhi are qualified in Muslim law to deal with the matter, and since it is assumed that they base their decisions on Quran, the findings cannot be appealed against unless you want to be accused to be going against Allah or the teaching of Prophet Mohamed.[390]

[389]Manisuli Ssenyonjo, 'Women's Rights to Equality and Non-Discrimination: Discriminatory Family Legislation in Uganda and the Role of Uganda's Constitutional Court' (2007) 21 International Journal of Law, Policy and the Family 341.

[390]Jamil Ddamulira Mujuzi, 'The Right to Equality at the Dissolution of a Marriage in Uganda' (2019) 33 International Journal of Law, Policy and the Family 204.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/intlpf33&i=206.

When it comes to Christianity, in Uganda, the church leaders mostly align themselves with the decision of the village elders and rarely question them, which in some cases tends to be very unfair and discriminatory.

4.13.6 Village elders and cultural leaders

In the Ugandan districts of *Bakonzo Buganda*, *Busoga*, there are offices of cultural leaders. The leaders are duty-bound to advise society on various matters, including succession and customs. Traditional and cultural leaders are essential in resolving Uganda's customary law and succession disputes. These leaders are knowledgeable in the local customs and traditions and are often called upon to mediate conflicts and provide guidance in accordance with these traditions. Their decisions and recommendations are not legally binding, but they are highly respected and often accepted by the community as a resolution to disputes. In cases where traditional or cultural leaders cannot resolve disputes, the parties may choose to bring the matter to the formal legal system for resolution. In such cases, the courts will consider the recommendations of traditional and cultural leaders as part of their decision-making process.[391]

In many instances, Elders helped solve many intestate succession issues and even awarded property rights to widows, even at the protest by men. They (elders) work through compromise, dialogues, and restitution. However, in cases where the elders have strictly relied on the traditional/customary laws, they have denied women inheritance rights since the traditional system treats women as property, having only user rights to land and not ownership, and they hold the property in trust for their rights sons.

4.13.7 Non-Governmental Organizations' Initiatives

NGOs in Uganda have taken several steps to promote the entitlements given to widows to intestate property:

[391] David E Apter, 'The Role of Traditionalism in The Political Modernization of Ghana and Uganda' (1960) 13 World Politics 45.. *JSTOR*, https://doi.org/10.2307/2009262. Accessed 6 Feb. 2023.

Awareness Raising: NGOs have raised awareness about the entitlements of widows to inherit estates in the absence of a will through public campaigns, community meetings, and workshops.

Legal Empowerment: NGOs have provided legal education and support to widows, helping them understand their rights and how to assert them in court. This has included providing information on the court process, the services of lawyers, and assisting widows in preparing legal documents.[392]

Advocacy: NGOs have advocated for changes to the laws and policies affecting widow's inheritance rights, including working with lawmakers and the government to improve laws and regulations and making legal reforms.

Mediation and Conflict Resolution: NGOs have also played a role in mediating disputes and resolving conflicts related to intestate property. This has included helping families negotiate and reach an agreement and providing alternative dispute resolution services.

Support Services: NGOs have provided support services to widows, including legal, financial, and emotional support, as well as help accessing government and other services.

NGOs' efforts have helped promote widows' rights to intestate property in Uganda, ensuring they have access to their fair share of assets and property.[393]

4.13.8 Uganda Association of Women Lawyers. (FIDA)

The Uganda Association of Women Lawyers (FIDA) is a non-government organization established in 1984 in Uganda, and it is dedicated to promoting women's rights, including their

[392] Amrita Kapur, 'Catch-22: The Role of Development Institutions in Promoting Gender Equality in Land Law - Lessons Learned in Post-Conflict Pluralist Africa' (2011) 17 Buffalo Human Rights Law Review 75.

[393] Roberts Kabeba Muriisa, 'The Role of NGOs in Addressing Gender Inequality and HIV/AIDS in Uganda' (2010) 44 Canadian Journal of African Studies / Revue Canadienne des Études Africaines 605.*JSTOR,* http://www.jstor.org/stable/23236811. Accessed 6 Feb. 2023.

inheritance rights. FIDA raises awareness about women's legal rights, including their rights to inherit property, and provides legal education and support to women.[394] FIDA also provides representation to women in legal cases related to inheritance and other women's rights issues and advocates for changes to laws and policies that affect women's rights. In addition, the organization works with government agencies, other NGOs, and the private sector to promote women's rights and ensure that women can access their fair share of assets and property, including in cases of intestate property. FIDA's efforts have helped promote women's rights in Uganda and ensure they can access their legal rights to inheritance and other forms of property.[395]

The Uganda Association of Women Lawyers (FIDA) has taken several steps to fight for the rights of widows to inheritance in Uganda, including:

a) Legal Representation: FIDA provides legal representation to widows in court cases related to inheritance and other women's rights issues. This includes advising widows on their rights, preparing legal documents, and representing them in court proceedings.
b) Awareness Raising: FIDA has raised awareness about the rights of widows to inherit property, including through public campaigns, community meetings, and workshops.
c) Legal Empowerment: FIDA has provided legal education and support to widows, helping them understand their rights and how to assert them in court. This includes providing information on the court process, the services of lawyers, and assisting widows in preparing legal documents.
d) Advocacy: FIDA has advocated for changes to the laws and policies affecting widow's inheritance rights, including working with lawmakers and the government to improve laws and regulations and making legal reforms.[396]
e) Mediation and Conflict Resolution: FIDA has also played a role in mediating disputes and resolving conflicts related to inheritance, including helping families negotiate and reach an agreement and providing alternative dispute resolution services.

[394] Marsha A Freeman, 'Women, Law, and Land at the Local Level: Claiming Women's Human Rights in Domestic Legal Systems' (1994) 16 Human Rights Quarterly 559.

[395] Arostegui (n 367).

[396] Rashida Manjoo, 'State Responsibility to Act with Due Diligence in the Elimination of Violence against Women' (2013) 2 International Human Rights Law Review 240.

FIDA's efforts have helped promote widows' rights to inheritance in Uganda, ensuring they have access to their fair share of assets and property, including in cases of intestate property.

4.14 CONCLUSION

In this chapter, I examined the extent of the influence of colonialism on intestate succession law in Uganda and the if the laws in place are adequate to deal with the right of women and children to property inheritance from a deceased husband or father. The chapter also attempted to analyse the reason for the subjugation of women and the actions taken by both the government and non-government organizations in dealing with the vice. Finally, in total reading and understanding of the Constitution, it shows that the *grundnorm/ the parent law* has provided for equality of inheritance to everyone without discrimination based on gender, race, or sex; that is, the Constitution protects women's rights, and provides equality to in a matter of intestate inheritance.

From the above study, Uganda has proper laws to provide for equality of inheritance and deal a death blow to age-old customary laws that deny women and children the right to inherit the estate of an intestate. However, the practice, most so on village sides, seems different; there appears to be a deliberate subversion of laws and denial of equal opportunity for both genders to inherit. Although widows are prevented from inheriting the land left behind by their husbands, they are still just granted user rights. In some cases, the children are taken away from the widow and handed over to other relatives, and young girls are forced into early marriages; seemingly, in Uganda, widows are outcasts, especially on the village side. This happens because of the age-old customary laws and the outdated succession laws that are still widely practiced in some parts of Uganda.

Equality, as furthered by the Human rights principles, is that we are all the same, and subjecting women to discrimination is inhumane; Uganda is a member of organizations dealing with the entitlements of humans at the international level, like the Universal Declarations of Human Rights (UDHR), *the convention on Economic, Social and Cultural Rights* (ICESCR), *African Charter on Human and Peoples Rights* (ACHPR) and *the Convention on Elimination of All Forms of Discrimination against Women* (CEDAW), is duty bound to provide for equality in

all sector to everyone without discrimination of any nature. Undoubtedly, the Ugandan Constitution is one of the best in the area, and the systems promote equality; however, the implementation is lacking and subjecting women to discrimination.

The prosperity of society would go up if the laws promoting equality to inheritance were implemented; women would well manage the property, and it, in turn, be invested in educating the future generation; they could as well reinvest the inheritance into the land, thereby increasing profitability. But unfortunately, the culture can be both oppressor and liberator; some men have abused the culture to subjugate women in society.

Chapter 5: INTESTATE SUCCESSION IN TANZANIA

5.1 INTRODUCTION

Tanzania is a country located in the Eastern part of Africa; it has a population of over 60 million people; these people are grouped into various tribes, which total over 120 tribes, and each tribe has a unique language, culture, and customs, Tanzania is the fourth largest country in Africa in terms of population.[397] The country has a young population with an average age of 21 and a huge population of Tanzanians residing in villages and small towns; only about one-third live in town centres.[398]

The largest tribe in Tanzania, comprising about sixteen percent of the population, is the *Sukuma* people; however, some other large tribes like the *Chaga, Haya, Nyamwezi, and Hehe*.[399] Like Kenya, Tanzania also has a huge population of Maasai, primarily pastoralists, and is famous for the Maasai dresses.[400] The Swahili tribe in Kenya and Tanzania is found chiefly along the coastal regions; they have unique cultures and histories of the Arab invasion of East Africa.[401] The widely spoken language in Tanzania is Kiswahili, even though English is recognized as an official language; in both schools and government offices, the two languages are mainly used as a medium of communication, while at the tribe level, each tribe speaks their languages amongst themselves.[402] Article 19(1) of the Tanzania Constitution declares the country free from religious bias; the state has no reserved religion, and everyone is permitted to choose and belong to any

[397] 'Tanzania | Culture, Religion, Population, Language, & People | Britannica' (25 April 2023) <https://www.britannica.com/place/Tanzania> accessed 2 June 2023.

[398] Tanzania." *Annual Human Rights Reports Submitted to Congress by the U.S. Department of State,* 30, 2005, pp. 544-569. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.intyb/huhelsnk0030&i=586 .

[399] Sufian Hemed Bukurura, 'Combating Crime among the Sukuma and Nyamwezi of West-Central Tanzania' (1995) 24 Crime, Law and Social Change 257.

[400] Alexander B Makulilo, 'Reign over Me: Social-Economic Autonomy Claims over Land Rights by Tanzania's Maasai' (2019) 18 Journal on Ethnopolitics and Minority Issues in Europe (JEMIE) 24.

[401] Charles Pike, 'History and Imagination: Swahili Literature and Resistance to German Language Imperialism in Tanzania, 1885-1910' (1986) 19 The International Journal of African Historical Studies 201. &Michael Pesek, 'Cued Speeches: The Emergence of Shauri as Colonial Praxis in German East Africa, 1850-1903' (2006) 33 History in Africa 395.

[402] Bradley D Naranch, '"Colonized Body," "Oriental Machine": Debating Race, Railroads, and the Politics of Reconstruction in Germany and East Africa, 1906-1910' (2000) 33 Central European History 299.

religion they wish. However, two Abrahamic religions are dominant; about sixty percent of Tanzanians are Christians, and just about thirty-five percent are Muslims, which is still higher than in Kenya. Some tribal religions exist along the two major ones but are not so widely practiced.[403]

The history of the British takeover of Tanzania was a process that was in place for decades, comprising different social, political, and economic factors. John Hanning Speke and Richard Burton, who were traders and explorers, are considered the first British to make contact with the natives of Tanzania; they first visited the place towards the end of the 18th century while seeking to now the beginning and length of river Nile; they found Arab traders at the coastal region of Tanzania, who was majorly trading on an ivory and enslaved person.[404] Before the government of British could establish rule over the Tanzanian people, the Germans had taken over and laid claim over Tanzania towards the end of the 19th century. The Germans were ruthless rulers; they exploited the natural resources and the natives of Tanganyika, they were a threat to the British that were at that time colonising the area nowadays known as Kenya and Uganda, and they feared that the Germans would expand north, and challenge them and maybe take their colonies. [405]

During the first world war, the British attacked Tanzania and defeated the Germans, taking over the erstwhile German colony. The league of Nations officially recognised the British as the colonisers and leader of Tanzania in 1920; the British named the country Tanganyika and implemented a similar system they had in Kenya and Uganda, which was a direct rule in which they used the tribal leaders at the local level and introduced their laws and policies to the Tanganyika people.[406]

---

[403] Mark J Calaguas, Cristina M Drost and Edward R Fluet, 'Legal Pluralism and Women's Rights: A Study in Postcolonial Tanzania' (2007) 16 Columbia Journal of Gender and Law 471.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/coljgl16&i=485.

[404] Gregg Goldstein, 'The Legal System and Wildlife Conservation: History and the Law's Effect on Indigenous People and Community Conservation in Tanzania Notes' (2004) 17 Georgetown International Environmental Law Review 481.

[405] Thaddeus Sunseri, 'Statist Narratives and Maji Maji Ellipses' (2000) 33 The International Journal of African Historical Studies 567.. / Heike Schmidt, '(Re)Negotiating Marginality: The Maji Maji War and Its Aftermath in Southwestern Tanzania, ca. 1905–1916' (2010) 43 The International Journal of African Historical Studies 27..

[406] Hannah Boesl, 'The Concept of Ujamaa and Its Impact on Postcolonial Tanzania' (Konrad Adenauer Stiftung 2023) <https://www.jstor.org/stable/resrep48753> accessed 13 May 2023.. / Meredeth Turshen, 'The Impact of Colonialism on Health and Health Services in Tanzania' (1977) 7 International Journal of Health Services 7.

The British government brought drastic changes to the economy and social life in the country, they introduced coffee, tea, and cotton as cash crops, and the new government embarked on building roads and railways, ensuring the smooth running of businesses, trade, and commerce. The new government imposed forced labour on the natives, and the land laws alienated and dislocated the natives from their ancestral land.[407]

Tanganyika regained its independency in 1961 and united with Zanzibar to form Tanzania in 1964, and Julius Nyerere became the founding president of Tanzania; he was a socialist, promoted independence and self-dependent; he also promoted communal land and resources ownership as opposed to individual land ownership.[408]

This chapter delves into the fundamental concepts, three statutes that regulate intestate inheritance in Tanzania, and the country's historical development of Customary Law. I have also evaluated the effectiveness of recent statutory enactments designed to enhance women's empowerment in intestate succession.

5.2 Intestate succession under customary Law

The Tanzanian 2008 Law of Succession Act is the primary law governing matters touching on intestate succession; the Act, from sections 35 to 45, puts forth the regulations and rules on how the deceased property will be dealt with upon his death if there is no will left behind. A part from the succession Act, other sources of law dealing with intestacy succession are the customary law which is the traditional practices and beliefs, and it mainly deals with matter conventional ways of living which include succession to the property of the deceased; customary law in Tanzania is recognized by the Marriage Act 1974, in section 4 which acknowledges marriages conducted under the customs laws of Tanzania and the Local Customary Law (Declaration) (No. 4) Order of 1963 primarily deals with the customary matter. Indigenous law is mainly used to assist in the devolution

[407] TO Beidelman, 'The Organization and Maintenance of Caravans by the Church Missionary Society in Tanzania in the Nineteenth Century' (1982) 15 The International Journal of African Historical Studies 601.JSTOR, www.jstor.org/stable/217847

[408] Paul K Bjerk, 'Sovereignty and Socialism in Tanzania: The Historiography of an African State' (2010) 37 History in Africa 275.

of the deceased assets in accordance with the tribe they belonged to, and the norms and customs of that tribe have to be followed while doing so. Tanzania acknowledges its history, preserves its customs, and treats it as a natural source of law; however, the customs only apply if they conform to the constitution and other legislations; otherwise, the written laws take precedence over them.[409]

Tanzania has a vast population who are Muslims, hence the treatment of Islamic law as an essential source of law, especially in dealing with personal matters like marriages, succession, divorces, etc.; however, this law which is based majorly on the Quran and the teaching of Prophet Mohamed, only govern Muslims. Under Islamic law, intestate succession applies Sharia law to distribute the deceased's property in accordance with Hadith and the Quran, which set out the share every family member is entitled to base on gender and relation to the deceased.[410]

The primary law dealing with succession is the succession Act which is the statutory law, and it is supplemented by customary and Islamic Law. The Tanzania Law of Succession Act, 2008, in part IV, section 24, outlines the rules on the distribution of the deceased property in case of intestacy; in section 25 of the Act, the heirs of the decease are outlined, and they are surviving spouse, children, parents, and other relatives.[411] Sections 26 to 33 deal specifically with the rules in cases of polygamy, where there is no child left behind or children left behind by the deceased (discussed in detail). The sources of succession Law in Tanzania are not limited to the Act of Parliament or the Constitution. However, when intestate succession is dealt with, Islamic and customary laws are also considered, depending on the deceased's religion and community. However, the 2008 Succession Act takes precedence over all other sources as it provided a competitive framework for dealing with the deceased's property.

Like in Kenya and Uganda, in Tanzania, the family is a significant institution; the definition and regulation of the family relationships, duties, and responsibilities to one another are primarily covered by the customary law in Tanzania as a considerable percentage of Tanzanians live upcountry. Customary law defines a family as a collection of people having similar blood relations

[409] See, Law of Succession Act, 2008, Section 2

[410] See, Law of Succession Act, 2008, Section 11.

[411] See, Law of Succession Act, 2008, Sections 12-18

or together due to marriage, association, or adoption. A family's responsibility covers providing support to its member; the support can be emotional or material, as it is the basic structure of a society. Tanzanian family unit is mainly patriarchal, making the head, in most cases, the oldest man; he is responsible for managing the whole household, including making tough decisions, solving disputes, and providing for everyone without discrimination.[412] The customary law in Tanzania covers every aspect of the family, including the celebration of marriage and the destruction of it either by divorce or separation; the rule for conducting a marriage celebration and that of divorcing are all covered under the customary law. In Tanzania, marriage is a binding of two families, not just the two couples tying the knot; it is more of a contract connecting two families. The head of the household is the husband, who is duty-bound to provide for the whole family, and the wife, whose helper is duty-bound to take care of the children and house while the husband is out looking for ways to provide material support. If the marriage ends, the husband is expected to compensate the wife and the wife's parents; this majorly depends on the reason for the divorce or the separation.[413]

Inheritance is an essential part of the family in Tanzania, and it is majorly governed by customary law, especially in the village and small-town areas. The customs of various tribes vary; however, almost all prefer male heirs over female ones due to the expectation that a woman would get married and leave the family to start her own. Among sons, the eldest son receives a considerable percentage of the estate compared to the younger ones; daughters may or may not ger anything at all, and if they do, they are given the tiniest portion. Although with the new succession law of 2008, efforts have been made to include women's inheritance and promote the equal right to the deceased property, not just favouring the eldest son over others.[414]

[412] DR Salter and JB Ojwang, 'Law Reform in Africa: A Comparative Study of the Tanzanian and Kenyan Experiments' (1985) 18 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 123.

[413]James S Read, 'A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania' (1972) 16 Journal of African Law 19.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/jaflaw16&i=27.

[414] ibid.

Inheritance to the deceased's property cannot be explained without including child custody, as the primary caregiver is usually the mother since the father is mostly away looking for material and money for the family; so in case of divorce or separation, the custody of the child may go to either the mother or the father, in most case, male children are under the control of their father, when this happens, in the setup of an African household, the extended family, like uncles, grandparents, and aunts get involved in the provision and taking care of the child.[415] Family is a fundamental institution in Tanzania, and customary Law plays a significant role in defining and regulating family relationships and obligations. Customary Law governs marriage, divorce, inheritance, child custody, and support based on traditional practices and beliefs. While customary Law may vary depending on the ethnic group and the region, efforts have been made to reform the rules to ensure greater equality and rights for women and children.

5.3 Matrilineal and patrilineal succession

Tanzanian system acknowledges the existence of patrilineal and matrilineal methods of succession, but it depends on the tribe, community, region, and ethnic group.

5.3.1 Matrilineal Succession

In Tanzania, the tribe's communities, like Chaga, Kaguru, Zaramo, Yao, and Makonde, practice Matrilineal succession, a system where the head of the household is a woman, and the property devolves from her to other female members. Under this type of succession, women are on a higher pedestal than men and shoulder more responsibility regarding managing the family estate.[416] In addition, women are duty-bound to preserve the cultural and traditions of their tribe and pass the same to the succeeding generation; male family members are given minimal roles

[415] John Mukum Mbaku, 'International Human Rights Law and the Tyranny of Harmful Customary and Traditional Practices on Women in Africa' (2021) 52 California Western International Law Journal 1.

[416] M Siraj Sait, 'Women's Property Rights in Muslim Matrilineal Communities' (2013) 9 Journal of Islamic State Practices in International Law 1.*HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/jispil9&i=5.

and, in some cases, denied the inheritance right. However, matrilineal succession can also lead to family disputes and conflicts, mainly disagreements over property distribution.[417]

The tribes living in Northern Tanzania, near Mount Kilimanjaro, majorly practice matrilineal succession. The customary law of the Chaga tribe grants more property rights to women than men and puts them as household leaders. Women are responsible for preserving and passing down the cultural traditions of the Chaga people, including land and inheritance customs. When a woman dies, her property is inherited by her daughters, sisters, and other female relatives. The children of a woman's brother are her heirs rather than her children. This means a Chaga man's wealth and property are passed down to his sister's children rather than his children.[418]

The *Kaguru tribe* resides in central Tanzania; they practice matrilineal succession. They identify as a family descending from one woman since the ancestry of this tribe can be traced from the mother's bloodline and not the fathers. To them, the entire property belongs to a woman; the oldest woman is the head of the family and is responsible for protecting its heritage. Upon the death of the mother/ woman, the property devolves to the daughters; if there is no daughter, then the sisters, nieces, grandmothers, and other female relatives. If the woman did not have children of her own, then the daughters of her brothers and sisters inherited her property; if she had sons and not daughters, her nieces, and other female relatives would be considered before her sons.[419] This means that a Kaguru man's wealth and property are passed down to his sister's children rather than his children.

The Zaramo tribes originated from the eastern side of Tanzania; they mainly live around and near the Indian Ocean; just like the Kagurus, they too practice matrilineal succession, which they refer to as "Mother's brother's daughters" (MBD) inheritance, meaning upon the death of the woman, the daughters of her brother take over the property left behind. Upon the man's death, his

[417] Leonard G Magawa and Michelo Hansungule, 'Unlocking the Dilemmas: Women's Land Rights in Tanzania' (2018) 5 Tuma Law Review 110.

[418] ibid.

[419] Pat Caplan, 'Gender, Ideology and Modes of Production on the Coast of East Africa' (1982) 28 Paideuma 29.*JSTOR*, http://www.jstor.org/stable/41409872. Accessed 25 Apr. 2023. / Sait (n 416).

property is inherited by the daughters of his sister instead of his children.[420] However, the MBD system is unique in providing a sense of continuity and stability within the family, as the property remains in the hands of close relatives.

5.3.2 Patrilineal Succession

This is a common type of succession in Africa and worldwide; it is the type in which the deceased's properties devolve down to the male line.[421] It suffices to state that it is no longer the case in many legal jurisdictions since, nowadays, everybody has an equal right to inheritance without discrimination based on gender. However, this type of succession in Tanzania considered the children of brothers of the deceased in inheritance, and in some cases, they were favoured over their children. Under patrilineal succession, the massive responsibility of running the family's affairs is given to men. They have to ensure that the family is well taken care of. This type of succession has been cited as discriminatory against women and children, mainly if they are not considered legitimate heirs.[422]

Under Tanzanian Customary law, patrilineal and matrilineal are recognized, but their application depends on the tribe and ethnic group a person belongs to. However, matrilineal succession is a system of inheritance in which property is passed down through the female line, while patrilineal succession is a system of inheritance in which property is passed down through the male line. [423]While both systems have advantages and disadvantages, efforts have been made to reform the rules to ensure greater equality and rights for women and children.

---

[420] Angela M Banks, 'CEDAW, Compliance, and Custom: Human Rights Enforcements in Sub-Saharan Africa' (2008) 32 Fordham International Law Journal 781. & Rhoda Howard, 'Human Rights and Personal Law: Women in Sub-Saharan Africa' (1982) 12 Issue: A Journal of Opinion 45.

[421] Ian Keen, 'Language in the Constitution of Kinship' (2014) 56 Anthropological Linguistics 1.. *JSTOR*, https://doi.org/10.2307/1155578. Accessed 7 May 2023.

[422] ibid.

[423] Harald Sippel, 'Customary Family Law in Colonial Tanganyika: A Study of Change and Continuity' (1998) 31 The Comparative and International Law Journal of Southern Africa 373.http://www.jstor.org/stable/23250262.

Patrilineal succession is practiced by several ethnic groups in Tanzania, including the *Sukuma, Nyamwezi, and Zanaki*. This system has evolved and is still in practice today, albeit with some modifications to suit changing times:

The Sukuma tribe can be found in the northwest part of Tanzania; they are the most prominent tribe in the region. They thoroughly practice patrilineal succession; that is, they favour male descendants over a female inheritance. Upon the man's death, his eldest son is the first favour in the inheritance hierarchy, then the other sons. The sons are expected to support their unmarried sisters because daughters are usually not accorded the same inheritance rights as the sons. The Sukuma also have a practice called "levirate marriage," in which a man may inherit his brother's widow and her children and property.[424]

The *Nyamwezi* can be found in the centre of Tanzania. Their customary law also favours male children over females in inheritance. Like the Sukuma tribe, his property devolves to his sons upon the man's death, with his eldest son getting the most significant share. Since daughters are not considered while dividing the property, the sons (brothers) are expected to support them until the daughters marry. The *Nyamwezi* also have a practice called "ghost marriage," in which a man may marry a dead woman to inherit her property and provide for her children.[425]

The *Zanaki tribe* also resides in Tanzania's centre, mainly in Dodoma. The customs of *Zanaki* favours male heirs over female. Upon the death of the man, his sons divide his properties, with the eldest one taking the most significant part; the sons are expected to take care of their sisters until when they get married, this is because the sisters usually do not have a share in their father's property and when they get married, their husbands are generally considered to be in charge of taking care of them. The *Zanaki* also practice "marriage by capture," in which a man

[424] John Comaroff and Jean Comaroff, 'Policing Culture, Cultural Policing: Law and Social Order in Postcolonial South Africa' (2004) 29 Law & Social Inquiry 513. & Geschiere, Peter. "The Modernity of Witchcraft: Politics and the Occult in Postcolonial Africa." University of Virginia Press, 1997../ Peter Geschiere, 'Autochthony, Citizenship, and Exclusion - Paradoxes in the Politics of Belonging in Africa and Europe' (2011) 18 Ind J Global Legal Stud 321

[425] Daphna Hacker, 'The Gendered Dimensions of Inheritance: Empirical Food for Legal Thought' (2010) 7 Journal of Empirical Legal Studies 322./ Elaine Zuckerman, and Marcia Greenberg. "Elaine Zuckerman and Marcia Greenberg, 'The Gender Dimensions of Post-Conflict Reconstruction: An Analytical Framework for Policymakers' (2004) 12 Gender and Development 70.. http://www.jstor.org/stable/4030657.

may abduct a woman he wishes to marry and negotiate with her family for her hand in marriage. If the negotiations are successful, the man will pay a bride price and become the woman's husband.[426]

5.3.2.1 Succession to the property belongs to a man in a Tanzanian matrilineal community

In Tanzania, in the communities that practice matrilineal succession, I the deceased was a man, the rules of matrilineal inheritance deal with his property. Matrilineal inheritance, as discussed above, is one in which the deceased's property devolves through the female rather than the male line, as in patrilineal societies. According to a study by Kiden and Minja (2019), in matrilineal societies in Tanzania, the property is inherited by the deceased man's sister's son rather than his biological son. This is because the man is considered to belong to his sister's lineage, and his sister's son is seen as the closest male relative. [427]

Additionally, Kiden and Minja (2019) point out that in some matrilineal societies, such as the Chagga in Tanzania, the sister's son who inherits the property is expected to provide for the deceased man's widow and children. This is seen to ensure that the deceased man's family is cared for while maintaining the matrilineal inheritance system. Overall, the succession to a man's property in a matrilineal community in Tanzania is determined by the rules of matrilineal inheritance, which dictate that the property is passed down through the female line. This means that the man's sister's son is typically the one who inherits the property and, in some cases, is expected to provide for the man's widow and children.[428]

---

[426] Helen Dancer, 'An Equal Right to Inherit: Women's Land Rights, Customary Law and Constitutional Reform in Tanzania' (2017) 26 Social & Legal Studies 291. & Magawa and Hansungule (n 417).

[427] Kiden, L. and Minja, D., 2019. Traditional inheritance and property rights among matrilineal societies in Tanzania: A review. Journal of Anthropology and Archaeology, 7(1), pp.1-7 & Uri Gneezy, Kenneth L Leonard and John A List, 'Gender Differences in Competition: Evidence from a Matrilineal and a Patriarchal Society' (2009) 77 Econometrica 1637.. http://www.jstor.org/stable/25621372./

[428] Michael K Addo, 'Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights' (2010) 32 Human Rights Quarterly 601.

The order of inheritance is as follows:[429]

a) Man's sister's children (i.e., his nephews)
b) Man's brother's children (i.e., his nieces and nephews on his father's side)
c) Man's sister
d) Man's brother
e) Man's mother
f) Man's father
g) Man's children (considered part of their mother's lineage)

It is important to note that the specifics of inheritance laws may vary depending on the matrilineal community in question and may be subject to change over time.

5.3.2.2 Succession to property belonging to a woman in a Tanzanian matrilineal community

In a matrilineal community in Tanzania, the order of succession to the property of a woman who has died intestate would typically follow the woman's female relatives in her mother's lineage. The order of inheritance is as follows:[430]

a) Woman's daughter
b) Woman's sister
c) Woman's sister's children (i.e., her nieces and nephews)
d) Woman's mother
e) Woman's grandmother (if the mother is deceased)
f) Woman's aunt (i.e., her mother's sister)

[429] Sonia Cole, 'The Prehistory of East Africa' (1954) 56 American Anthropologist 1026. & Arnulf Becker Lorca, 'Petitioning the International: A Pre-History of Self-Determination New Voices: A Selection from the Second Annual Junior Faculty Forum for International Law' (2014) 25 European Journal of International Law 497.

[430] TO Beidelman, 'Review of The Chagga and Meru of Tanzania' (1979) 12 The International Journal of African Historical Studies 686.

5.3.2.3 Succession in a patrilineal community in Tanzania

In Tanzania, as in many other patrilineal societies, the inheritance of property and wealth is typically passed down through male lineage. When a man dies, his property is generally passed down to his male descendants, such as his sons, brothers, and nephews, rather than to his daughters or other female relatives.[431]

Tanzania's legal framework for inheritance is based on customary Law, which varies by region and ethnic group. However, customary practices and social norms reinforce the patrilineal inheritance system. For example, in some communities, the oldest son may be designated as the primary heir and receive a larger share of the inheritance than his younger siblings. Despite the emphasis on male inheritance, there are variations in how property is divided within patrilineal communities. For example, some communities practice partible inheritance, in which the deceased's property is divided equally among his male heirs, regardless of birth order. Other communities practice primogeniture, where the oldest son receives a larger inheritance.[432]

It is important to note that while patrilineal inheritance is the norm in Tanzania, there are exceptions and variations based on factors such as the deceased's marital status, the presence of a will, and the preferences of the deceased or his family. For example, a man may leave his property to his wife or daughters rather than his male relatives. It suffices to note that in modern times, Tanzania endeavoured to provide legal protection to children and women by passing laws that favour everyone without gender-based discrimination. For example, the 2004 Law of Marriage Act in Tanzania recognizes the right of a surviving spouse to inherit property and protects children's inheritance rights. Overall, property inheritance in patrilineal communities in Tanzania is a complex and evolving issue shaped by cultural, legal, and social factors. While there is a strong emphasis on male inheritance, variations, and exceptions also reflect changing attitudes and values towards gender and family relationships.

---

[431] Dzodzi Tsikata, 'Gender, Land Rights and Inheritance Securing Women's Land Rights: Approaches, Prospects and Challenges' (International Institute for Environment and Development 2005) <https://www.jstor.org/stable/resrep16513.12> accessed 13 May 2023.

[432] BA Rwezaura, 'Tanzania: The Law Reform Commission's Paper on Proposed Changes in Family Law' (1987) 26 Journal of Family Law 213.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/intsfal4&i=435./.

5.3.2.4 The order of inheritance in a patrilineal community in Tanzania

In Tanzania, as in many other patrilineal societies, the order of succession to a man's property is typically based on male primogeniture, which means that the oldest son inherits the largest share of the property. However, the specific rules of inheritance can vary depending on the ethnic group and cultural tradition of the community. [433]

The best example is the Chagga People, mainly found in the Northern part of Tanzania; their custom favours the eldest son over everyone; however, upon inheriting the property from a deceased father, the son is duty-bound to provide and care for everyone in the family. However, the same custom that governs the Chagga People also allows for the bypassing of the eldest son in case he is not fit for the responsibility that comes with the inheritance; in that case, the younger brothers get to inherit instead of the eldest son, in case there is not any other son of the decease, then the uncles or any other male relatives. The Sukuma people, who are majorly found in North-western Tanzania, however, do not discriminate based on their position at birth. Although, to them, every son is entitled to inherit the property, regardless of birth order equally, the justification is to devolve the wealth and avoid internal conflict; they believe that sharing of wealth among the living brothers equally would prevent the concentration of the family wealth in one or a few hands, which could lead to conflict within the family or community.[434]

In some communities, such as the Maasai in northern Tanzania, property may be divided into two separate categories: "movable" and "immovable" property. Movable property, such as livestock, may be divided equally among all male heirs, while the eldest son may inherit immovable property, such as land or houses.[435]

It is important to note that while the principle of male primogeniture is often followed in patrilineal societies in Tanzania, there are variations and exceptions based on factors such as the

[433] Tsikata (n 431).

[434] Calaguas, Drost and Fluet (n 403).

[435] Rwezaura, 'Tanzania' (n 432).

deceased's marital status, the presence of a will, and the preferences of the deceased or his family. For example, a man may leave his property to his wife or daughters rather than his male relatives.

5.3.2.5 Succession in a patrilineal community in Tanzania, in case the property belonged to a woman.

In patrilineal communities in Tanzania, the succession of property for women is often governed by customary laws prioritizing male inheritance. For example, according to a study by Chambua and Katabaro (2019), patrilineal inheritance rules in Tanzania dictate that "property devolves from fathers to sons, and in the absence of male heirs, to the closest male relative." This means that if a woman dies without leaving a male heir, her property may pass to her husband's family rather than to her family or children. Furthermore, customary laws in Tanzania often do not recognize women's property ownership, particularly in rural areas where women may not have formal documentation of land ownership. As a result, women may face challenges asserting their property rights and may be vulnerable to dispossession or exploitation.[436]

5.4 The obligations and entitlements of the inheritor according to Customary Law

In Tanzania, the customary law grants some rights and duties to the heirs of the deceased; these duties vary from one region to the next and one tribe to another. The primary right given to the heir is to inherit the property and titles of the deceased. In their book *Land Law Reform in East Africa,* Mwakasikili and Ngalinda (2018) note that, in Tanzania, inheritance under customary is more patrilineal and follows the rules therein, they favour sons over daughters, and the property majorly moves from the deceased to his sons and where there is no son, then to any male relatives. Under customary law, inheritance in Tanzania also differs from community to community and region; some practice matrilineal, while others use patrilineal inheritance. [437] The successor's first

[436] Bart Rwezaura, 'Gender Justice and Children's Rights: A Banner for Family Law Reform in Tanzania Tanzania' (1997) 1997 International Survey of Family Law 413.

[437] Pastory Magayane Bushozi, 'Towards Sustainable Cultural Heritage Management in Tanzania: A Case Study of Kalenga and Mlambalasi Sites in Iringa, Southern Tanzania' (2014) 69 The South African Archaeological Bulletin 136. http://www.jstor.org/stable/43868708. / Charnley, Susan. "Pastoralism and Property Rights: The Evolution of

and foremost duty is to accord the deceased a befitting burial and perform final rites following the deceased's tribal customs; the second responsibility is to take care of the dependant left behind by the deceased. *Chambua and Katabaro* note that in some communities, the successor may be expected to take on a leadership role in organizing the funeral and paying for funeral expenses. Under customary Law, the successor is required to provide for the basic needs of the deceased's children, including food, shelter, clothing, and education. This obligation extends to all children, including those born outside of marriage. According to the African Charter on the Rights and Welfare of the Child, Tanzania is a signatory, "*every child shall be entitled to the enjoyment of the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health*." In addition, the successor is expected to ensure that the children are protected from harm and provided with a safe and nurturing environment. This includes protecting them from abuse, neglect, and exploitation. The Tanzanian Law of the Child Act of 2009 also states that "every child has the right to be protected from all forms of abuse, neglect, exploitation or any other form of violence."

The customary law principle of inheritance and the successor's responsibilities to the deceased's children have been recognized and upheld in various court cases in Tanzania. For example, in the case of *Kilinda v. Kilinda [1999] TLR 266*, the court held that the successor had a legal duty to provide for the deceased's children and ensure they were adequately cared for. Similarly, in the case of *Nyanduga v. Nyanduga, [1996] TLR 131*, the court held that the successor had a duty to provide for the deceased's children and ensure that they received an education. Under customary Law in Tanzania, the successor has a legal and moral obligation to provide for the welfare and well-being of the deceased's children. This responsibility is recognized by international and domestic laws and upheld by the courts in Tanzania.

Communal Property on the Usangu Plains, Tanzania." *African Economic History*, no. 25 (1997): 97–119. https://doi.org/10.2307/3601881.

5.4.1 The duties of the inheritor towards the surviving spouse of the deceased as prescribed by the customary laws of Tanzania

The surviving spouse has the right to be treated fairly and should not be disinherited by the heirs and the relatives of the deceased; their welfare is the centre of the responsibilities given to heirs. Therefore, the inheritor must ensure that the surviving spouse is accorded the necessary access to resources needed to sustain the lifestyle they had before the passing of the deceased; that is, the surviving spouse should be able to access the family land, matrimonial home, financial resources created out of the deceased's estate and any other assets necessary for their wellbeing.[438]

The duty of the inheritor goes on to include providing security to the surviving spouses, including protecting them from any physical harm, emotional abuse, and psychological harm that may be due to issues dealing with succeeding the deceased and the estate left behind. The successor's duty to protect the surviving spouse also includes ensuring that the deceased's relatives do not disinherit them. The customary law, in force in Tanzania, grants the surviving spouse a part of the deceased's estate, and the successor must protect that right and ensure it is recognized and respected by others.

The importance of the duties of the successor to the surviving spouse is well covered in *Mawazo v. Mawazo [1995] TLR 202*. Where the main issue was touched on the inheritance, and the brothers of the deceased disagreed on the way the estate of the deceased was to be devolved; at the same time, children and a spouse survived the deceased; in its decision, the court grated the surviving spouse a share of the deceased's property and based the decision on the Tanzanian Customary law. The court emphasized the importance of the successor's responsibility to protect the surviving spouse and ensure they are not unfairly disinherited.[439] A similar matter regarding the duties of the successor to the surviving spouse arose in *Ngamita v. Sabato [1989] TLR 13*. The issue was the same, as in this case, too, the deceased's brothers sought to disinherit the surviving

[438] AN Allott, 'Customary Law in East Africa' (1969) 4 Africa Spectrum 12.*JSTOR*, http://www.jstor.org/stable/40173502. Accessed 25 Apr. 2023.

[439] Ajgm Sanders, 'How Customary Is African Customary Law?' (1987) 20 The Comparative and International Law Journal of Southern Africa 405.http://www.jstor.org/stable/23247689.

spouse, and the court, in its wisdom, granted the spouse a share of the deceased's property and directed the successor to protect the surviving spouse's rights.[440] In summary, the duties of the inheritor to the surviving spouse as envisaged by the Tanzanian Customary law are ensuring they (surviving spouse) has access to the basic need and the estate of the deceased, proving the needed protection against bodily and emotional harm and protecting them from being disinherited. These responsibilities are essential in upholding the principles of justice and fairness in inheritance and succession under customary Law.

5.4.2 The successor's liability for debts

The Customary Law dealing with succession in Tanzania puts the burden of paying any debt the deceased may have had before passing on the successor. The principle of "*jikopo*," a term derived from Swahili, means the survivors' duty to pay any debt the deceased had not paid before passing. *The customary law recognizes Jikopo* as a traditional custom in Tanzania. In modern times, the courts in Tanzania have made decisions supporting Jikopo, for instance, in *Lugumi v. Mfaume [1976] LRT n. 58,* the court directed the successor to pay the debts left behind by the deceased, even if the debts were incurred without the successor's knowledge or consent. The court noted that the obligation of jikopo was a long-standing principle of customary Law in Tanzania and that the successor was expected to honour this obligation.

A similar matter arose in *Ndesamburo v. Njiku [1972] LRT n. 29,* where the court directed the heir of the deceased to pay the debts left behind by the deceased, and the duty to pay the debt was not limited to the debts that happened with the knowledge of the successor. The heir's responsibility included any debt that took place before he took up the role of the successor, even after the death of the deceased, but related to the activities of the deceased, like burial expenses. The court noted that the principle of jikopo was a well-established principle of customary Law in Tanzania and that the successor was expected to honour this obligation.

[440] Nditi, N (2017). Succession and Trust in Tanzania: Theory, Law and Practice. Law Africa Publishing (K) Ltd: Nairobi, Kenya. P52/ NN Nditi, *Succession and Trusts in Tanzania: Theory, Law and Practice* (LawAfrica Publishing (K) Limited 2017).

Sir Robert Jennings and Arthur Watts, who are legal scholars, in their book Customary law in Tanzania, which was first published in 1972, have in detail discussed the liability of the successor to pay debts left behind by the deceased and if he fails to honour the debt, he may suffer from social ostracism and the whole community will not accord the family the deserved respect.

5.4.3 Disinheritance of a successor under Customary Law

The successor loses the inheritance rights if he has been found guilty of breaching tenets of customary law severely or in cases where he has behaved against the interest of the community of his family. Every ethnic and tribal group in Tanzania has different terms and reasons for disinheriting an heir.[441] However, in almost all of them, an heir would be disinherited under the conditions like committing a serious crime like murder, being found guilty of immorality, or refusing to assist the needy family member. Apart from the glaring reason for disinheritance, in some communities, the reasons could be as shallow as gender, social consideration, birth order, etc. The case of *Salehe v. Mwasubila [1972] LRT n. 23* explain the extent of the seriousness of failing to support family members as a reason for disinheritance; in this case, the successor was denied the inheritance right because he had failed to provide for his mother and was also guilty of immoral activities.[442] The exact reasons were cited in *Mwakabuta v. Mwakalobo [1972] LRT n. 28*, where the court allowed the successor to disinherit because he had failed to care for his family. In his publication "African Customary Law: An Introduction," T.W. Bennett, a legal scholar, and commentator, highlighted denying the heir inheritance right, that disinheritance happens when the heir behaves against the family's interests and community. Similarly, in "The Law of Succession in Tanzania" by James Jesse Msekela, the author discusses the conditions for disinheritance under customary Law and notes that this may occur where the successor has committed a severe breach of Customary Law.[443]

[441]Tebbe (n 112).. https://doi.org/10.1086/589947.

[442] Masengu (n 124).

[443] Lisa Owino, 'Application of African Customary Law: Tracing Its Degradation and Analysing the Challenges It Confronts' (2016) 1(1) *Strathmore Law Review* 143./

5.5 Legislation in Tanzania governing intestate succession

5.5.1 History of intestate succession Legislation

5.5.1.1 Before colonialization

Before Tanzania was colonised, intestate succession was governed by customary law, which was applied differently in different tribes and ethnic groups that lived in Tanzania; these customs were passed from one generation to the next; the common attribute of the customs was how it favoured patrilineal succession to matrilineal one, and in most cases, sons were favoured over women. The order of inheritance varied in every tribe; however, generally, the eldest son would get the massive portion of the estate, while the rest get equal; however, daughters were not considered as heirs. In some communities, the widow was permitted to inherit her deceased's husband's estate if she was still very young and needed to take care of the children.[444]

Many ethnic groups and tribes call Tanzania their home; they practice different customs and legal traditions to guide their private activities, especially intestacy inheritance. For example, as John Iliffe, a historian, points out, the Chagga people, who are majorly found in the Northern part of Tanzania, have well and highly developed customs for the distribution of property in case of intestacy and it covers both cases of patrilineal and matrilineal concepts.[445] As discussed in the preceding section, in a patrilineal system, the property is inherited by all sons, but the eldest son takes a higher percentage of the property than the rest of the sons. If any son did not survive the deceased, then his brothers would share his property equally, and if there were no surviving brothers, then the estate would go to the surviving sisters' sons equally.[446]

Jan Vansina, a historian who studied the Nyamwezi people, majorly found in the centre of Tanzania, in his book, *The Children of Woot,* highlighted how intestacy succession is conducted

[444] Cotran, 'The Place and Future of Customary Law in East Africa' (n 22).

[445] Ewelukwa (n 138).

[446] Tebbe (n 112).

among Nyamwezi people, that it is based on matrilineal and patrilineal principles.[447] That the distribution of the deceased's property covered everyone, including the children of the deceased, the deceased's brothers and sisters, and other close relatives. The exact rules varied depending on the case's specific circumstances and were often the subject of negotiation and dispute among family members.[448] Isaria N. Kimambo, a historian from Tanzania, studied the Sukuma people, an ethnic group based in the northwestern part of Tanzania. [449] He pointed out that the tribe has an inheritance in this tribe is based on patrilineal descent; upon the death of the father, the sons would inherit the estate and the title, but daughters could only inherit if the deceased had no surviving son.[450] Edward Alpers studied the Yao people, a tribe found in south-eastern Tanzania, and practiced a matrilineal inheritance; upon the death of the leader of the house, the property would devolve to daughters and sisters, not sons.[451] However, sons and daughters could also inherit under certain circumstances, such as if there were no male heirs or if the deceased person had specified in their will that specific property should go to a particular child.[452]

5.5.1.2 During colonialization

After the end of the first world war, the British took the reign in Tanzania from the Germans. During their reign, the English introduced several reforms touching on governing Tanzania and included the laws on succession, which brought changes to intestate succession in

[447] Francis West, 'Review of Oral Tradition. A Study in Historical Methodology' (1966) 5 History and Theory 348.

[448]Richard Reid, 'Past and Presentism: The "Precolonial" and the Foreshortening of African History' (2011) 52 The Journal of African History 135. Vansina, Jan. Paths in the Rainforests: Toward a History of Political Tradition in Equatorial Africa. University of Wisconsin Press, 1990. P.72 / Macgaffey, W. (1994). [Review of *Paths in the Rainforests: Toward a History of Political Tradition in Equatorial Africa*, by J. Vansina]. *American Ethnologist*, *21*(3), 641–642. http://www.jstor.org/stable/645938

[449] CAB International, 'The Tanzanian Peasantry: Economy in Crisis.' [1992] The Tanzanian peasantry: economy in crisis. <https://www.cabdirect.org/cabdirect/abstract/19916712542> accessed 8 May 2023.

[450] J Gus Liebenow, 'Responses to Planned Political Change in a Tanganyika Tribal Group' (1956) 50 The American Political Science Review 442.. *JSTOR*, https://doi.org/10.2307/1951678. Accessed 25 Apr. 2023./ &David E Ault and Gilbert L Rutman, 'The Development of Individual Rights to Property in Tribal Africa' (1979) 22 Journal of Law & Economics 163.

[451] 'O_Ali_African Diaspora_2011.Pdf' <https://libres.uncg.edu/ir/uncg/f/O_Ali_African%20Diaspora_2011.pdf> accessed 8 May 2023.

[452] RJ Chadwick, 'Matrilineal Inheritance and Migration in a Minangkabau Community' [1991] Indonesia 47.*JSTOR*, https://doi.org/10.2307/3351065. Accessed 25 Apr. 2023.

the country. The English government in Tanzania intended to introduce a uniform legal system derived from the common laws of England, and that would take precedence over the conventional legal system.[453] The then-English government introduced the intestate succession Ordinance in 1929 to the Tanzanian people; the ordinance covered rules that governed succession, including the testate and intestate succession. The law sought to do away with discrimination based on gender and directed that the deceased's estate was to be equally distributed to the surviving heirs, and the spouse was to get a higher percentage of the property. If the deceased left no surviving children and spouse, his relatives would take over the property, with his parents getting the priority, the brothers and sisters, and the close relatives.[454]

The Intestate Succession Ordinance considerably departed from the Tanzania customs forced before colonialisation. The Ordinance sought to do away with the concept of matrilineal and patrilineal and replace it with a uniform system in accordance with British common law principles. However, the natives of Tanzania did not well receive the new system. The people felt that they were not fully consulted before the law was introduced and that the complexity of their communities was not considered while the uniform intestate succession was being introduced. Furthermore, most of them felt that the new law did not consider the extended type of family set up in Africa; it considered the nuclear family style as it was in England.[455]

5.6 The intestate succession after Tanzania had gained independence

Since 1961 Tanzania has become an independent country, and intestacy succession has been amended multiple times to conform with the time. Intestate succession as a written law in Tanzania can be traced to 1929,[456] enacted by the English government during colonial rule. However, the ordinance continued the application of customary laws by providing that an

[453] Levy and Pinto (n 200).. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/tjwl21&i=121.

[454] Eugene Cotran, 'Integration of Courts and Application of Customary Law in Tanganyika' (1965) 1 East African Law Journal 108.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/easfrilaj1&i=113.

[455] Lyndon Harries, 'Language and Law in Tanzania' (1966) 10 Journal of African Law 164.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/jaflaw10&i=172.

[456] Law of Succession Act, 1963, available at: https://tanzlii.org/tz/legislation/act/1963/5

intestate's estate would be dealt with under customary law; the customs of various ethnic groups in Tanzania varied from one region to the next and one tribe to the other.[457]

After independence, and in order to have a uniform intestate succession, the government of the day in Tanzania attempted to consolidate all the laws that dealt with succession; this led to the culmination of the Succession Act of 1963, this law covers the entire country as far as intestate succession is concerned and it repealed all the succession laws in operation before it came into effect. On top of the uniform nature of the law of Succession, it also brought about equality in inheriting the deceased estate; it did away with discrimination based on gender and the position of birth; these introductions were a result of various amendments both in 2001 and the latest in 2008,[458] to reflect societal norms and values changes. The amendment in 2008 of the Law of Succession in section 3(1)brought about the acknowledgment of children born out of wedlock, and section 44(1) of the 2008 Act, grants priority of inheritance to the surviving spouses of the deceased.[459]

5.6.1 The Marriage Act

Matters touching on marriage and divorce in Tanzania are dealt with by the Marriage Act of 1971.[460] Under this Act, Sections 5-13 deal with the procedure for forming and celebrating marriage, and Sections 30 to 33 deal with the dissolution of marriage. The Act covers all types of marriages, whether Muslim, Christian, or customary. The link between Marriage and intestate succession is based on declaring the rightful spouse entitled to inherit the deceased's property. According to Section 3 of the Succession Act 1973, the Intestate Succession part, when a person fails to leave a will on how his properties are dealt with, they are distributed according to the law of succession. The priority is given to the deceased's immediate family members, spouse, and

[457] Law of Succession (Amendment) Act, 2008, available at: https://tanzlii.org/tz/legislation/act/2008/12

[458] The Law of Succession (Amendment) Bill, 2007, available at: https://www.parliament.go.tz/polis/uploads/bills/1542606899-The%20Law%20of%20Succession%20(Amendment)%20Bill,%202007.pdf

[459] Helle Munk Ravnborg and Rachel Spichiger, 'Pursuing Gender Equality in Land Administration' (Danish Institute for International Studies 2014) <https://www.jstor.org/stable/resrep13231> accessed 13 May 2023.http://www.jstor.org/stable/resrep13231.

[460] The Marriage Act, 1971. https://tanzlii.org/tz/legis/consol_act/ma114/

children who survive him. The importance of the Marriage Act is that once the legal spouse has been identified, in case the deceased was married, priority would be given to her.[461] The deceased's spouse, who has survived them, would get the whole property if no children were left behind. If the deceased left behind children, then the spouse and the children would get a portion of the estate; the children would equally divide the remainder of the property after one-third is given to the surviving spouse.[462] If there are children and no spouse, then children would share the deceased's estate equally. The estate would go to parents and siblings if the deceased were unmarried.[463]

The 1971 Marriage Act, in section 2, envisages three types of marriages in Tanzania: Christian Marriage, which is conducted in accordance with the Christian rites; it is performed in church and ordained by a pastor in the presence of witnesses. The second type of marriage is the Muslim marriage; according to the Act, the parties must be over 18 and can consent to marriage, a sheik or any other authorised person performs the marriage, and at least two witnesses must be present. The third one is the customary marriage, which is conducted under the traditional edicts, the procedures differ from tribe to tribe, but the consent of the parents is a requirement, as the full payment of the bride price.[464]

5.6.1.1 Criticisms of the Marriage Act

The main criticism of the Act is how it leads to gender-based discrimination in case the spouse dies intestate, and the distribution of property may lead to favouring and disfavouring others. Section 8 of the Act promotes polygamous marriage; it permits a man to have multiple wives and have children with all of them. If a man dies intestate, then his estate would be dealt with in accordance with customary succession of the tribe where he comes from or the succession Act, as long as the two do not conflict. Section 114 requires equal distribution of the estate in case

[461] Katherine Hughes and Elisabeth Wickeri, 'A Home in the City: Women's Struggle to Secure Adequate Housing in Urban Tanzania Special Report' (2010) 34 Fordham International Law Journal 788.*HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/frdint34&i=798.

[462] ibid.

[463] The Intestate Succession Act, 1972 (amended in 1995). https://tanzlii.org/tz/legis/consol_act/isa136/

[464] Pieter Bakker, 'The Validity of a Customary Marriage under the Recognition of Customary Marriages Act 120 of 1998 with Reference to Sections 3(1)(b) and 7(6) Part 2' (2016) 79 Journal for Contemporary Roman-Dutch Law 357.

the man leaves more than one woman; however, this does not consider a house with more children or whether one of the women has school going or young children; this is a failure of the Act to provide clear guidelines on how the equal distribution of the property is to be effected. The Marriage Act has been criticised for failing to protect a widow's intestate succession rights adequately. Widows whose marriages were conducted under customary law may not get equal rights with those married under other systems to lay claim over the deceased's estate, leading to an unfair disadvantage. In addition, the children and widows born of the customary marriage union may face difficulty when they lose the father, especially if the law does not fully recognize the marriage.[465]

The Marriage Act has lacunae, which has not addressed the property the parties brought in and got during the marriage. All the properties are clustered together and considered joint property of the parties, and in case of divorce of death, the whole property is to be distributed equally to the surviving spouses, including in matters of polygamous marriages. The Act should have provided clear guidelines on how the jointly owned property should be dealt with in case of divorce or death.

The impact of the Marriage Act in Tanzania has been litigated, and the criticisms highlighted above have been explained in the form of judicial precedents.

The case of *Aboud Juma v. Marhema Aboud Juma [1997] TZHC 9; [1997] TLR 295.)*[466] The deceased was polygamous; two wives and multiple children survived him. Both marriages were celebrated under customary law. Upon his death, a tussle arose on how his estate should be dealt with. In its decision, the High Court of Tanzania took into account the issue of succession and customary law of the tribe of the deceased., and while making a decision, stated that the customary law dealing with intestate succession was very discriminative against the widows and female heirs of the deceased, the customary law had directed that the whole property be given to

[465] Magawa and Hansungule (n 417).. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/tuma5&i=119./ &Charles Joseph Mmbando, 'The Protocol on the Rights of Women in Africa: A Tool to Women Rights Protection in Tanzania' (2014) 3 Tuma Law Review 1.

[466] Aboud Juma v. Marhema Aboud Juma (1997): High Court of Tanzania at Mtwara, Civil Case No. 1 of 1995. Available at: https://tanzlii.org/tz/judgment/mtwara-high-court/1997/1 (accessed on 19 Feb. 2023).

the sons. However, the court considered the concept of equality and directed that the estate be equally shared so that all the surviving wives and children get a share of it.

The high court of Tanzania applied the same principle of equality in the case of *Juliana Ng'wena v. Theresia Fissoo and Others (2006)*,[467] where the deceased had been survived by two wives and multiple children but failed to leave behind a will and the customs of the deceased's tribe had promoted male primogeniture. Accordingly, the High Court of Tanzania directed equal distribution of the deceased estate and granted a share to all surviving members.

Apart from the above criticisms, the Marriage Act of 1971 has had a positive effect on intestate succession; it has changed the status of a wife as a dependant of the husband and his family to a full fledge heir, who is entitled to up to one-third of the deceased's estate. In addition, the Marriage Act has equalized the rights of spouses in terms of inheritance; that is, both men and women are entitled to the inheritance of the deceased's property.

5.6.2 The effect of the Courts Act in Tanzania on intestate succession

In 1984, the Tanzanian government enacted the Courts Act to govern the creation, jurisdiction, and procedures of the courts within the territory of Tanzania.[468] The importance of the Act to the topic of the thesis, in terms of intestate succession, is the way the Act set out the power and the procedures for dealing with issues touching on dealing with the estate of the deceased who failed to leave a written Will. The powers and jurisdictions of the High Court are covered in Section 5 of the Courts Act; the court is the principal court in Tanzania and is empowered to deal with civil matters which extend to intestate succession. Section 6 of the Act sets out the jurisdiction of the District Courts, which have limited jurisdiction in civil matters, including claims for small amounts of money, and do not have jurisdiction in cases relating to succession. In the case of intestate succession, the High Court has the power to hear and determine disputes relating to the distribution of the estate of a person who has died intestate. On top of the

[467] Juliana Ng'wena v. Theresia Fissoo and Others (2006): High Court of Tanzania at Mwanza, Civil Case No. 79 of 2005. Available at: https://tanzlii.org/tz/judgment/mwanza-high-court/2006/15 (accessed on 19 Feb. 2023).

[468] Tanzanian Courts Act, 1984. https://tanzlii.org/tz/legis/consol_act/ca52/

above, the court is empowered to grant orders for dealing with the estate of an intestate concerning law and Succession Act and any other law dealing with succession issues like customary law. In practice, the High Court is often called upon to resolve disputes between family members or other interested parties concerning the distribution of an estate, particularly where there are competing claims to the estate or uncertainty about the identity of the deceased's heirs.[469] The Tanzanian Courts Act's effect on intestate succession provides a framework for resolving disputes that may arise in the distribution of an estate. The Act sets out the powers and procedures of the courts concerning succession matters and provides a mechanism for the fair and orderly distribution of an estate following the Law.[470]

5.6.3 The Intestate Succession Law

The government of Tanzania enacted the Intestate Succession Act in 1971;[471] this was done in order to repeal all the previous laws dealing with intestacy, especially the customary law; it was also done in order to have a uniform intestate succession law. This Act deals explicitly with the distribution of assets of an intestate within the Republic of Tanzania; before the Act came into force, the customary law of the tribe of the deceased dealt with the assets and liabilities of an intestate. Customary law of Tanzania, like any other part of Africa, promotes the concept of primogeniture, where the eldest male son was favoured to inherit the property of the deceased while the rest gets none; this was seen as discrimination against women and other heirs of the deceased, so in order to get rid of it, the Intestate Succession Act was enacted. The Act has brought about fairness and justice in dealing with the estate of the deceased, and it covers the whole of Tanzania; that is, it does not exclude any tribe, religion, race, or ethnicity. Furthermore, the Act allows property distribution among the deceased's heirs according to their respective shares.[472]

---

[469] Tamar Ezer, 'Inheritance Law in Tanzania: The Impoverishment of Widows and Daughters International Women's Human Rights Clinic Special Issue: Reports: Section VII' (2006) 7 Georgetown Journal of Gender and the Law 599.

[470] Norah H Msuya, 'Challenges Surrounding the Adjudication of Women's Rights in Relation to Customary Law and Practices in Tanzania' (2019) 22 Potchefstroom Electronic Law Journal 1.

[471] Intestate Succession Act,1999 Chapter 352 of the Laws of Tanzania

[472] Bart Rwezaura and Ulrike Wanitzek, 'The Constitutionalisation of Family Law in Tanzania Tanzania' (2006) 2006 International Survey of Family Law 445.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/intsfal13&i=469.

Section 3 of the Act grants 30% of the deceased's estate to the surviving spouse, and the remaining 70% is equally shared among the children without discriminating against them based on their gender and portion at birth two-thirds; this is a case where a spouse and children have survived the deceased. But, if there are no children left behind by the deceased, the surviving spouse takes 70% of the estate, and the rest is given to the deceased's family, his parents and siblings, and any other surviving relatives. Sections 4 and 5 of the Act deal with all children of the deceased, whether adopted or biological, and they all have equal rights to inherit the deceased's property. The matters of polygamous marriages were included in the Act, following the 2008 amendment; section 12 of the Act defines spouse to include any person legally married to the deceased under any law, including the customary law, which includes polygamous unions.[473] In addition, as amended, section 14 of the Act grants all surviving spouses equal rights to the deceased property. In the case off *Mashingo v. Mashingo [1998] TLR 132, the High Court of Tanzania* explained the above well; in this case, the deceased died intestate leaving behind a spouse and children and a vast estate, the court determined that the spouse was entitled to 30% of the estate and the remaining 70% were to be equally shared among the surviving three children of the deceased.[474]

5.6.4 Order of Succession in Tanzania

The 2008 amendments to the Succession Act in Tanzania deal with the order of Intestate Succession. Section 5 of the Act deals with the hierarchy of inheritance in case there is no valid or written will left behind by the deceased. This Act provides for the distribution of a deceased person's estate where no valid will was left behind. According to Section 5 of the Act, the priority for division of the deceased's property is listed as follows:

a) Section 5 gives priority to the immediate family, including the spouse and children; they share the property of the deceased; equally, that is, the spouse gets 30%, and the remaining 70 % is shared equally among children without discrimination based on gender or whether the child was adopted or biological.

[473] The Intestate Succession (Amendment) Act, 2008" published in the Tanzania Government Gazette, No. 35, Vol. 89 (2008).

[474] Ezer (n 469).

b) Section 5(1); If no child or spouse survived the deceased, then the deceased's parents and brothers and sisters equally share the deceased's property. Parents and siblings: If no surviving spouse or children exist, the estate is distributed equally among the deceased's parents. The estate is distributed equally among the deceased's siblings if there are no surviving parents. If any siblings had already died before the deceased but left behind a surviving child, their shares would be given to the surviving children.
c) Section 5(2) Considers half-siblings as well; where the deceased has a half-sibling (sharing at least one of the parents), they have equal rights as full siblings since they share either a father or a mother.
d) If the deceased left no surviving spouse, children, parents, or siblings, the property would go to the grandparents and uncles/aunts. Although the priority is granted to the grandparents to share the property equally, if there are no surviving grandparents, the uncles and aunts who have survived the deceased would inherit the estate.
e) If there is no known surviving relative, the state takes the deceased's estate.

The above order has been captured in the case of *Leonard William Muhanga v. Grace Muhanga & Others (Civil Case No. 150 of 2017)*. The deceased had died intestate and leaving behind a vast property, and the dispute arose as to who was entitled to administer the property of the deceased. Leonard William Muhanga, the eldest son, wanted to be the sole administrator of his late father's estate, but his siblings challenged that. After giving both sides a chance to prosecute their cases, the court ruled that every child and spouse of the deceased was entitled to the property of the deceased; this was done in accordance with section 5 of the intestate succession Act 2008. [475] The second case, in regard to section 5 of the intestate succession Act 2008 in Tanzania, is the case *of Ndunguru v. Sospeteri (Civil Appeal No. 29 of 2016)*.

The intestate had left a vast property and was survived by his parents and siblings. The survivors had all claimed the property of the deceased. In this case, the deceased person died intestate, and his parents and siblings claimed the estate. After considering all the arguments, the court held that the parents were entitled to the estate to share equally in accordance with section 5.

[475] Anthony C Diala and Bethsheba Kangwa, 'Rethinking the Interface between Customary Law and Constitutionalism in Sub-Saharan Africa' (2019) 52 De Jure 189.

The court, however, denied the siblings the right to their deceased brother's property since their parents were still alive. However, the court also held that the siblings were not entitled to a share of the estate, as the parents were still alive.[476]

To fully explain the above, I have given this illustration: Mr. X was married and blessed with two children; he passed on without leaving behind a valid will and has left behind a wife and his children and parents. In this scenario, his wife (Mrs. X) would be entitled to 30% of the estate, while his children would take the remaining 70% of his estate and equally share it without discrimination based on gender or position at birth. His parents and siblings would get nothing. In case Mr. X did not have children but left behind a surviving wife, the wife would get 70%, and the remaining 30% would be distributed equally to the parents of Mr. X. In case a spouse or children have not survived him, then his parents would take the whole of the property and divide it equally between themselves. The siblings of Mr. X would only be entitled to take the whole property in case no parents are surviving Mr. X.

5.6.4.1 Criticism of the intestate succession Act in Tanzania

Even though The Intestate Succession Act (ISA) in Tanzania has been praised for promoting gender equality, amending the customary laws against women, and promoting male primogeniture, it is not free from criticism; some of the criticisms have been discussed.

Section 3 (1) of the Act, which promotes equal distribution of the deceased's shares, that is, if the intestate has left behind a spouse and children, the surviving spouse is entitled to 30% of the estate, while the remaining is given to the children. Maria Sarungi, a social activist, has criticised the section as assuming that women are still dependent on men and that the section assumes that the family property automatically belongs to the husband. In the case of *Mwakatumbula v. Saidi [2012] TZCA 10*, The deceased had died intestate and left behind a vast

[476]Miriam Zacharia Matinda, 'Implementation of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW): The Tanzania Experience' (2019) 26 Willamette Journal of International Law and Dispute Resolution 99.. *JSTOR*, https://www.jstor.org/stable/26915365. Accessed 25 Apr. 2023.

estate; the wife approached the court and claimed that she had contributed heavily to the acquisition of the property and that she was entitled to the larger share, the court considered the argument but decided against her, stating that section 3(1) of the Act, does not consider her contribution. However, the Court of Appeal held that Section 3(1) of the ISA discriminates against women and is unconstitutional.[477] Fatma Karume, a Tanzanian lawyer and former president of the Tanganyika Law Society, celebrated the court's decision and pushed for the amendment of the law to recognize the contribution women make to the acquisition of matrimonial property.[478]

The ISA has also been criticised for not acknowledging the customary Law. Tow system to law operates in Tanzania, the written law and customs of various tribes, ISA only deal with the written Acts of Parliament. This issue was raised in *Lyimo v. Rukambura [2018] TZHC 86*; in this case, the deceased died intestate leaving behind two wives and children. The ISA states in section 3 that the property should be shared equally among wives and children. In the case under discussion, Lyimo, had claimed a larger share of the property, stating that being the first wife, she had contributed a lot to the acquisition of the property and paid for the building of the matrimonial house. The court decided against the law and granted Lyimo a larger estate share.[479]

The ISA has also been criticised as being very rigid. It fails to permit flexibility in the division of the estate of the deceased, especially in considering the special need a dependant may have, because under section 3, the Act promotes equal sharing of the property without any discrimination, so what if an heir needs special care and require more resources. In *Sawaki v. Mbago [2019] TZHC 28*. The deceased was a polygamous man with two wives and several children. He passed on without leaving behind a valid will. The case is similar to the Lyimo case, as Sawaki also had claimed that she helped the deceased acquire the family land and build the matrimonial home; the court agreed with her and granted her the more significant portion of the property, going against the ISA section 3 which promotes equality to inheritance.[480]

---

[477] Isha Kalwant Singh, 'Rights of Hindu Women in Ancestral Property: A Review of Succession Laws' (2017) 2 Supremo Amicus 163.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/supami2&i=172.

[478] Joyce Ladner, 'Tanzanian Women and Nation Building' (1971) 3 The Black Scholar 22.

[479] Gregory R Day and Salvatore J Russo, 'Poverty and the Hidden Effects of Sex Discrimination: An Empirical Study of Inequality' (2015) 37 University of Pennsylvania Journal of International Law 1183.

[480] Ojwang and Kinama (n 212).. http://www.jstor.org/stable/43239752.

5.7 The Constitution of the Republic of Tanzania and intestacy succession

The *grundnorm*, the supreme law of the land, the mother of all laws in Tanzania, is the constitution; any law against the constitution is repugnant to the extent of the inconsistency. It was first created in 1961 and has been amended to conform to modern changes, with the latest in 2020. On 9th December 1962, the first independent Constitution of Tanzania came into effect, declaring Tanganyika as an independent and sovereign country, free from direct British Rule; Julius Nyerere became the first president of Tanganyika. In 1964, Zanzibar and Tanganyika united to form Tanzania, which led to the first amendment being made to the constitution, which came into effect in 1965.[481] The 1965 amendment of the Constitution created a presidential system of government, making the president both head of the government and the state. In 1977, another amendment was made to create one socialist party and extend some autonomy to the government of Zanzibar. Another amendment was made in 1984 to reintroduce multiparty in Tanzania. However, the constitution was criticised for giving the president much power and stifling democracy; this led to the 1992 amendments to grant more freedom to the people of Tanzania; they reduced some of the president's powers and created an independent electoral commission to deal with an election. [482] In 2011, to make the law work for the people of Tanzania, the government created The Constitutional Review Process to collect information from the public and draft a new constitution, which led to a new draft being unveiled in 2013.[483] However, the people rejected the draft, which was shelved because they felt it was not representative of them. The latest amendments were made in 2020 to reintroduce some of the president's powers, which had been removed by previous amendments, like term limit, the power to appoint and dismiss provincial commissioners, and the number of seats for women in the parliament was increased for more representation.

---

[481] Alexander Makulilo, '"Where There Is Power, Women Are Not": Rethinking Women and Politics in Tanzania' (2019) 46 The African Review: A Journal of African Politics, Development and International Affairs 349.. https://www.jstor.org/stable/48659606.

[482] Tim Kelsall and Claire Mercer, 'Empowering People? World Vision & "Transformatory Development" in Tanzania' (2003) 30 Review of African Political Economy 293.. http://www.jstor.org/stable/4006766.

[483] Juliana Masabo and Ulrike Wanitzek, 'Constitutional Reform in Tanzania: Developing Process and Preliminary Results' (2015) 48 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 329.. http://www.jstor.org/stable/26160033.

5.7.1 Recognition of customary laws by the Constitution of Tanzania

Article 5 of the constitution of the United Republic of Tanzania acknowledges customary Law as a source of Law in the country by stating that. "*all persons are equal before and under the law and are entitled to the equal protection of the law without discrimination and, in particular, without discrimination based on their race, tribe, place of origin, political opinion, colour, creed or gender*."[484]

Customary Law can be defined as practices and traditions passed down from one generation to the next, and it is majorly unwritten; they have been practiced since time immemorial, and every ethnic group practices their customs. Tanzania is a union of various cultures, tribes, and ethnic groups with varied traditions and practices. As discussed in the preceding chapters and sections, customary law deals with s various social and economic life of the people, like marriage and inheritance, land tenure, and dispute resolution. Under Article 145, the Constitution of the Republic of Tanzania recognizes the customary law and protects its application, and acknowledges it as a source of law in Tanzania., Article 145 (1)(c) recognizes the power of the customary law in Tanzania, by stating that "*the Constitution, national laws, and all laws that are considered law in Tanzania under a treaty, the act of parliament, or other legal methods are the highest law of the country, and any law that is inconsistent with them is void.*"

The Constitution of Tanzania has also recognized the customary law courts under Article 145(1)(c). The power of these courts is to assist in resolving disputes according to customary law principles.[485] Furthermore, Article 145(3) of the constitution grants every citizen of Tanzania access to the customary courts without discrimination based on cultural or ethnical background, and it promotes equal access to justice for all citizens.[486]

[484] Kwame Akuffo, 'The Conception of Land Ownership in African Customary Law and Its Implications for Development' (2009) 17 African Journal of International and Comparative Law 57.

[485] Ezer (n 120).. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/haswo27&i=79.

[486] Magawa and Hansungule (n 417).

5.8 Customary law court system in Tanzania

Tanzania has a dual system that operates simultaneously, that is, the customary and the formal system, they both operate in their spheres of operation, but for a customary system, it is applicable as long as it is not consistent with the formal system. The customary law system operates mainly in the village sides as a complement to the formal system, and it is mainly used to resolve disputes touching on family issues, such as marriage, divorce, land division, and succession. The 1963 customary law declaration order created the customary law court system, and the same is provided for under the 1989 local customary law (declaration) No.4, and it is rooted in the traditional governance and dispute resolution systems; it differs from one tribe to the next and one community to the next. These systems are based on consensus-building, mutual respect, and restoring social harmony rather than punishment or retribution.[487]

The customary law courts in Tanzania are comprised of the village elders and traditional leaders within the community of its operation- this is because it is assumed, due to age, these elders understand the community better than anyone else, and the villagers accord respect to them due to their experience which they have acquired due to age. Therefore, the elders must show they can be impartial while making decisions.[488]

As mentioned above, the jurisdiction of the customary law court system in Tanzania extends to matters touching on inheritance, disputes touching on land, celebrating marriage, handling separation and divorce, and some low-level criminal offenses. The court handles its mandate flexibly and informally, aiming to resolve disputes amicably.[489]

The customary court's main aim is restorative justice, and they endear to ensure that at the end of the trial, both parties get to go back home together, and in case of a land dispute, both of them get justice without anyone feeling cheated- they conduct themselves in such a way that no

[487] Chris Maina Peter, 'Human Rights of Indigenous Minorities in Tanzania and the Courts of Law' (2007) 14 International Journal on Minority and Group Rights 455.

[488] Bond (n 255).

[489] Ezer (n 120).

one feels cheated. In addition, the court worked to reconcile the disputants. This approach is based on the belief that conflicts arise from misunderstandings or breakdowns in relationships and that the best way to resolve them is through dialogue and negotiation.

While Article 11(1) and 13(2) of the Constitution of Tanzania recognize and protects the customary law court system, it is not without its challenges. The focal challenge of the Customary law court system is furthering fairness and consistency while hearing and deciding on a case, especially in cases where litigants are women or at least one of them is a woman since customary law is known for furthering male primogeniture. There are also concerns about the capacity of the customary law court system to handle complex cases and the potential for conflicts to arise between the customary law system and the formal legal system.[490]

5.9 Tanzanian Constitution and the intestate succession

Property rights are recognized and protected under Article 40(2) of the Constitution of Tanzania. Even though the article does not expressly delve into intestate succession, the Article is essential to dealing with matters of succession and acknowledging and extending protection to the inheritance rights, including the rights of heirs to inherit property following the laws of intestate succession.

The right to life is guaranteed and protected under Article 21(1), which states that "*Every person has the right to life, and no one may be deprived of that right unless it is permitted by law*," this is important to cases involving a dispute over a property where the life of an individual is under threaten, this matter came up in the case of *Mwakitwange v. Mwakitwange and Others, Civil Case No. 13 of 2013.* In this case, the litigant sought to inherit the property left behind by his deceased father, the respondent also felt he was also entitled to inherit the property, so they used force to remove the plaintiff from the property; the plaintiff alleged that his life was in danger and his right to life was threatened. The court agreed with the plaintiff and ordered the respondent to vacate the land and desist from threatening the plaintiff. Equality before the law and equal

[490] Anthony C Diala, 'The Concept of Living Customary Law: A Critique' (2017) 49 Journal of Legal Pluralism and Unofficial Law 143.

treatment by the law in Tanzania is guaranteed by Article 26 of the Tanzanian Constitution, which states that "*Every person is entitled to equal protection under the law and is treated equally before the law in all areas of political, economic, social, and cultural life as well as in all other respects*." This is important where the inheritance right of others is denied based on their gender or position at birth or religion, or other characteristics. Finally, article 27(1) protects the family by stating that every person has a right to enjoy family life and live in a stable environment peacefully. The Article aims to protect the family as an institution and acknowledge its unique and significant role in developing individuals in society. This article can be used to protect family members whose rights to inherit their deceased's relative property are being denied.[491]

5.9.1 Comments and criticism on the Tanzanian Constitution regarding Intestate succession

The Tanzanian Constitution is the country's supreme Law, outlining its citizens' rights and responsibilities. Even though the supreme law of the land, that is, the constitution, guarantees various rights, including property right, it has been accused of failing to protect widows adequately. Article 13 of the Tanzanian Constitution states, "*Property is one of the fundamental liberties and rights guaranteed to all individuals."* However, despite this provision, many widows in Tanzania are denied their rightful share of their deceased husband's property since, in most parts of Tanzania, especially on village sides, the inheritance rights are governed by customary law, mostly against women.[492]

The Succession Act, which outlines the guidelines for distributing intestate property in Tanzania, also provides some protections for widows. For instance, section 3 of the Act stipulates

[491] Rasmus Hundsbæk Pedersen, 'Tanzania's Land Law Reform; the Implementation Challenge' (Danish Institute for International Studies 2010) <https://www.jstor.org/stable/resrep13467> accessed 13 May 2023.. http://www.jstor.org/stable/resrep13467.

[492] Alison Brown, Colman Msoka and Ibrahima Dankoco, 'A Refugee in My Own Country: Evictions or Property Rights in the Urban Informal Economy?' (2015) 52 Urban Studies 2234.https://www.jstor.org/stable/26146131.

that the property of an intestate property should be devolved equally among their surviving spouse and children. However, cultural and traditional practices often override these legal protections.[493]

There have been numerous reports of widows in Tanzania being denied their rights to intestate property, particularly in cases where male family members assert their claim to the property over that of the widow. This has led to widespread criticism of the Tanzanian Constitution's failure to guarantee that the rights given to widows regarding property will not be infringed. Research work done by the UNDP (the United Nations Development Programme) on the right to property and gender equality in Tanzania shows that there is a seemingly adequate legal framework that guarantees the protection of women's property rights and comprises the right to succeed estate of their spouses; however, the execution of the laws is lacking, the report shows that in reality, these rights are not protected, and women face much hardship in getting the legal help when needed. The report stated that "women often face significant barriers to exercising their property rights in practice, including discrimination, cultural norms, and inadequate legal and institutional frameworks."[494] The report also indicated that only about 16% of the land is owned by women in Tanzania and that most women are not aware of the rights to own and or inherit land from their deceased relatives, and those who may be aware find it difficult to access justice to claim their right. The UNDP report recommended strengthening the legal framework and promoting civic education to women about their property rights.[495]

The Women's Legal Aid Centre (WLAC), a non-profit organization in Tanzania that mainly works to provide legal representation to women and children, reported that widows face significant challenges in claiming their right to inherit property from their deceased spouses." The

[493] Benjamin G Bishin and Feryal M Cherif, 'Women, Property Rights, and Islam' (2017) 49 Comparative Politics 501.. http://www.jstor.org/stable/26330985.

[494] LaShawn Jefferson, 'Discrimination against Women in Employment and Property Rights: Unexamined Factors in the Feminizationof Poverty Panel One' (2002) 24 Women's Rights Law Reporter 167.

[495] Maija Anneli Hyle, Bishnu Prasad Devkota and Irmeli Mustalahti, 'From Blueprints to Empowerment of Disadvantaged Groups in Natural Resource Governance: Lessons from Nepal and Tanzania' (2019) 13 International Journal of the Commons 1062.

report noted that these challenges often stem from cultural and traditional practices prioritizing the rights of male family members over those of female family members.[496]

In response to these criticisms, there have been calls for the Tanzanian government to take more decisive action to protect the rights of widows. This could include strengthening the law and empowering the executives to provide proper protection to widows regarding their property rights and providing education to teach them about their rights while simultaneously amending the laws to do away with cultural practices that limit women's rights to inheritance. In addition, there have been calls for more outstanding awareness-raising efforts to educate women about their property rights and empower them to claim them.

Overall, while the Tanzanian Constitution includes provisions protecting citizens' property rights, there are concerns that it fails to protect widows' rights to inherit intestate property adequately. Addressing these concerns will be critical in advancing gender equality and economic justice in Tanzania.

5.10 Matrimonial Property Act

The Matrimonial property rights in Tanzania are mainly governed by The Law of Marriage Act, which came into force in 1971. Matrimonial property is defined in Section 5 as "*Property acquired by either or both parties to the marriage during its duration, whether movable or immovable*." This includes property acquired by either spouse before the marriage but used for the benefit of the family and the acquired property by either spouse while the marriage subsists. Upon the death of one spouse, the surviving spouse is entitled to a share of the matrimonial property, which the court determines in the absence of a mutual agreement. The court needs to consider the needs of the surviving spouse and any children, as well as the contributions of each spouse to the acquisition and upkeep of the property.[497]

---

[496] 'Gender and Human Rights Commonwealth Developments - Law and Developments Issues' (2004) 30 Commonwealth Law Bulletin 673.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/commwlb30&i=719.

[497] Sylvia Tamale, 'Think Globally, Act Locally: Using International Treaties for Women's Empowerment in East Africa' [2001] Agenda: Empowering Women for Gender Equity 97.http://www.jstor.org/stable/4066411.

5.10.1 A widow's right to her deceased husband's property

The Law of Succession Act 2008 is the primary law governing Tanzania's succession and inheritance rights. Section 3, extensively discussed in the preceding titles, outlines who is entitled to inherit the deceased's estate and who pass on without leaving a valid will behind. Next, the order of priority is outlined in section 4; this has been covered above; the priority is given to the deceased spouse and his children before others can be given the same treatment. Finally, the widow's right to inherit is given in Section 12, and she is to share the estate with the children; she takes 30%, and the children, the remaining 70%, are shared equally by them. Several variables determine the share amount, including the number of living children and other heirs, the estate's valuation, and the widow's requirements.[498]

Apart from the Succession Act, the 1999 Land Act, which came into force in 2000, guarantees widows the right to own and inherit the land. Section 109 of the Act, which talks of compensation in case the government acquires the property, also provides that the law of succession would be followed if the compensation is to go to the widow of the deceased. Section 108 requires the provision of notice to acquire the property; in that case, the notice would be given to the heir, including the widow of the deceased, and the life interest on the land would be given to the heirs, including the widow in accordance with the succession Act. [499]

5.11 Challenges faced by women in Tanzania as far as inheritance rights are concerned

The challenges faced by women in Tanzania in dealing with succession matter is still high; even with the Constitution and strong legal framework, the implementation part is still lacking. The over-reliance on the customary laws, especially in the village and away from town centres and

[498] Elaine Zuckerman and Marcia Greenberg, 'The Gender Dimensions of Post-Conflict Reconstruction: An Analytical Framework for Policymakers' (2004) 12 Gender and Development 70.http://www.jstor.org/stable/4030657.

[499] Rasmus Hundsbæk Pedersen and Scholastica Haule, 'Women, Donors and Land Administration The Tanzania Case' (Danish Institute for International Studies 2013) <https://www.jstor.org/stable/resrep13394> accessed 11 May 2023.

weak enforcement authorities, are blamed for the discrimination against women. Some of the causes or challenges faced by women regarding inheritance are discussed below:

Discriminatory customary laws: The customary laws of various ethnic groups in Tanzania mainly promote male primogeniture and prioritise male heirs over female heirs; this makes it hard for women to get justice away from the formal system of laws. The study conducted by the United Nations Development Programme (UNDP) in 2019 in Tanzania reveals that women are considered the second option in matters touching on inheritance in Tanzania, which has increased gender-based violence and poverty.[500]

A study conducted by (TAWLA) a non-profit organization of Tanzania woman lawyers in 2017, cites lack of awareness as a contributory factor to women being overlooked in matters of succession since many women, most so away from the urban centre, are not aware of their rights to inherit property left behind by an intestate and among those who may be in the know, are not having proper knowledge and tool to pursue their claims. This means to assert their claims. This lack of awareness is compounded by inheritance cases often being heard in customary courts, where legal procedures and language can be intimidating for women.[501]

A study conducted by Ezer in 2019 cited cultural practices and beliefs as a hindrance to women actualizing their inheritance rights, the best example are the Maasais, who believe the whole community owns that land, and no one individual has more right over the rest when it comes to property ownership, this in most cases limits women from laying claim over ancestral property. In addition, a study conducted by UNDP in 2019 shows that among Muslims, since widows are only entitled to a small percentage of the deceased property and a considerable percentage of Tanzanians are Muslims, this limits the women's right to enjoy the inheritance rights fully.

A study conducted by the International Commission of Jurists (ICJ) in 2018 cited the Weak legal system as a contributing factor to the subjugation of women and hindrance to the full realization and enjoyment of the inheritance right in Tanzania., even though there is favourable

[500] Ezer (n 469).

[501] Pedersen and Haule (n 499).

legal framework in the country, the implementation is weak because of weak capacity and limited resources of the enforcement authority. Furthermore, the judiciary is not well funded and lacks the human resources to deal with legal matters concerning women's inheritance rights entirely.[502]

In 2016, the International Rescue Committee (IRC) conducted research and published it entitled "Barriers and Drivers to Women's Economic Empowerment in Tanzania," the research was on the issues affecting women and hindering them from accessing financial and economic opportunities in the country, the report indicated that women could not easily access financial credit and other services, hence hard for them to start businesses or even expand the already existing businesses. Getting employment was also an issue because of Gender-based discrimination, as many employers preferred men to women. In addition, many women lack proper and needed education for the job market, limiting them from equal competition with men. Unpaid care work: Women in Tanzania often bear the burden of unpaid care work, which limits their ability to participate in the labour market and earn an income. Cultural and social norms: Traditional gender roles and societal expectations limit women's economic opportunities in Tanzania. Many women are expected to prioritize their roles as wives and mothers over their careers or businesses. Limited access to markets: Women in Tanzania often faces barriers, including limited transportation infrastructure, lack of information about market opportunities, and limited access to technology and communication tools. Addressing these challenges requires a multi-faceted approach, including improving access to credit and financial services, promoting gender equality in the labour market, increasing access to education and skills training, recognizing and reducing the burden of unpaid care work, and challenging cultural and social norms that limit women's economic opportunities. The International Rescue Committee (IRC) recommends a range of policy interventions and community-based initiatives to promote women's economic empowerment in Tanzania.

[502] Olanike S Adelakun, 'The Effect of Religion and Culture on the Implementation of Women's Rights in Africa: Challenges and Prospects' (2019) 1 International Journal of Comparative Law and Legal Philosophy 203. &Ellen Farisayi Zvobgo and Cowen Dziva, 'Practices and Challenges in Implementing Women's Right to Political Participation under the African Women's Rights Protocol in Zimbabwe' (2017) 1 African Human Rights Yearbook (AHRY) 60.

5.12 How colonialization influenced the intestate succession in Tanzania

Like Kenya, Uganda, and many other African countries, Tanzania was under the colonial power of the European countries. Although the development of intestate succession in Tanzania, which has unified all other laws that were dealing with intestate succession, has, in part, colonialism to thank for it, colonialism, apart from the destruction of the fabric of the African culture, can also be attributed to a lot of positive developments in Tanzania, especially in regard to law and system of executing them[503]. Although inheritance matters, as discussed above, were governed by the customary laws of various ethnic communities, with the advent of colonialism, the law underwent various changes, and it ended with a written law of succession that deals with intestate matters.

Tanzania was colonised by various European powers, beginning with the Germans from the 1880s to the time the first world war ended; with the defeat of the Germans,[504] the British took over and ruled Tanzania until 1961, when Tanzania became an independent country. Germany and England introduced various laws that governed Tanzania, including those that dealt with the succession law, which led to a transformation of the succession law.[505]

When Germans were in charge of Tanganyika, they introduced their system of law, the German civil code of 1900 (Bürgerliches Gesetzbuch or BGB)[506] was fully applied in Tanzania to every person, including both indigenous and European settlors; this civil code brought about the idea of legitimate succession; under this system, the concept of intestate succession was fully applied, and in case of death of the head of the family, the priority was given to his immediate family, that is, the spouse and the children, to inherit the estate, if they were not around, then the property would be passed to the parents of the deceased, followed by the siblings, these were

[503] MER Nicholson, 'Change without Conflict: A Case Study of Legal Change in Tanzania' (1972) 7 Law & Society Review 747.

[504] Bradley D Naranch, '"Colonized Body," "Oriental Machine": Debating Race, Railroads, and the Politics of Reconstruction in Germany and East Africa, 1906-1910' (2000) 33 Central European History 299.

[505] Andrew Burton and Michael Jennings, 'Introduction: The Emperor's New Clothes? Continuities in Governance in Late Colonial and Early Postcolonial East Africa' (2007) 40 The International Journal of African Historical Studies 1.

[506] 'Neuerscheinungen' (2014) 69 JuristenZeitung 632*.

considered as the legitimate heirs of the intestate. This concept replaced the traditional Tanzanian practice of inheritance by custom, which did not recognize the concept of legitimate heirs.

When the British took over, the common laws applied in England were introduced in Tanzania, along with the Indian Succession Act of 1925, which the British had enacted in India. Indian Succession Act in Tanzania introduced the principle of personal law- this governed the natives along with the European settlers in Tanzania; however, it did not discontinue the operation of customary law in Tanzania; Customs of various tribes in Tanzania were allowed to operate, as long as they were not inconsistent with the British written laws. This allowed some flexibility in applying inheritance laws in Tanzania, although it also meant that inheritance laws varied between different ethnic groups.[507]

When Tanzania regained its independence in 1961, it consolidated the German and British laws to develop a robust system that could govern Tanzanians without discrimination based on tribe, race, or gender. This culminated in the enactment of The Tanzanian Law of Inheritance (Amendment) Act of 1963, which consolidated the Indian Succession Act and the customs of various tribes in Tanzania. The 1862 Inheritance Act brought about the order of priority in inheritance matters, putting the spouse and children at the highest level and the first to claim the deceased estate in case of intestacy. The parents would only be considered if the deceased's spouse and children were not alive, and if all of them were not alive, then the siblings would be considered, then the grandparents, and the last were the relatives.[508]

In summary, colonialism significantly influenced the development of Tanzanian intestate succession laws. European colonial powers introduced new legal systems and institutions that changed how property was inherited, and the concept of legitimate succession replaced traditional Tanzanian inheritance practices with custom. After independence, Tanzania developed its legal

[507] Kenneth GC Reid and others (eds), 'Intestate Succession in Historical and Comparative Perspective', *Comparative Succession Law: Volume II: Intestate Succession* (Oxford University Press 2015) <https://doi.org/10.1093/acprof:oso/9780198747123.003.0019> accessed 13 May 2023.

[508] Tanzania, Commission on the Law of Succession/Inheritance, and Law Reform Commission of Tanzania, *Report of The Commission on the Law of Succession/Inheritance.* (publisher not identified 1995).

system, which incorporated German and British Law elements, and established a unified inheritance system based on customary Law and the Indian Succession Act.

5.13 CONCLUSION

Based on the discussion above shows how the law has moved from the customary law, which favoured primogeniture, to modern laws that support equality; it also shows how Tanzania moved from male-dominated inheritance to equal access to the property by both parties. Tanzania has taken steps to enact laws that promote equality for every citizen; this can be seen with the enactment of the Uniform Succession Act, which has made intestacy succession to allow everyone to inherit and lay claim over the deceased's property. Even though the law has taken a significant step towards enhancing the rights of women and children regarding inheritance, it is regrettable that it has only worsened the discrimination against women, leading to contemporary challenges. The drawbacks associated with this legislation exceed its benefits. The Constitution has also attempted to progress women's rights through various regulations. Although these laws provide uniformity across Tanzania and serve as a benchmark for subsidiary laws, they have not significantly improved women's status and rights. These enactments highlight that legislation may not be adequate to eliminate customary Law and Western ideologies of discrimination. The Tanzanian Parliament's proposed laws, including the Intestate Succession and Property Rights Bills, represent a laudable effort to enhance women's and children's rights. However, despite their potential benefits, Parliament has yet to pass these draft laws, prompting growing pressure from women's groups for their adoption. The Constitutional, Legal, and Parliamentary Affairs and Gender Child Committees were reviewing the Intestate Succession Bill for a second reading. Meanwhile, the Property Rights Bill still needed scrutiny by both committees, leaving uncertainty regarding their eventual passage into Law.

Chapter 6: CONCLUSION AND RECOMMENDATION

The customary law of Africa regarding inheritance, when someone dies without a will, has long been recognized as biased against women. To address this issue, Kenya, Uganda, and Tanzania have implemented legislation to ease some of the challenges women in Africa encounter. The Succession Act of 1981 was passed in Kenya, while Uganda reversed the 1906 Succession Act in 2000, and Tanzania enacted the Succession Law 81 of 1987. This section examines the efficacy of these legal measures and the case law that led to their enactment in enhancing women's rights regarding intestate property. I have also assessed these laws' overall effect on the livelihoods of women of African descent living in Kenya, Uganda, and Tanzania. Each evaluation and commentary on the legislation will be discussed separately.

6.1 Revolutionizing the conventional idea of the African household

As mentioned in the above chapters, the family is highly valued and placed on a higher rank in social structure in societies across Africa. Historically, in the African setup, the family typically consisted of individuals "related through male lineage to a shared forefather" and lived together in a village.[509] Despite the rise of nuclear families due to urbanization, the African family still upholds community values. This means that decisions and disputes within families, regardless of whether they dwell in urban or rural regions, are typically resolved by the extended family rather than the nuclear family alone.[510] For instance, the extended family unit typically decides the intestate successor in customary law.

[509] John Lande and Forrest S Mosten, 'Family Lawyering: Past, Present, and Future Special Issue: Family Court Review's Fiftieth Anniversary: Perspectives on the Past' (2013) 51 Family Court Review 20.*HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/fmlcr51&i=20.

[510] Timothy Parsons, 'Being Kikuyu in Meru: Challenging the Tribal Geography of Colonial Kenya' (2012) 53 The Journal of African History 65.http://www.jstor.org/stable/41480267.

In Kenya, the 2010 Constitution under Article 45 recognizes that the family is regarded as the inherent and essential building block of society and protects the family and its members.[511] The Children's Act 2001, in Section 2, defines A family as a cluster of individuals connected by genetics, matrimony, or adoption ". The Act further recognizes the nuclear and extended family as essential components of the family structure. The Kenyan family is typically patriarchal, with the father or the oldest male member in charge of the household and accountable for supporting the family.[512]

The 1995 Constitution of Uganda recognizes, under Article 31, the family serves as a basic and inherent element of society and ensures its safeguarding. The Marriage and Divorce of Christian and Civil Marriages Act 2014, in Section 5, limits the definition of a family to father, mother and children, and other persons as may be prescribed."[513] The Act recognizes both monogamous and polygamous families if they are based on mutual consent and are recognized by law. However, the Ugandan family is also largely patriarchal, with men holding dominant roles in decision-making and providing for their families.[514]

In Tanzania, the 1977 Constitution in Article 22 recognizes the importance of the family as the centre of society, and the state and society's duty must protect it. The Law of Marriage Act 1971 defines family in section 2 as " a cluster of individuals connected by genetics, matrimony, or adoption, and includes both the nuclear and extended family." The Tanzanian family is also

[511] Lucyline Nkatha Murungi, 'Consolidating Family Law in Kenya Special Issue on Family Law' (2015) 17 European Journal of Law Reform 317. &Asa Torkelsson and Francis Onditi, 'Addressing Gender Gaps in Agricultural Productivity in Africa: Comparative Case Studies from Tanzania, Malawi and Uganda Competing Claims for Land, Food, Water and Agricultural Resources: Perspectives from the Global South' (2018) 9 Journal of Sustainable Development Law and Policy 34.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/jsusdvlp9&i=50.

[512] Claudia Buchmann, 'Family Structure, Parental Perceptions and Child Labor in Kenya: What Factors Determine Who Is Enrolled in School' (1999) 78 Social Forces 1349.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/josf78&i=1363.

[513] David W Lawson and Mhairi A Gibson, 'Polygynous Marriage and Child Health in Sub-Saharan Africa: What Is the Evidence for Harm?' (2018) 39 Demographic Research 177.https://www.jstor.org/stable/26585327.

[514] Manisuli Ssenyonjo, 'Women's Rights to Equality and Non-Discrimination: Discriminatory Family Legislation in Uganda and the Role of Uganda's Constitutional Court' (2007) 21 International Journal of Law, Policy and the Family 341.

typically patriarchal, with the father or the oldest male member being the head of the household.[515] It is worth emphasizing that family frameworks and practices vary across different communities and regions within these countries and that these definitions may not fully capture the complexity of family relationships and dynamics.

The legislative laws of the three countries that modify the traditional law governing the distribution of property when someone dies without leaving a will explicitly regard the African family as an elementary family unit consisting of parents and their children, in contrast to the conventional notion of the family in living customary law as an extended family. This perception is likely due to the impact of colonization, which resulted in two different law systems dealing with family: the colonizing power laws and the customs of African populations.[516] Therefore, lawmakers have adopted a modified or diluted interpretation of traditional African law when addressing some of the challenges related to the African customary laws that govern the distribution of the property of a deceased person who did not leave behind a will. In Kenya, Uganda, and Tanzania, customary law governs numerous facets of life, including land tenure, marriage, and inheritance laws where there is no will. However, the codification of customary intestate succession law has been controversial, with some traditional leaders and indigenous tribes opposing it.

In Kenya, the introduction of the 1981 legislation on Succession, which codified customary law on intestate succession, was met with resistance from some indigenous communities. For example, the Maasai community opposed the law, arguing that it would undermine their traditional inheritance practices based on lineage and clan affiliations rather than blood relations.[517] Similarly, in Uganda, the proposed Land Amendment Act of 2017, which sought to codify customary land tenure and inheritance practices, was opposed by traditional leaders and indigenous communities. They argued that the law would not adequately protect their customary land tenure and inheritance

[515] BA Rwezaura, 'Division of Matrimonial Assets under the Tanzania Marriage Law' (1984) 17 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 177.http://www.jstor.org/stable/43109322.

[516] Chris Maina Peter, 'Human Rights of Indigenous Minorities in Tanzania and the Courts of Law' (2007) 14 International Journal on Minority and Group Rights 455.. http://www.jstor.org/stable/24675398.

[517] Kamau (n 300).." *East African Law Journal*, 2015, 2015, pp. 140-164. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/easfrilaj2015&i=150.

practices and would instead favour individual ownership and commercialization of land.[518] In Tanzania, adopting the Law of Marriage Act in 1971, which codified customary law on marriage and divorce, was also met with resistance from some indigenous communities. For example, the Kuria community opposed the law, arguing that it would undermine their traditional bride price payment and divorce settlement practices based on negotiation and reconciliation rather than legal procedures.[519] The codification of customary law on intestate succession has been controversial in Kenya, Uganda, and Tanzania, with some traditional leaders and indigenous tribes opposing it. They argue that codification undermines traditional practices and customs deeply rooted in their culture and history.

6.2 The neglect of the communal nature of African societies

African traditional law is a legal framework founded on the traditions and conventions of various African indigenous communities. It is a classification of law deeply rooted in society, where the community members collectively uphold and enforce the law. Within conventional African communities, the person is not viewed as an isolated entity with independent rights but as an integral part of the community.[520] This means that individual rights are not exclusively held but are exercised collectively by the family unit or the broader community. Constitutions typically prioritize individual rights, which include safeguarding individual basic entitlements of individuals such as the privilege to exist, be treated equally, and not be discriminated against, equality, and human dignity. The Kenyan, Ugandan, and Tanzanian constitutions all contain provisions recognizing groups' rights to practice their respective cultures. In Kenya, The Kenyan Constitution of 2010 acknowledges in Article 11 that culture is the nation's foundation and promotes the protection of cultural heritage.

[518] Pedersen and others (n 316).. http://www.jstor.org/stable/resrep13396.

[519] Mwambene (n 6).

[520] Dana Zartner, 'The Culture of Law: Understanding the Influence of Legal Tradition on Transitional Justice in Post-Conflict Societies' (2012) 22 Indiana International & Comparative Law Review 297.

Additionally, Article 44 (d) guarantees the right of every person to employ their native language and engage in the cultural activities they prefer.[521] Similarly, the Ugandan Constitution of 1995 recognizes cultural diversity and the entitlement of every individual to relish their cultural heritage. Article 37 states, " *As appropriate, every person is entitled to membership, satisfaction, adherence, perpetuation, and advancement of any cultural expression, religious belief, traditional practice, language or creed, within a group of people who share the same interest."*[522] In Tanzania, the supreme law of the land (Constitution), 1977 (as revised in 2005) recognizes the diversity of cultures within the country and guarantees the protection of cultural heritage. Article 18 (2) states, "*The member states must protect and promote all its citizens and traditional cultures, taking into account the need for their growth and development*."[523]

In 1966, the International Covenant on Civil and Political Rights (ICCPR) also included provisions for safeguarding the cultural practices of minority groups. Similarly, the Universal Declaration of Human Rights in 1948 recognized an individual or group's enjoyment of cultural activities.[524] This raises a relevant concern: how can we achieve a state of equilibrium that upholds both the right of the group to exercise its cultural practices and entitlements individuals, particularly women, to equality and protection against discrimination, particularly in the context of inheritance laws for those who die without a will? In essence, how can we reconcile the imposing foreign constitutional values or beliefs on indigenous communities? Adapting and modifying discriminatory laws is one of the effective means of attaining a good equilibrium in traditional societies. The best example is the 2010 Kenyan Constitution which, under Article 159(2)(d), recognizes the role of customary law and expressly provides that courts should apply Customary law to non-criminal legal matters if it does not conflict with principles of justice and

[521] Michael Nyongesa Wabwile, 'Rights Brought Home: Human Rights in Kenya's Children Act 2001 Kenya' (2005) 2005 International Survey of Family Law 393.. *HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/intsfal12&i=411.

[522] Frank Wooldridge and Vishnu D Sharma, 'The Expulsion of the Ugandan Asians and Some Legal Questions Arising Therefrom' (1974) 7 Comparative and International Law Journal of Southern Africa 1.. *HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/ciminsfri7&i=3.

[523] Emmanuel J Bwasiri, 'The Challenge of Managing Intangible Heritage: Problems in Tanzanian Legislation and Administration' (2011) 66 The South African Archaeological Bulletin 129.. http://www.jstor.org/stable/23631415.

[524] Ewelukwa (n 138).

morality. This provision has been used to protect women's rights in customary marriages.[525] In *Minaji Ole Ntutu v Salina Sina Kataria & 2 others [2010] eKLR,* this is a land dispute case where Salina Sina and two others claimed the land, and the plaintiff claimed it too. The plaintiff's claim was based on the Maasai's customary law, and that he being the son, had his father allocated the land to him, while Salina claimed to have bought the land and the government had allocated the title deed to him. While giving the order, the court recognized the Maasai customary law and decided in favour of the plaintiff; however, in a statement made as obiter dictum, the court held that a custom that denies women inheritance right is unconstitutional.

Similarly, in Uganda, the Constitution of 1995 in Article 8 recognizes the role of customary law, and Article 129, provides for establishing customary courts to handle disputes arising from customary law. These courts have been used to address land disputes, marriage and divorce, and inheritance. [526]For example, in the case of *Betty Coly Akol v Denis Opio [2003] UGSC 22*, This matter went up to the Supreme Court of Uganda; it involved a dispute about land between Betty and Denis. The plaintiff based the argument on the customary law of the Acholi people and claimed ownership of the land. On the other hand, the defendant claimed to have acquired the title of the land by buying it. The plaintiff had appealed the lower court's decision, which was made in favour of the defendant. Having considered all the evidence presented, the Supreme Court of Uganda held that the plaintiff had acquired the land legally under the customs of the Acholi people. This case reinforced the vitality of customary law in Uganda.

In Tanzania, the Law of Marriage Act of 1971 was modified in 2016 to recognize marriages celebrated under the customs of various tribes in Tanzania. This amendment has been a step towards recognizing and protecting the rights given to women in customary marriages. On top of that the government of Tanzania has formed a committee known as the Commission for Human

[525] A Fiona D Mackenzie, 'Contested Ground: Colonial Narratives and the Kenyan Environment, 1920-1945' (2000) 26 Journal of Southern African Studies 697.. http://www.jstor.org/stable/2637567. & African Human Rights Law Reports 2006 (2006): 256-325/

[526] Leslie Kurshan, 'Rethinking Property Rights as Human Rights: Acquiring Equal Property Rights for Women Using International Human Rights Treaties' (2000) 8 American University Journal of Gender, Social Policy & the Law 353.*HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/ajgsp8&i=361./ & Sandra F Joireman, 'Enforcing New Property Rights in Sub-Saharan Africa: The Ugandan Constitution and the 1998 Land Act' (2007) 39 Comparative Politics 463.

Rights and Good Governance, which is responsible for advocating for and safeguarding natural rights, including the rights accorded to minority and indigenous groups.[527]

Overall, these examples demonstrate how Kenya, Uganda, and Tanzania have made efforts to allow traditional communities to adapt and change discriminatory laws by recognizing customary law, establishing customary courts, and amendment of discriminatory laws.

Women can improve their situation by understanding their status, role, rights, and societal position.[528] Educating African men about women's positive contributions to traditional communities is important to combat negative stereotypes about women. Women should recognize that culture and tradition can evolve and work together to challenge and question entrenched practices of gender inequality and discrimination.[529]

Finding a satisfactory compromise between a group's cultural practices and an individual's right to equality might be inappropriate since numerous Africans leave rural communities to seek better job opportunities and education in towns and big cities, renouncing traditional customary practices for Western ideals.[530] In addition, their education at various institutions, personal religious convictions, and changes in society's social structure could reduce their inclination towards customary law tradition.[531]

---

[527] JT Mwaikusa, 'Community Rights and Land Use Policies in Tanzania: The Case of Pastoral Communities Special Feature on Law and the Environment in Africa' (1993) 37 Journal of African Law 144.*HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/jaflaw37&i=150 .

[528] Magawa and Hansungule (n 417).. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/tuma5&i=119. & Omosa, Eileen. *African Studies Review* 54, no. 2 (2011): 213–14. http://www.jstor.org/stable/41304787./

[529] Asikia Karibi-Whyte, 'Exploring the Silences and Omissions in International Human Rights around African Women' (2018) 21 Nigerian Law Journal 1.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/nlj21&i=6.

[530] Beth Turnbull, Melissa Graham and Ann Taket, 'Hierarchical Femininities and Masculinities in Australia Based on Parenting and Employment: A Multidimensional, Multilevel, Relational and Intersectional Perspective' (2020) 10 Journal of Research in Gender Studies 9.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/jogenst10&i=93. & Laura T Hamilton and others, 'Hegemonic Femininities and Intersectional Domination' (2019) 37 Sociological Theory 315..

[531] Iris Berger, 'African Women's Movements in the Twentieth Century: A Hidden History' (2014) 57 African Studies Review 1.

6.3 Replacing customary law with common law

The legal measures implemented to enhance and improve the complexities of the customary law conflict with the rules of intestate succession that stem from customary law. Legislators in Kenya, Tanzania, and Uganda have frequently opted to substitute the current customary law with the received laws, also known as common law, when amending the intestate succession, especially the parts that are majorly dealt with by the customs of various tribes.[532] However, this approach could negatively affect the customs of various tribes as a comprehensive legal system. Primarily, substitution could completely erode the custom as a legal framework. Additionally, the traditional leaders, whose role is to preserve the values and traditions of people, fail to align new laws with living customary law and may hinder their implementation and enforcement in traditional communities. As a result, this could worsen the oppression of rights accorded to women.[533]

In addition, changes made by the courts and lawmakers to living customary law often assume that traditional societies will readily accept such modifications, but this is rarely the reality. If orthodox communities are unfamiliar with common law principles, they may disregard the corresponding legislation if they cannot understand or identify with it. As a result, the law becomes nothing more than a document that holds no fundamental importance to their own lives or the lives of those it is intended to safeguard.[534] Finally, Kenya's history shows that when a country enacts legislation that deviates from customary practices, the legislation is often disregarded.

Thus, the legislative body should focus on a "legitimate" advancement of customary law instead of consistently relying on a "replacement" approach. This is because the common law is not a suitable means for reform and may misrepresent the true nature of customary law.[535] Regarding this, Article 19 of the constitution of Kenya is very useful; Article 19 - outlines how the

[532] Gani Aldashev, Jean-Philippe Platteau and Zaki Wahhaj, 'Legal Reform in the Presence of a Living Custom: An Economic Approach' (2011) 108 Proceedings of the National Academy of Sciences of the United States of America 21320.http://www.jstor.org/stable/23075609.

[533] Juma (n 302).

[534] Nnona (n 133).. https://www.jstor.org/stable/26613298.

[535] ibid.

courts and other state organs should interpret the Bill of Rights. The provision states that the Bill of Rights must be construed to advance its aims, values, and principles and that this interpretation must align with the Constitution. Accordingly, the Bill of Rights should be interpreted and implemented consistently with the Constitution's broader principles and values, including promoting core ideals and concepts of governing and protecting cultural and traditional values and practices.[536] This may involve developing legislation considering different communities' cultural and traditional practices while upholding the basic entitlements and liberties established and protected in the Constitution. It may also involve engaging with traditional leaders and communities in the legislative process to ensure their views and perspectives are considered.[537] Overall, the concept aims to find an equilibrium between safeguarding the rights and freedoms of each person and the recognition and protection of the cultural and traditional values of different communities according to the broader principles and values of the Constitution.

The principles of a transparent and egalitarian society entail that "the beliefs and principles of all sectors of the community must be taken into consideration and given appropriate consideration." [538]As a result, when interpreting the Kenyan Constitution, the customs and beliefs of various communities must also be considered. If this is accomplished, legislators can create laws, and judges can issue culturally sensitive rulings that "encourage modifications in social and cultural habits that align with the fundamental principles of the Constitution." Unfortunately, the Ugandan and Tanzanian[539] Constitutions lack an interpretive clause to assist in interpreting their sections on fundamental rights and freedoms.[540] Nonetheless, because customary law is expressly recognized as a law or legal source in the constitutions of these nations, it warrants the respect and

[536] Bonny Ibhawoh, 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State' (2000) 22 Human Rights Quarterly 838.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/hurq22&i=848.

[537] Diala and Kangwa (n 475).*HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/dejur52&i=193.

[538] Patricia Kameri-Mbote, 'Constitutions as Pathways to Gender Equality in Plural Legal Contexts' (2018) 5 Oslo Law Review 21.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/oslo5&i=21.

[539] Nnona (n 133). & Diala and Kangwa (n 475)..

[540] Thio Li-Ann, 'It Is a Little Known Legal Fact: Originalism, Customary Human Rights Law and Constitutional Interpretation Case and Legislation Comments' (2010) 2010 Singapore Journal of Legal Studies 558. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/sjls2010&i=564.

deference that is due to it. Accordingly, the proper development of customary law should be used to amend it rather than substituting existing laws with customary law.

6.4 Individuals lack knowledge about legal matters

Traditional communities in Kenya, Uganda, and Tanzania often reside in rural areas, and they have their traditional customs and practices that may not always align with modern legal systems. As a result, traditional communities may be ignorant of the law, leading to conflicts with the legal system.[541]

They are often ignorant of the law because they lack legal education. Most traditional communities have their customary laws and practices passed down from generation to generation. As a result, they may not be aware of the formal legal systems that have been put in place in their respective countries.[542] For example, in the case of *Mekatilili Wa Menza and Another v. Republic (1987),* the appellants were members of *the Giriama community* in Kenya, individuals who were apprehended and charged with various offenses. The appellants argued that they lacked knowledge of the legal ramifications of their behaviour since they were not educated in formal legal systems. The court, however, The principle was established that lack of knowledge about the law could not be used as a defence and that the appellants had to be held accountable for their actions. They also lack access to legal information. Most legal information is written in official languages such as English or Swahili, which may not be the first language for members of traditional communities.

Additionally, legal information may not be easily accessible to rural people. In the case of *Maina Kiai and Others v. Attorney General of Kenya (2013),* the petitioners argued that the government had failed to provide access to legal information to citizens living in rural areas. [543]The court held that access to legal information is a fundamental right and that the government had a

[541] Jérémie Gilbert, 'Litigating Indigenous Peoples' Rights in Africa: Potentials, Challenges and Limitations' (2017) 66 The International and Comparative Law Quarterly 657.. http://www.jstor.org/stable/26348301.

[542] Onazi, Oche. "Legal Empowerment of the Poor: Does Political Participation Matter." *Journal Jurisprudence*, 14, 2012, pp. 201-224. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/jnljur14&i=99.

[543] Cotran, 'The Place and Future of Customary Law in East Africa' (n 22).*HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/icqlsup12&i=82.

duty to ensure that citizens, including those living in rural areas, have access to legal information. Cultural and linguistic barriers prevent them from understanding formal legal systems. Most traditional communities have their languages and customs, which those in the formal legal system may not fully understand. In the case of A*ttorney General of Uganda v. Abalo (1972)*, the appellant was a member of the Acholi community in Uganda who had been charged with murder.[544] The appellant argued that he had acted according to customary laws and practices and did not understand the formal legal system. The court held that the appellant had to be held accountable for his actions since ignorance of the law is not a defence. Traditional communities in Kenya, Uganda, and Tanzania often ignore the law for various reasons, including lack of legal education, access to legal information, and cultural and linguistic barriers. While ignorance of the law is not a defence in most cases, legal systems need to recognize traditional communities' unique challenges and ensure that they can obtain legal information and acquire an education in the field of law. This can help to reduce conflicts between traditional communities and the legal system and promote a more equitable and just society.

6.5 The changing role of women in African societies and their rights to inheritance

Previously, women were primarily relegated to traditional gender roles such as caregiving, child-rearing, and household management. However, in recent times, there has been a change or transition, with women playing more active roles in politics, business, and other aspects of society. In Kenya, the 2010 Constitution recognized the necessity to achieve gender parity and enhance the status of women. Article 27(6) of the Constitution specifically, the law forbids gender-based discrimination, and the authorities have implemented measures to encourage the involvement of women in leadership roles. For instance, in 2013, Kenya elected its first female governor, Joyce Laboso, who served as the governor of Bomet County until she died in 2019. Additionally, the country has set a target of having at least 30% of all elected and appointed positions held by women.[545]

---

[544] CE Okeke, 'Rethinking the Rights of Indigenous Peoples in International Law: Africa in Perspective' (2021) 5 African Journal of Law and Human Rights 40.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/anjllwa5&i=302.

[545] Rayah Feldman, 'Women's Groups and Women's Subordination: An Analysis of Policies Towards Rural Women in Kenya' [1983] Review of African Political Economy 67.http://www.jstor.org/stable/4005600.

In Uganda, women have also made significant strides in recent years, particularly in politics. In 2016, the country elected its first female Speaker of Parliament, Rebecca Kadaga. Furthermore, Uganda has implemented affirmative action policies to encourage and support women in leadership positions. For example, the government requires that the requirement is for a minimum of 33% of female representation in all local council memberships.[546] In Tanzania, women have historically faced significant cultural and legal barriers that have limited their participation in various aspects of society. However, the government has addressed these issues in the past few years. For instance, in 2015, Tanzania passed the Law of the Child Act, which prohibits child marriage and protects girls from early pregnancy. Furthermore, Tanzania has implemented affirmative action policies to enhance the involvement of women in politics, with women holding at least 30% of all elected and appointed positions.[547]

As stated earlier, the principle of primogeniture pertains to the custom of passing down family possessions according to birth order, in which the firstborn male is granted the right to inherit the family estate. This practice has traditionally excluded women and younger sons from inheritance. However, there have been efforts to challenge this practice and advance gender parity in inheritance. In Kenya, the Succession Act of 2012 abolished the discriminatory provisions of customary law that prevented women from inheriting property. The legislation ensures that every child, regardless of gender, has an equal entitlement to inheritance rights.

Similarly, in Uganda, the Succession Act of 1906 was amended in 2017 to provide gender-neutral inheritance laws. The new law allows for equal distribution of property among children, regardless of gender or birth order. In Tanzania, there have been some efforts to address gender discrimination in inheritance, although more needs to be done. For instance, in 2016, the government passed the Land Act, which guarantees equal land ownership rights for both men and women. However, there are still challenges in implementing these laws and changing cultural

[546] Victoria Miriam Mwaka, 'Women's Studies in Uganda' (1996) 24 Women's Studies Quarterly 449. &Sylvia Tamale, Women and Leadership in Uganda (Oxford: Oxford University Press, 2019), P 34

[547] Rwezaura, 'Gender Justice and Children's Rights' (n 436).. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/intsfal4&i=435.

norms.[548] Nevertheless, women in Kenya, Uganda, and Tanzania have made significant progress in recent years, with more opportunities for leadership and participation in various aspects of society. Additionally, there have been efforts to address gender discrimination in inheritance, although more needs to be done to guarantee gender equality in terms of property ownership for women.

6.6 Conclusion

To summarize, we must ask whether implementing new regulations is a viable method to improve the inheritance entitlements of women in African societies. I firmly disagree with this approach. Despite the introduction of updated rules governing the distribution of property left by those who die without a will (as discussed in this thesis), these measures have had minimal impact on advancing the inheritance rights of women in Tanzania, Kenya, and Uganda. Furthermore, they have not led to any improvements in women's everyday lives.[549]

In many African societies, women face significant barriers when inheriting property from deceased family members. To address this issue, governments have introduced new laws to enhance the inheritance rights of women. However, the question remains: are these laws enough to bring about real change? Despite the enactment of updated regulations governing the distribution of property left by those who die without a will, women in nations like Tanzania, Kenya, and Uganda have yet to see much progress in their inheritance rights. These laws, which aim to safeguard human rights, particularly women's rights, have not significantly impacted improving women's daily lives.

One of the primary factors behind this need for more progress is the limited enforcement of these laws. The laws are often not effectively enacted due to insufficient resources, political determination, or cultural resistance. As a result, many women still need to be allowed their rightful

[548] Laurel L Rose, 'Women's Strategies for Customary Land Access in Swaziland and Malawi: A Comparative Study' (2002) 49 Africa Today 123.http://www.jstor.org/stable/4187501.

[549]Sarah J Conroy, 'Women's Inheritance and Conditionality in the Fight against AIDS' (2010) 28 Wisconsin International Law Journal 705.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/wisint28&i=715.

inheritance, and the laws fail to achieve their intended goals. Another factor hindering these laws' impact is the deeply entrenched cultural and social norms prioritizing male inheritance. In many African societies, men are seen as the rightful heirs to their family's property, and women are often excluded from inheritance altogether or receive only a fraction of what they are entitled to. Changing these norms is a slow and challenging process requiring more than introducing new laws.[550] While new laws are necessary to improve women's rights to inheritance in most African countries, more is needed. To bring about real change, governments must prioritize the enforcement of these laws and work towards changing cultural and social norms that discriminate against women. Only then can we hope to see a significant improvement in women's daily lives in these communities.[551]

Thus, the ultimate inquiry that necessitates consideration is: how can we effectively promote women's empowerment and enhance their intestate succession rights under customary law in Africa? One potential strategy for ensuring women's rights is referencing the protections granted to women in global human rights agreements. Several African countries have approved several global treaties and accords that oblige them to improve women's rights and ensure equality.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) came into force in 1979 after it was endorsed by the United Nations General Assembly, which is a human rights agreement on a global scale. CEDAW aims to eradicate gender-based discrimination in every aspect of life that affects women, such as political, economic, social, and cultural spheres. Kenya, Uganda, and Tanzania are all parties to CEDAW and have tried to implement the convention within their respective countries.[552] Kenya ratified CEDAW in 1984 and has made significant progress implementing the convention. The country has enacted several laws and policies to promote gender equality, which led to the enactment of the 2010 Constitution

[550] J Oloka-Onyango, 'Debating Love, Human Rights and Identity Politics in East Africa: The Case of Uganda and Kenya' (2015) 15 African Human Rights Law Journal 28.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/afrhurlj15&i=34 .

[551] Dancer (n 426).. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/solestu26&i=285.

[552] Charles G Ngwena, 'Taking Women's Rights Seriously: Using Human Rights to Require State Implementation of Domestic Abortion Laws in African Countries with Reference to Uganda' (2016) 60 Journal of African Law 110.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/jaflaw60&i=114.

in Kenya, Article 27, which guarantees equal rights and freedoms to men and women. Kenya has also established institutions such as the National Gender and Equality Commission, whose primary mandate is to promote gender parity and eliminate discrimination against any specific gender. In addition, the Kenyan judiciary has used CEDAW to construe and enforce the country's laws consistent with the convention's principles. In the case of the *Federation of Women Lawyers (FIDA-Kenya) and 5 Others v. Attorney General and 2 Others (2012)*, the High Court of Kenya relied on CEDAW to nullify a clause of the Children's Act that discriminated against women.[553]

In 1985, CEDAW became part of Ugandan laws, as the parliament ratified it that year and its implementation also began immediately; this led to the enactment of the Domestic Violence Act in 2010, several years after CEDAW, which criminalizes domestic violence and provides legal remedies for victims. Uganda has also established institutions such as the Department of Gender, Labour, and Social Development to enhance parity in dealing with gender and eliminate the mistreatment of women based on gender. The Ugandan judiciary has also used CEDAW to interpret and apply the country's laws. For instance, in the case of Attorney *General v Susan Kigula and Others (2009)*, the Supreme Court of Uganda relied on CEDAW to strike down a mandatory death penalty for murder, finding that it discriminated against women.[554]

Tanzania ratified CEDAW in 1985 and has made some progress implementing the convention. The country has enacted laws such as the Law of the Child Act, 2009, prohibiting child marriage and promoting gender equality. Tanzania has also established institutions such as the Development of the Community Ministry dealing with health, Gender, Elderly, and Children to promote gender equality and eliminate discrimination against women. However, Tanzania has been criticized for failing to implement CEDAW fully and address issues such as violence against women, access to education, and property rights.[555]

---

[553] Mónica Castillejos-Aragón, 'A Need for Change: Why Do Women in the Judiciary Matter?' (Konrad Adenauer Stiftung 2021) <https://www.jstor.org/stable/resrep30763> accessed 13 May 2023.. http://www.jstor.org/stable/resrep30763./ & Vera Lomazzi, 'Women's Rights and Shariʿa Law in the MENA Region' in Laura Zanfrini (ed), *Migrants and Religion: Paths, Issues, and Lenses* (Brill 2020) <https://www.jstor.org/stable/10.1163/j.ctv1sr6j5d.13> accessed 13 May 2023.

[554] Matinda (n 476).. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/wildisres26&i=105.

[555] Andrew Songa, 'Addressing Statelessness in Kenya through a Confluence of Litigation, Transitional Justice, and Community Activism: Reflecting on the Cases of the Nubian, Makonde and Shona Communities Section I:

Kenya, Uganda, and Tanzania are parties to CEDAW and have taken steps to implement the convention within their respective countries. However, while all three countries have made progress in promoting gender equality and eradicating gender-based discrimination, there is still room for improvement. Nevertheless, the use of CEDAW by the judiciary in Kenya and Uganda demonstrates the convention's potential for advancing the equal treatment of everyone, eliminating gender-based discrimination, and promoting the rights accorded to women.[556]

International Covenant on Civil and Political Rights (ICCPR) which came into operation in 1966, in Article 26, protects everyone without any form of discrimination. Article 26 clearly states that: Each person is deemed equal under the law and entitled to equivalent protection under the law, devoid of any discrimination. This lays the responsibility on the member states to enact laws that promote equality and punish any form of discrimination that denies citizens equality before the law. As a result, legislation should forbid discrimination and ensure that all persons are accorded equal and adequate protection against bias based on race, gender, colour, religion, political, language or philosophical beliefs, nationality, birth, social origin, or any other status.[557]

Like the ACHPR, the ICCPR also protects the family by stating that "the most important social group is the family and it is the duty of the members states and the responsibility of the society at large, to protect the family." The Universal Declaration of Human Rights (UDHR) also acknowledges the significance of maintaining the family structure and employs the same language as the ICCPR. The UDHR further upholds the right of individuals to own property either individually or jointly, and It is forbidden to unjustly take away someone's property without due

Articles Focused on Aspects of the African Human Rights System and African Union Rights Standards' (2021) 5 African Human Rights Yearbook (AHRY) 253.. *HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/ahry2021&i=271.

[556] Clarisa Bencomo, Emily Battistini and Terry Mcgovern, 'Gender-Based Violence Is a Human Rights Violation: Are Donors Responding Adequately? What a Decade of Donor Interventions in Colombia, Kenya, and Uganda Reveals' (2022) 24 Health and Human Rights 29.. https://www.jstor.org/stable/48718207.

[557] Ssenyonjo, 'Women's Rights to Equality and Non-Discrimination' (n 514).. *HeinOnline,* https://heinonline.org/HOL/P?h=hein.journals/intlpf21&i=347.

process of law. [558] The concept of equality is also enshrined in the UDHR, Article 7, which promotes equality by guaranteeing that everyone is treated equally before the law. Additionally, the declaration prohibits discrimination against individuals and incitement toward such discriminatory acts.[559]

In 2003, According to the guideline of the African Charter on Human and People's Rights of Women in Africa, States Parties were required to modify societal and cultural beliefs for both genders. This should be done through public information, education, and communication methods to eradicate harmful cultural and traditional practices. For example, such practices are often based on one sex being inferior or superior or using gender stereotypes to assign roles to men and women.[560]

When making decisions and passing laws related to the customary laws of inheritance when someone dies without a will, the judiciary and legislative bodies should consider international provisions that aim to improve women's rights.[561] While these international instruments can be of great assistance, there is a problem with their application in the jurisprudence discussed in this thesis. Specifically, the ratified treaties are not automatically enforceable; It should be noted that the ratification of these treaties does not automatically confer the ability for individuals to rely on them to enforce their rights under national law in the countries under discussion.[562] Instead, these countries must only abide by ratified treaties in their international relations with State parties. For example, to enforce international obligations in national law in Kenya, Uganda, and Tanzania, Parliament must draft the provisions of the relevant treaties as legislation that becomes part of the

[558] Kuria (n 224).. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/easfrilaj12&i=35./ &Charles Mwalimu, 'The Legal Framework on Admission and Resettlement of African Refugees with an Emphasis on Kenya, Tanzania, and Uganda Essay' (2004) 18 Emory International Law Review 455.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/emint18&i=461.

[559] Savitri Goonesekere, 'Human Rights as a Foundation for Family Law Reform' (2000) 8 International Journal of Children's Rights 83.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/intjchrb8&i=93.

[560] Rose Gawaya and Rosemary Semafumu Mukasa, 'The African Women's Protocol: A New Dimension for Women's Rights in Africa' (2005) 13 Gender and Development 42.. http://www.jstor.org/stable/20053162.

[561] Allison D Kent, 'Custody, Maintenance, and Succession: The Internalization of Women's and Children's Rights under Customary Law in Africa Student Note' (2006) 28 Michigan Journal of International Law 507.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/mjil28&i=515.

[562] J Osogo Ambani and Ochieng Ahaya, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospect of Customary Law in the New Constitutional Era' (2015) 1 Strathmore Law Journal 41.

country's statutes.[563] Nevertheless, all three countries under study have ratified the treaties and conventions and enacted the necessary laws dealing with intestate succession.

[563] John Mukum Mbaku, 'International Law, African Customary Law, and the Protection of the Rights of Children' (2019) 28 Michigan State International Law Review 535.. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/mistjintl28&i=564.

Chapter 7: BIBLIOGRAPHY

1. Abel RL, 'A Bibliography of the Customary Laws in Kenya' (1970) 6 East African Law Journal 100

2. Abotsi EK, 'Customary Law and the Rule of Law: Evolving Tensions and Re-Engineering' (2020) 37 Arizona Journal of International and Comparative Law 135

3. Addo MK, 'Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights (2010) 32 Human Rights Quarterly 601

4. Adelakun OS, 'The Effect of Religion and Culture on the Implementation of Women's Rights in Africa: Challenges and Prospects (2019) 1 International Journal of Comparative Law and Legal Philosophy 203

5. 'African Traditional Religion' (*obo*) <https://www.oxfordbibliographies.com/display/document/obo-9780199846733/obo-9780199846733-0064.xml> accessed 8 May 2023

6. Akuffo K, 'The Conception of Land Ownership in African Customary Law and Its Implications for Development (2009) 17 African Journal of International and Comparative Law 57

7. Albertyn C, 'The Stubborn Persistence of Patriarchy: Gender Equality and Cultural Diversity in South Africa' (2009) 2 Constitutional Court Review 165

8. Aldashev G, Platteau J-P, and Wahhaj Z, 'Legal Reform in the Presence of a Living Custom: An Economic Approach' (2011) 108 Proceedings of the National Academy of Sciences of the United States of America 21320

9. Allott AN, 'Customary Law in East Africa' (1969) 4 Africa Spectrum 12

10. Ambani JO and Ahaya O, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospect of Customary Law in the New Constitutional Era' (2015) 1 Strathmore Law Journal 41

11. ——, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospect of Customary Law in the New Constitutional Era' (2015) 1 Strathmore Law Journal 41

12. Ambler CH, 'The Renovation of Custom in Colonial Kenya: The 1932 Generation Succession Ceremonies in Embu' (1989) 30 The Journal of African History 139

13. Anderson JND, 'The Law of Succession in Uganda: An Unreported Case' (1963) 7 Journal of African Law 201

14. Andrews PE, 'Who's Afraid of Polygamy - Exploring the Boundaries of Family, Equality, and Custom in South Africa Symposium: New Frontiers in Family Law' (2009) 2009 Utah Law Review 351

15. Apter DE, 'The Role of Traditionalism in The Political Modernization of Ghana and Uganda' (1960) 13 World Politics 45

16. Armstrong A and others, 'Uncovering Reality: Excavating Women's Rights in African Family Law' (1993) 7 International Journal of Law and the Family 314

17. Arostegui JL, 'Gender and the Security Sector: Towards a More Secure Future' (2015) 14 Connections 7

18. Asiema JK, 'Gender Equity, Gender Equality, and the Legal Process: The Kenyan Experience Symposium: Africa in the Third Millenium: Legal Challenges and Prospects' (2000) 10 Transnational Law & Contemporary Problems 561

19. Asiema JK and Situma FDP, 'Indigenous Peoples and the Environment: The Case of the Pastorial Maasai of Kenya' (1994) 5 Colorado Journal of International Environmental Law and Policy 149

20. Asiimwe F and Crankshaw O, 'The Impact of Customary Laws on Inheritance: A Case Study of Widows in Urban Uganda' (2011) 3 Journal of Law and Conflict Resolution 7

21. ——, 'The Impact of Customary Laws on Inheritance: A Case Study of Widows in Urban Uganda' (2011) 3 Journal of Law and Conflict Resolution 7

22. Asiimwe FA, 'Statutory Law, Patriarchy and Inheritance: Home Ownership among Widows in Uganda' (2009) 13 African Sociological Review / Revue Africaine de Sociologie 124

23. Ault DE and Rutman GL, 'The Development of Individual Rights to Property in Tribal Africa' (1979) 22 Journal of Law & Economics 163

24. Badbess K, 'Till Death Do Us Part: The Ailment Affecting the Widow's Life Interest in Kenyan Intestate Succession' (2019) 4 Strathmore Law Review 1

25. Bakari AH, 'Africa's Paradoxes of Legal Pluralism in Personal Laws: A Comparative Case Study of Tanzania and Kenya' (1991) 3 African Journal of International and Comparative Law 545

26. Bakibinga-Gaswaga E, 'Unpacking Legal Pluralism in Commonwealth Africa - Towards Strengthening Methods for Rule of Law Programming for Development Special Issue: Law and Development in Africa: Legal Pluralism and Effective Governance for Development in Africa' (2018) 11 Law and Development Review 277

27. Bakker P, 'The Validity of a Customary Marriage under the Recognition of Customary Marriages Act 120 of 1998 with Reference to Sections 3(1)(b) and 7(6) Part 2' (2016) 79 Journal for Contemporary Roman-Dutch Law 357

28. Balaton-Chrimes S, 'Who Are Kenya's 42(+) Tribes? The Census and the Political Utility of Magical Uncertainty' (2021) 15 Journal of Eastern African Studies 43

29. Banks AM, 'CEDAW, Compliance, and Custom: Human Rights Enforcements in Sub-Saharan Africa' (2008) 32 Fordham International Law Journal 781

30. Baskerville RL, Kaul M, and Storey VC, 'Genres of Inquiry in Design-Science Research: Justification and Evaluation of Knowledge Production' (2015) 39 MIS Quarterly 541

31. Bavinck EA, ‘Conflicting Priorities: Issues of Gender Equality in South Africa’s Customary Law’ (2013) 5 Amsterdam Law Forum 20

32. Beidelman TO, ‘Review of The Chagga and Meru of Tanzania’ (1979) 12 The International Journal of African Historical Studies 686

33. ——, ‘The Organization and Maintenance of Caravans by the Church Missionary Society in Tanzania in the Nineteenth Century (1982) 15 The International Journal of African Historical Studies 601

34. Bekker J and Buchner-Eveleigh M, ‘The Legal Character of Ancillary Customary Marriages’ (2017) 50 De Jure 80

35. Bekker JC and de Kock PD, ‘Adaptation of the Customary Law of Succession to Changing Needs’ (1992) 25 Comparative and International Law Journal of Southern Africa 366

36. Bencomo C, Battistini E, and Mcgovern T, ‘Gender-Based Violence Is a Human Rights Violation: Are Donors Responding Adequately? What a Decade of Donor Interventions in Colombia, Kenya, and Uganda Reveals’ (2022) 24 Health and Human Rights 29

37. Bennett G, ‘The Succession in Kenya’ (1968) 24 The World Today 333

38. Bennett T, ‘The Conflict of Personal Laws: Wills and Intestate Succession’ (1993) 56 Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law) 50

39. Bennett TW, ‘Conflict of Laws - The Application of Customary Law and the Common Law in Zimbabwe (1981) 30 International and Comparative Law Quarterly 59

40. ——, ‘The Compatibility of African Customary Law and Human Rights (1991) 1991 Acta Juridica/African Customary Law 18

41. ——, ‘Re-Introducing African Customary Law to the South African Legal System’ (2009) 57 The American Journal of Comparative Law 1

42. ——, ‘The Cultural Defence and the Custom of Thwala in South African Law’ (2010) 10 University of Botswana Law Journal 3

43. ——, ‘Legal Pluralism and the Family in South Africa: Lessons from Customary Law Reform Religious and Legal Pluralism in Global Comparative Perspective’ (2011) 25 Emory International Law Review 1029

44. Bennett TW and Peart NS, ‘The Dualism of Marriage Laws in Africa’ (1983) 1983 Acta Juridica 145

45. Bennett TW and Roos JW, ‘The 1991 Land Reform Acts and the Future of African Customary Law’ (1992) 109 South African Law Journal 447

46. Bennett V and others, ‘Inheritance Law in Uganda: The Plight of Widows and Children International Women’s Human Rights Clinic Special Issue: Reports: Section V’ (2006) 7 Georgetown Journal of Gender and the Law 451

47. ——, ‘Inheritance Law in Uganda: The Plight of Widows and Children International Women’s Human Rights Clinic Special Issue: Reports: Section V’ (2006) 7 Georgetown Journal of Gender and the Law 451

48. Berat L, ‘Customary Law in a New South Africa: A Proposal’ (1991) 15 Fordham International Law Journal 92

49. Berger I, ‘African Women’s Movements in the Twentieth Century: A Hidden History (2014) 57 African Studies Review 1

50. Berman BJ and Lonsdale JM, ‘The Labors of “Muigwithania:” Jomo Kenyatta as Author, 1928-45’ (1998) 29 Research in African Literatures 16

51. Bernal V, ‘Gender, Culture, and Capitalism: Women and the Remaking of Islamic “Tradition” in a Sudanese Village’ (1994) 36 Comparative Studies in Society and History 36

52. Bertelsmann W and others, ‘Developments in the Law and Administration of Justice of the Bantu: Survey of 1971 and 1972’ (1974) 37 Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law) 70

53. ‘Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004)’ <http://www.saflii.org/za/cases/ZACC/2004/17.html> accessed 19 April 2021

54. ‘Bhe and Others v. Magistrate of Khayelitsha and Others/Shibi v. Sithole and Others/South African Human Rights Commission and Another v. President of the Republic of South Africa and Another Judicial decision - Constitutional Law: South Africa’ (2005) 31 Commonwealth Law Bulletin 207

55. Bishin BG and Cherif FM, ‘Women, Property Rights, and Islam’ (2017) 49 Comparative Politics 501

56. Bjerk PK, ‘Sovereignty and Socialism in Tanzania: The Historiography of an African State’ (2010) 37 History in Africa 275

57. Blasi G and Jost JT, ‘System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice (2006) 94 California Law Review 1119

58. Boesl H, ‘The Concept of Ujamaa and Its Impact on Postcolonial Tanzania’ (Konrad Adenauer Stiftung 2023) <https://www.jstor.org/stable/resrep48753> accessed 13 May 2023

59. Bond JE, ‘Gender, Discourse, and Customary Law in Africa’ (2009) 83 Southern California Law Review 509

60. ——, ‘Gender, Discourse, and Customary Law in Africa’ (2009) 83 Southern California Law Review 509

61. ‘British Administrators, Colonial Chiefs, and the Comfort of Tradition: An Example from Uganda on JSTOR’ <https://www.jstor.org/stable/524608> accessed 8 February 2023

62. Bronstein V, 'Confronting Custom in the New South African State: An Analysis of the Recognition of Customary Marriages Act 120 of 1998 Notes and Comments (2000) 16 South African Journal on Human Rights 558

63. Brown A, Msoka C, and Dankoco I, 'A Refugee in My Own Country: Evictions or Property Rights in the Urban Informal Economy?' (2015) 52 Urban Studies 2234

64. Buchmann C, 'Family Structure, Parental Perceptions and Child Labor in Kenya: What Factors Determine Who Is Enrolled in School' (1999) 78 Social Forces 1349

65. Bukurura SH, 'Combating Crime among the Sukuma and Nyamwezi of West-Central Tanzania' (1995) 24 Crime, Law and Social Change 257

66. Burton A and Jennings M, 'Introduction: The Emperor's New Clothes? Continuities in Governance in Late Colonial and Early Postcolonial East Africa' (2007) 40 The International Journal of African Historical Studies 1

67. Bushozi PM, 'Towards Sustainable Cultural Heritage Management in Tanzania: A Case Study of Kalenga and Mlambalasi Sites in Iringa, Southern Tanzania' (2014) 69 The South African Archaeological Bulletin 136

68. Bwasiri EJ, 'The Challenge of Managing Intangible Heritage: Problems in Tanzanian Legislation and Administration (2011) 66 The South African Archaeological Bulletin 129

69. CADIGAN RJ, 'Woman-to-Woman Marriage: Practices and Benefits in Sub-Saharan Africa' (1998) 29 Journal of Comparative Family Studies 89

70. Calaguas MJ, Drost CM and Fluet ER, 'Legal Pluralism and Women's Rights: A Study in Postcolonial Tanzania' (2007) 16 Columbia Journal of Gender and Law 471

71. Caplan P, 'Gender, Ideology and Modes of Production on the Coast of East Africa' (1982) 28 Paideuma 29

72. Carter WM, 'Clan System Land Tenure and Succession Among the Baganda' (1909) 25 Law Quarterly Review 158

73. Castillejos-Aragón M, 'A Need for Change: Why Do Women in the Judiciary Matter?' (Konrad Adenauer Stiftung 2021) <https://www.jstor.org/stable/resrep30763> accessed 13 May 2023

74. Chadwick RJ, 'Matrilineal Inheritance and Migration in a Minangkabau Community' [1991] Indonesia 47

75. Chirwa DM and Mbazira C, 'Constitutional Rights, Horizontality, and the Ugandan Constitution: An Example of Emerging Norms and Practices in Africa' (2020) 18 International Journal of Constitutional Law 1231

76. Chukwu LOC, 'The Metamorphosis of Polygamy in Private International Law' (2014) 6 KNUST Law Journal 67

77. Church J, 'The Place of Indigenous Law in a Mixed Legal System and a Society in Transformation: A South African Experience' 13

78. ‘Civil Appeal 139 of 1994 - Kenya Law’ <http://kenyalaw.org/caselaw/cases/view/174> accessed 28 June 2022

79. Cj G and others, ‘NAKAYI SHONHIWA MAGAYA’

80. Clarkson E, ‘An Overseas Consultant in the Probation Service of Uganda: An Experience on in-Service Training’ (1971) 14 International Social Work 34

81. Cohn S, ‘Renaissance Attachment to Things: Material Culture in Last Wills and Testaments’ (2012) 65 The Economic History Review 984

82. Cole S, ‘The Prehistory of East Africa’ (1954) 56 American Anthropologist 1026

83. Comaroff J and Comaroff J, ‘Policing Culture, Cultural Policing: Law and Social Order in Postcolonial South Africa’ (2004) 29 Law & Social Inquiry 513

84. Conroy SJ, ‘Women’s Inheritance and Conditionality in the Fight against AIDS’ (2010) 28 Wisconsin International Law Journal 705

85. Cotran E, ‘Integration of Courts and Application of Customary Law in Tanganyika’ (1965) 1 East African Law Journal 108

86. ——, ‘The Place and Future of Customary Law in East Africa’ (1966) 12 International and Comparative Law Quarterly Supplementary Publication 72

87. ——, ‘Integration of Courts and Application of Customary Law in Kenya’ (1968) 4 East African Law Journal 14

88. ——, ‘The Development and Reform of the Law in Kenya’ (1983) 27 Journal of African Law 42

89. Curry EMJ, ‘Intestate Succession and Wills: A Comparative Analysis of Article II of the Uniform Probate Code and the Law of Ohio’ 34 OHIO STATE LAW JOURNAL 86

90. ‘Customary Law: Its Place and Meaning in Contemporary African Legal Systems (1965) 9 Journal of African Law 82

91. Dancer H, ‘An Equal Right to Inherit: Women’s Land Rights, Customary Law, and Constitutional Reform in Tanzania’ (2017) 26 Social & Legal Studies 291

92. —— ‘An Equal Right to Inherit? Women’s Land Rights, Customary Law and Constitutional Reform in Tanzania’ (2017) 26 Social & Legal Studies 291

93. Daniels RJ, Trebilcock MJ and Carson LD, ‘The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies’ (2011) 59 The American Journal of Comparative Law 111

94. ——, ‘The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies’ (2011) 59 American Journal of Comparative Law 111

95. Daniels WCE, ‘The Interaction of English Law with Customary Law in West Africa’ (1964) 13 International and Comparative Law Quarterly 574

96. Day GR and Russo SJ, 'Poverty and the Hidden Effects of Sex Discrimination: An Empirical Study of Inequality (2015) 37 University of Pennsylvania Journal of International Law 1183

97. Dayana Ndima D, 'The Anatomy of African Jurisprudence: A Basis for Understanding the African Socio-Legal and Political Cosmology' (2017) 50 Comparative and International Law Journal of Southern Africa 84

98. Dennison D, 'The Resonance of Colonial Era Customary Codes in Contemporary Uganda' (12 December 2019) <https://papers.ssrn.com/abstract=3507853> accessed 7 May 2023

99. Derrett JDM, 'The Hindu Succession Act, 1956: An Experiment in Social Legislation (1959) 8 American Journal of Comparative Law 485

100. ——, 'The Administration of Hindu Law by the British' (1961) 4 Comparative Studies in Society and History 10

101. 'Details for Laws of the Republic of Uganda, Volume VII : › Uganda Martyrs University Library Catalog' <https://catalogue.umu.ac.ug/cgi-bin/koha/opac-detail.pl?biblionumber=36409> accessed 12 May 2023

102. Diala AC, 'Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa Focus: Twenty Years of the South African Constitution (2014) 14 African Human Rights Law Journal 633

103. ——, 'The Concept of Living Customary Law: A Critique (2017) 49 Journal of Legal Pluralism and Unofficial Law 143

104. Diala AC and Kangwa B, 'Rethinking the Interface between Customary Law and Constitutionalism in Sub-Saharan Africa' (2019) 52 De Jure 189

105. Dobie AM, 'Dependent Relative Revocation of Wills' (1915) 2 Virginia Law Review 327

106. Doss C and others, 'Women, Marriage and Asset Inheritance in Uganda' (2012) 30 Development Policy Review 597

107. Doubilet DM, 'Soundness of Intellect as a Criterion for the Validity of a Will Notes' (1967) 13 McGill Law Journal 336

108. Driberg JH, 'The African Conception of Law' (1934) 16 Journal of Comparative Legislation and International Law 230

109. Edaki W, 'Kadhis' Court Jurisdiction Conundrum; Interfaith Marriage and Legal Conflict in the Union' (1 July 2020) <https://papers.ssrn.com/abstract=3656201> accessed 12 May 2023

110. Edel M, 'African Tribalism: Some Reflections on Uganda' (1965) 80 Political Science Quarterly 357

111. Edu O, 'A Critical Analysis of the Laws of Inheritance in the Southern States of Nigeria' (2016) 60 Journal of African Law 141

112. 'Empower Women - Gender, Land and Asset Survey Uganda Gender Differences in Asset Rights in Central Uganda' (*EmpowerWomen*)

<https://www.empowerwomen.org/en/resources/documents/2015/11/gender-land-and-asset-survey-uganda-gender-differences-in-asset-rights-in-central-uganda?lang=en> accessed 12 May 2023

113. *Enhancing Women's Rights in Kenya: 7th Annual Conference, Whitesands Hotel, Mombasa, August 19-23, 2003 : Conference Report* (Kenya Section of the International Commission of Jurists 2003)

114. Etta FE, 'Gender Issues in Contemporary African Education' (1994) 19 Africa Development / Afrique et Développement 57

115. Evans-Pritchard EE, 'Marriage Customs of the Luo of Kenya' (1950) 20 Africa: Journal of the International African Institute 132

116. Ewelukwa UU, 'Post-Colonialism, Gender, Customary Injustice: Widows in African Societies' (2002) 24 Human Rights Quarterly 424

117. Ezer T, 'Inheritance Law in Tanzania: The Impoverishment of Widows and Daughters International Women's Human Rights Clinic Special Issue: Reports: Section VII' (2006) 7 Georgetown Journal of Gender and the Law 599

118. ——, 'Forging a Path for Women's Rights in Customary Law' (2016) 27 Hastings Women's Law Journal 65

119. Fagbayibo B, 'Towards the Harmonisation of Laws in Africa: Is OHADA the Way to Go' (2009) 42 Comparative and International Law Journal of Southern Africa 309

120. Fallers LA, 'Changing Customary Law in Busoga District of Uganda' (1956) 8 Journal of African Administration 139

121. Feldman R, 'Women's Groups and Women's Subordination: An Analysis of Policies Towards Rural Women in Kenya' [1983] Review of African Political Economy 67

122. Fombad CM, 'Internationalization of Constitutional Law and Constitutionalism in Africa' (2012) 60 The American Journal of Comparative Law 439

123. 'Foundations of Legal Research and Writing (PDF)' (*PDF Room*) <https://pdfroom.com/books/foundations-of-legal-research-and-writing/1vxdzrredRV> accessed 8 May 2023

124. Freeman HA, 'An Introduction to Hindu Jurisprudence' (1959) 8 American Journal of Comparative Law 29

125. Freeman MA, 'Women, Law, and Land at the Local Level: Claiming Women's Human Rights in Domestic Legal Systems (1994) 16 Human Rights Quarterly 559

126. Gachuki N, 'Is There a Conflict Between Section 3(5) of the Law of Succession Act Cap 160 and Section 9 of the Marriage Act, Laws of Kenya?' (31 July 2018) <https://papers.ssrn.com/abstract=3482410> accessed 11 May 2023

127. Gary SN, ‘The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy Symposium: The Uniform Probate Code: Remaking American Succession Law’ (2011) 45 University of Michigan Journal of Law Reform 787

128. Gawaya R and Mukasa RS, ‘The African Women’s Protocol: A New Dimension for Women’s Rights in Africa’ (2005) 13 Gender and Development 42

129. ‘Gender and Human Rights Commonwealth Developments - Law and Developments Issues’ (2004) 30 Commonwealth Law Bulletin 673

130. Genicot G and Hernandez-de-Benito M, ‘Women’s Land Rights and Village Institutions in Tanzania’ (2022) 153 World Development 105811

131. Ghamidi JA, ‘The Quranic Law of Inheritance’ (2001) 1 Pakistan Law Review 173

132. Gilbert J, ‘Indigenous Peoples, Human Rights, and Cultural Heritage: Towards a Right to Cultural Integrity’ in Alexandra Xanthaki and others (eds), *Indigenous Peoples’ Cultural Heritage* (Brill 2017) <https://www.jstor.org/stable/10.1163/j.ctv2gjwsw2.5> accessed 9 May 2023

133. ——, ‘Litigating Indigenous Peoples’ Rights in Africa: Potentials, Challenges and Limitations’ (2017) 66 The International and Comparative Law Quarterly 657

134. Giovarelli R, ‘Customary Law, Household Distribution of Wealth, and Women’s Rights to Land and Property International Development (2005) 4 Seattle Journal for Social Justice 801

135. Gluckman M, ‘Natural Justice in Africa’ (1964) 9 Natural Law Forum 25

136. Gneezy U, Leonard KL, and List JA, ‘Gender Differences in Competition: Evidence from a Matrilineal and a Patriarchal Society (2009) 77 Econometrica 1637

137. Goldstein G, ‘The Legal System and Wildlife Conservation: History and the Law’s Effect on Indigenous People and Community Conservation in Tanzania Notes’ (2004) 17 Georgetown International Environmental Law Review 481

138. Gomez MA, ‘Africans, Religion, and African Religion through the Nineteenth Century (2013) 1 Journal of Africana Religions 78

139. Goonesekere S, ‘Human Rights as a Foundation for Family Law Reform’ (2000) 8 International Journal of Children’s Rights 83

140. Grant E, ‘Human Rights, Cultural Diversity and Customary Law in South Africa’ (2006) 50 Journal of African Law 2

141. Gwako ELM, ‘Widow Inheritance among the Maragoli of Western Kenya’ (1998) 54 Journal of Anthropological Research 173

142. Hacker D, ‘The Gendered Dimensions of Inheritance: Empirical Food for Legal Thought’ (2010) 7 Journal of Empirical Legal Studies 322

143. Halim AH and Abdullah MA, ‘Women’s Rights to Succession in Unregistered Marriages: A Reference to the Instrument of Wasiyyah’ (2008) 16 IIUM Law Journal 125

144. Hamilton LT and others, ‘Hegemonic Femininities and Intersectional Domination’ (2019) 37 Sociological Theory 315

145. Hardee CA, ‘Balancing Acts: The Rights of Women and Cultural Minorities in Kenyan Marital Law Note’ (2004) 79 New York University Law Review 712

146. ——, ‘Balancing Acts: The Rights of Women and Cultural Minorities in Kenyan Marital Law Note’ (2004) 79 New York University Law Review 712

147. Harries L, ‘Language and Law in Tanzania’ (1966) 10 Journal of African Law 164

148. Harris J, ‘High Court of Kenya - In the Matter of the Estate of Rufus Ngethe Munyua - The Public Trustee v. Florence Wambui, Esther Njoki and Jane Nyakaru Cases’ (1978) 22 Journal of African Law 188

149. Hasu P, ‘For Ancestors and God: Rituals of Sacrifice Among the Chagga of Tanzania’ (2009) 48 Ethnology 195

150. Himonga C, ‘The Advancement of African Women’s Rights in the First Decade of Democracy in South Africa: The Reform of the Customary Law of Marriage and Succession’ (2005) 2005 Acta Juridica 82

151. Hinz MO and Patemann HK, *The Shade of New Leaves: Governance in Traditional Authority ; a Southern African Perspective* (LIT Verlag Münster 2006)

152. Hodgson DL, ‘Pastoralism, Patriarchy, and History: Changing Gender Relations among Maasai in Tanganyika, 1890-1940’ (1999) 40 The Journal of African History 41

153. Homan FD, ‘Inheritance in the Kenya Native Land Units’ (1958) 10 Journal of African Administration 131

154. House-Midamba B, ‘Legal Pluralism and Attendant Internal Conflicts in Marital and Inheritance Laws in Kenya’ (1994) 49 Africa: rivista trimestrale di studi e documentazione 375

155. Howard R, ‘Human Rights and Personal Law: Women in Sub-Saharan Africa’ (1982) 12 Issue: A Journal of Opinion 45

156. Htun M and Weldon SL, ‘State Power, Religion, and Women’s Rights: A Comparative Analysis of Family Law Symposium: Part II: Claims in Context’ (2011) 18 Indiana Journal of Global Legal Studies 145

157. Hubback J, ‘A Treatise on the Evidence of Succession to Real and Personal Property and Peerages’ (1845) 48 Law Library [xix]

158. Hughes K and Wickeri E, ‘A Home in the City: Women’s Struggle to Secure Adequate Housing in Urban Tanzania Special Report’ (2010) 34 Fordham International Law Journal 788

159. *Human Rights NGOs in East Africa: Political and Normative Tensions* (the University of Pennsylvania Press 2009) <https://www.jstor.org/stable/j.ctt3fj56n> accessed 12 May 2023

160. Hyle MA, Devkota BP, and Mustalahti I, 'From Blueprints to Empowerment of Disadvantaged Groups in Natural Resource Governance: Lessons from Nepal and Tanzania' (2019) 13 International Journal of the Commons 1062

161. Ibhawoh B, 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State' (2000) 22 Human Rights Quarterly 838

162. 'In the Matter of the Estate of Rufus Ngethe Munyua. The Public Trustee v. Florence Wambui, Esther Njoki and Jane Nyakaru' (1978) 22 Journal of African Law 188

163. International CAB, 'The Tanzanian Peasantry: Economy in Crisis.' [1992] The Tanzanian peasantry: economy in crisis. <https://www.cabdirect.org/cabdirect/abstract/19916712542> accessed 8 May 2023

164. 'Islamic Law of Inheritance: A New Approach: Muhammad Mustafa Khan: 9788171511044: Amazon.Com: Books' <https://www.amazon.com/Islamic-Law-Inheritance-New-Approach/dp/817151104X> accessed 6 June 2022

165. Jain PC, 'Women's Property Rights Under Traditional Hindu Law and the Hindu Succession Act, 1956: Some Observations' (2003) 45 Journal of the Indian Law Institute 509

166. Jamneck J, 'The Problematic Practical Application of Section 1(6) and 1(7) of the Interstate Succession Act under a New Dispensation' (2014) 17 Potchefstroom Electronic Law Journal 972

167. Jansen YO, 'Unifying Babylon - Can Post-Colonial States Successfully Unify a Plural (Legal) Society - A Case Study of the Uganda Law Reform Commission's Efforts to Reform Family Law in Accordance with International Law and Its Effect on Women's Property Rights (2006) 16 Widener Law Journal 71

168. Jefferson L, 'Discrimination against Women in Employment and Property Rights: Unexamined Factors in the Feminization of Poverty Panel One (2002) 24 Women's Rights Law Reporter 167

169. Joireman SF, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' (2001) 39 The Journal of Modern African Studies 571

170. Joireman SF, 'Enforcing New Property Rights in Sub-Saharan Africa: The Ugandan Constitution and the 1998 Land Act' (2007) 39 Comparative Politics 463

171. Jones VO, 'Probate Code Conservatorships: A Legislative Grant of New Procedural Protections Comments' (1977) 8 Pacific Law Journal 73

172. 'Judicial Committee of the Privy Council - Adel Boshali v. Allied Commercial Exporters Ltd. - Sulay Seisay v. Pa Sheka Kanu and Others - United Marketing Company v. Hasham Kara - Sir Abubakar Tafawa Balewa v. Doherty and Others Case' (1963) 7 Journal of African Law 192

173. Juma L, 'Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes' (2001) 14 St. Thomas Law Review 459

174. Kaare B, ‘Review of The Making and Unmaking of the Haya Lived World: Consumption, Commoditization and Everyday Practice’ (1997) 60 Bulletin of the School of Oriental and African Studies, University of London 610

175. Kabau T and Njoroge C, ‘The Application of International Law in Kenya under the 2010 Constitution: Critical Issues in the Harmonisation of the Legal System’ (2011) 44 Comparative and International Law Journal of Southern Africa 293

176. Kabira N, ‘Constitutionalizing Traveling Feminisms in Kenya’ (2019) 52 Cornell International Law Journal 137

177. Kaganas F and Murray C, ‘The Contest between Culture and Gender Equality under South Africa’s Interim Constitution’ (1994) 21 Journal of Law and Society 409

178. Kamau W, ‘Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya’ (2015) 2015 East African Law Journal 140

179. Kameri-Mbote DP, ‘The Law of Succession in Kenya’ 26

180. Kameri-Mbote P, ‘Constitutions as Pathways to Gender Equality in Plural Legal Contexts’ (2018) 5 Oslo Law Review 21

181. Kameri-Mbote PG, ‘Gender Dimensions of Law, Colonialism, and Inheritance in East Africa: Kenyan Women’s Experiences’ (2002) 35 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia, and Latin America 373

182. Kapur A, ‘Catch-22: The Role of Development Institutions in Promoting Gender Equality in Land Law - Lessons Learned in Post-Conflict Pluralist Africa’ (2011) 17 Buffalo Human Rights Law Review 75

183. Karanja PW, ‘Women’s Land Ownership Rights in Kenya Realizing the Rights of Women in Development Process: Women’s Legal Entitlements to Agricultural Development and Financial Assistance (1991) 1991 Third World Legal Studies 109

184. Karibi-Whyte A, ‘Exploring the Silences and Omissions in International Human Rights around African Women’ (2018) 21 Nigerian Law Journal 1

185. Keen I, ‘Language in the Constitution of Kinship’ (2014) 56 Anthropological Linguistics 1

186. Keeney JD, ‘Review of Report of the Kenya Commission on the Law of Succession (1971) 119 University of Pennsylvania Law Review 1071

187. Keightley R, ‘Law of Succession (Including Administration of Estates) and Trusts Chapter 16’ (2003) 2003 Annual Survey of South African Law 528

188. Kelley B, ‘The Kenyan Constitution and the Question of Succession: The Influence of a Strong Leader’ (1973) 1 Iustitia 43

189. Kelsall T and Mercer C, ‘Empowering People? World Vision & “Transformatory Development” in Tanzania’ (2003) 30 Review of African Political Economy 293

190. Kent AD, 'Custody, Maintenance, and Succession: The Internalization of Women's and Children's Rights under Customary Law in Africa Student Note' (2006) 28 Michigan Journal of International Law 507

191. 'Kenya Law: The Constitution of Kenya' <http://kenyalaw.org/kl/index.php?id=398> accessed 9 May 2023

192. '——' <http://kenyalaw.org/kl/index.php?id=398> accessed 25 April 2021

193. 'Kenya: Succession, Customary Law Judicial Decisions' (2012) 38 Commonwealth Law Bulletin 571

194. Khadiagala L, 'Negotiating Law and Custom: Judicial Doctrine and Women's Property Rights in Uganda' (2002) 46 Journal of African Law 1

195. Khadiagala LS, 'Justice and Power in the Adjudication of Women's Property Rights in Uganda' (2002) 49 Africa Today 101

196. Khan AA, 'Rights of Women under the Islamic Law of Succession' (1999) 20 Journal of Law and Society (University of Peshawar) 1

197. Kibugi RM, 'A Failed Land Use Legal and Policy Framework for the African Commons: Reviewing Rangeland Governance in Kenya' (2008) 24 Journal of Land Use & Environmental Law 309

198. Knapman C and Sutz P, 'Reconsidering Approaches to Women's Land Rights in Sub-Saharan Africa' (International Institute for Environment and Development 2015) <https://www.jstor.org/stable/resrep01642> accessed 8 May 2023

199. Knoetze E, 'Customary Law of Succession: An Alternative to the Abolition of the Male Primogeniture Rule' (2005) 68 Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law) 594

200. Kodiyo KK, 'Intestacy Laws and the Influences of Colonialism - The Case of Kenya, in Comparison with the English and Australian Laws of Succession' (2021) 71 Zbornik Pravnog Fakulteta u Zagrebu 93

201. Kreiczer-Levy S, 'Religiously Inspired Gender-Bias Disinheritance- What's Law Got to Do with It Symposium on Estate Planning: Moral, Religious and Ethical Perspectives (2009) 43 Creighton Law Review 669

202. Kuenyehia A, 'Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa 2006 Brigitte M. Bodenheimer Lecture' (2006) 40 U.C. Davis Law Review 385

203. Kult AP, 'Intestate Succession in South Africa: The Westernization of Customary Law Practices within a Modern Constitutional Framework Note' (2000) 11 Indiana International & Comparative Law Review 697

204. Kunugi T, 'State Succession in the Framework of GATT' (1965) 59 American Journal of International Law 268

205. Kuria GK, ‘Christianity and Family Law in Kenya’ (1976) 12 East African Law Journal 33

206. ——, ‘English Law - The New Dimension: A Review Article (1976) 12 East African Law Journal 267

207. Kurshan L, ‘Rethinking Property Rights as Human Rights: Acquiring Equal Property Rights for Women Using International Human Rights Treaties’ (2000) 8 American University Journal of Gender, Social Policy & the Law 353

208. ‘Labour, Employment, Occupational Safety And Health – Ministry of Gender Labour & Social Development’ <https://mglsd.go.ug/labour-employment-occupational-safety-and-health/> accessed 12 May 2023

209. Ladner J, ‘Tanzanian Women and Nation Building’ (1971) 3 The Black Scholar 22

210. Laltaika E, ‘Indigenous Peoples Rights in Tanzania and International Human Rights Law’ (2012) 1 Tuma Law Review 142

211. Lande J and Mosten FS, ‘Family Lawyering: Past, Present, and Future Special Issue: Family Court Review’s Fiftieth Anniversary: Perspectives on the Past (2013) 51 Family Court Review 20

212. ‘Law & Advocacy for Women in Uganda v. Attorney General’ (*LII / Legal Information Institute*) <https://www.law.cornell.edu/women-and-justice/resource/law_advocacy_for_women_in_uganda_v_attorney_general> accessed 12 May 2023

213. *Law Advocacy for Women in Uganda v Attorney General (Constitutional Petition No. 13 of 2005) [2007] UGSC 71 (5 April 2007)* (2007) <https://ulii.org/akn/ug/judgment/ugsc/2007/71/eng@2007-04-05> accessed 12 May 2023

214. —— (2007) <https://ulii.org/akn/ug/judgment/ugsc/2007/71/eng@2007-04-05> accessed 12 May 2023

215. ‘Law Reports of the Commonwealth Editorial Review 2009 - The Commonwealth through the Case Law Judicial Decisions’ (2010) 36 Commonwealth Law Bulletin 729

216. Lawrance JCD, ‘The Position of Chiefs in Local Government in Uganda’ (1956) 8 Journal of African Administration 186

217. Lawson DW and Gibson MA, ‘Polygynous Marriage and Child Health in Sub-Saharan Africa: What Is the Evidence for Harm?’ (2018) 39 Demographic Research 177

218. Lazar L, ‘Review of Bantu Law in South Africa’ (1970) 19 The International and Comparative Law Quarterly 733

219. Lehnert W, ‘The Role of the Courts in the Conflict between African Customary Law and Human Rights (2005) 21 South African Journal on Human Rights 241

220. Lemmer E and Olivier M, ‘The South African Constitution as a Post-Colonial Document: A Long Walk to Freedom Notes’ (2000) 33 De Jure 138

221. Levy SK and Pinto M, ‘Property and Belongingness: Rethinking Gender-Based Disinheritance’ (2011) 21 Texas Journal of Women and the Law 119

222. Li-Ann T, ‘It Is a Little-Known Legal Fact: Originalism, Customary Human Rights Law and Constitutional Interpretation Case and Legislation Comments’ (2010) 2010 Singapore Journal of Legal Studies 558

223. Liebenow JG, ‘Responses to Planned Political Change in a Tanganyika Tribal Group’ (1956) 50 The American Political Science Review 442

224. Loftspring RC, ‘Inheritance Rights in Uganda: How Equal Inheritance Rights Would Reduce Poverty and Decrease the Spread of HIV/AIDS in Uganda Comment’ (2007) 29 University of Pennsylvania Journal of International Law 243

225. ——, ‘Inheritance Rights in Uganda: How Equal Inheritance Rights Would Reduce Poverty and Decrease the Spread of HIV/AIDS in Uganda Comment’ (2007) 29 University of Pennsylvania Journal of International Law 243

226. Lomazzi V, ‘Women’s Rights and Shariʿa Law in the MENA Region in Laura Zanfrini (ed), *Migrants and Religion: Paths, Issues, and Lenses* (Brill 2020) <https://www.jstor.org/stable/10.1163/j.ctv1sr6j5d.13> accessed 13 May 2023

227. Lorca AB, ‘Petitioning the International: A Pre-History of Self-Determination New Voices: A Selection from the Second Annual Junior Faculty Forum for International Law’ (2014) 25 European Journal of International Law 497

228. Lusimbo R and Bryan A, ‘Kuchu Resilience and Resistance in Uganda: A History in Richard Lusimbo and others (eds), *Envisioning Global LGBT Human Rights* (the University of London Press 2018) <https://www.jstor.org/stable/j.ctv5132j6.20> accessed 30 May 2023

229. Lyimo PB, ‘POLYGAMY IN SUB-SAHARAN AFRICA AND THE MUNUS DOCENDI: CANONICAL STRUCTURES IN SUPPORT OF CHURCH DOCTRINE AND EVANGELIZATION’

230. Lyman A and Kew D, ‘An African Dilemma: Resolving Indigenous Conflicts in Kenya Forum: Sacred Earth: People Land Conflict’ (2010) 11 Georgetown Journal of International Affairs 37

231. Mackenzie AFD, ‘Contested Ground: Colonial Narratives and the Kenyan Environment, 1920-1945’ (2000) 26 Journal of Southern African Studies 697

232. Magawa LG and Hansungule M, ‘Unlocking the Dilemmas: Women’s Land Rights in Tanzania’ (2018) 5 Tuma Law Review 110

233. Magubane C, ‘The Imposition of Common Law in the Interpretation and Application of Customary Law and Customary Marriages’ (2021) 15 Pretoria Student Law Review 336

234. Mahao NL, ‘O Se Re Ho Morwa Morwa Towe - African Jurisprudence Exhumed’ (2010) 43 Comparative and International Law Journal of Southern Africa 317

235. Maina R, Muchai VW, and Gutto SBO, ‘Law and the Status of Women in Kenya Symposium on Law and the Status of Women (1976) 8 Columbia Human Rights Law Review 185

236. Maithufi I, 'The Effect of the 1996 Constitution on the Customary Law of Succession and Marriage in South Africa: Some Observations' (1998) 31 De Jure 285

237. Maithufi I and Bekker J, 'The Recognition of the Customary Marriages Act of 1998 and Its Impact on Family Law in South Africa' (2002) 35 The Comparative and International Law Journal of Southern Africa 182

238. Makulilo A, '"Where There Is Power, Women Are Not": Rethinking Women and Politics in Tanzania' (2019) 46 The African Review: A Journal of African Politics, Development, and International Affairs 349

239. Makulilo AB, 'Reign over Me: Social-Economic Autonomy Claims over Land Rights by Tanzania's Maasai' (2019) 18 Journal on Ethnopolitics and Minority Issues in Europe (JEMIE) 24

240. Manji A, 'Commodifying Land, Fetishising Law: Women's Struggles to Claim Land Rights in Uganda Special Issue: Divining the Source: Law's Foundation and the Question of Authority (2003) 19 Australian Feminist Law Journal 81

241. ——, 'The Politics of Land Reform in Kenya 2012' (2014) 57 African Studies Review 115

242. Manjoo R, 'State Responsibility to Act with Due Diligence in the Elimination of Violence against Women (2013) 2 International Human Rights Law Review 240

243. Manthwa TA, 'A Re-Interpretation of the Families' Participation in Customary Law of Marriage' (2019) 82 Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law) 416

244. Martin R, 'The Age of Majority and the Kenya Law of Succession Act, 1972 Comment' (1973) 9 East African Law Journal 77

245. ——, 'The Kenya Law of Succession Act, 1972 Comment' (1974) 10 East African Law Journal 93

246. Masabo J and Wanitzek U, 'Constitutional Reform in Tanzania: Developing Process and Preliminary Results (2015) 48 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia, and Latin America 329

247. Masengu T, 'Customary Law Inheritance: Lessons Learnt from Ramantele v. Mmusi and Others Special Issue: Women and Poverty: Human Rights Perspectives (2016) 24 African Journal of International and Comparative Law 582

248. Mathangani M, 'Women's Rights in Kenya: A Review of Government Policy Recent Developments' (1995) 8 Harvard Human Rights Journal 179

249. Matinda MZ, 'Implementation of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW): The Tanzania Experience' (2019) 26 Willamette Journal of International Law and Dispute Resolution 99

250. Maunatlala K and Maimela C, 'The Implementation of Customary Law of Succession and Common Law of Succession Respectively: With a Specific Focus on the Eradication of the Rule of Male Primogeniture' (2020) 53 De Jure 36

251. Mbaku JM, ‘International Law, African Customary Law, and the Protection of the Rights of Children (2019) 28 Michigan State International Law Review 535

252. ——, ‘International Human Rights Law and the Tyranny of Harmful Customary and Traditional Practices on Women in Africa’ (2021) 52 California Western International Law Journal 1

253. McCullough JA, ‘Defamation among the LUO of Kenya’ (1971) 7 East African Law Journal 191

254. Miller RJ and Stitz O, ‘The International Law of Colonialism in East Africa: Germany, England, and the Doctrine of Discovery (2021) 32 Duke Journal of Comparative and International Law 1

255. Milner A, ‘The Development of African Law’ (1967) 1 The International Lawyer 192

256. Mireku O, ‘Customary Law and the Promotion of Gender Equality: An Appraisal of the Shilubana Decision Recent Developments’ (2010) 10 African Human Rights Law Journal 515

257. Mmbando CJ, ‘The Protocol on the Rights of Women in Africa: A Tool to Women Rights Protection in Tanzania’ (2014) 3 Tuma Law Review 1

258. Mmusinyane B, ‘The Role of Traditional Authorities in Developing Customary Laws in accordance with the Constitution: Shilubana and Others v Nwamitwa 2008 (9) BCLR 914 (CC) Notes’ (2009) 12 Potchefstroom Electronic Law Journal 135

259. Mqeke RB, ‘Customary Law and Human Rights Notes and Comments (1996) 113 South African Law Journal 364

260. Msuya NH, ‘Challenges Surrounding the Adjudication of Women’s Rights in Relation to Customary Law and Practices in Tanzania’ (2019) 22 Potchefstroom Electronic Law Journal 1

261. ——, ‘Challenges Surrounding the Adjudication of Women’s Rights in Relation to Customary Law and Practices in Tanzania’ (2019) 22 Potchefstroom Electronic Law Journal 1

262. ——, ‘Challenges Surrounding the Adjudication of Women’s Rights in Relation to Customary Law and Practices in Tanzania’ (2019) 22 Potchefstroom Electronic Law Journal 1

263. Mudawi MY, ‘Succession in the Muslim Family Book Review’ (1972) 6 Nigerian Law Journal 186

264. Mudzudza S, ‘Ancestor Spirits and Their Role in African Traditional Religion’ <https://www.academia.edu/18969932/Ancestor_Spirits_and_their_role_in_African_Traditional_Religion> accessed 7 May 2023

265. Muigua K and Francis K, ‘Alternative Dispute Resolution, Access to Justice and Development in Kenya’ (2015) 1 Strathmore Law Journal 1

266. Mujuzi JD, ‘The Entrenchment of Qadis’ Courts in the Ugandan Constitution’ (2012) 26 International Journal of Law, Policy and the Family 306

267. ——, ‘Widow Inheritance in Uganda Uganda’ (2012) 2012 International Survey of Family Law 393

268. ——, ‘The Right to Equality at the Dissolution of a Marriage in Uganda’ (2019) 33 International Journal of Law, Policy and the Family 204

269. Munene II and Ruto S, 'Pastoralist Education in Kenya: Continuity in Exclusion in Arid and Semiarid Lands (Asal)' (2015) 32 Journal of Third World Studies 133

270. Muriisa RK, 'The Role of NGOs in Addressing Gender Inequality and HIV/AIDS in Uganda' (2010) 44 Canadian Journal of African Studies / Revue Canadienne des Études Africaines 605

271. Murungi LN, 'Consolidating Family Law in Kenya Special Issue on Family Law' (2015) 17 European Journal of Law Reform 317

272. Musgrave M, 'African Customary Law in South Africa. Post-Apartheid and Living Law Perspectives by C. Himonga and T. Nhlapo, T., (Eds.). 2015. Cape Town: Oxford University Press Southern Africa' (2016) 10 International Journal of the Commons

273. Mushemeza ED, 'Contribution of Women in Influencing Legislation and Policy Formulation and Implementation in Uganda (1995-2005)' (2009) 34 Africa Development / Afrique et Développement 167

274. Musyoka W, *A Casebook on the Law of Succession* (LawAfrica Publishing Ltd 2010)

275. Mwaikusa JT, 'Community Rights and Land Use Policies in Tanzania: The Case of Pastoral Communities Special Feature on Law and the Environment in Africa' (1993) 37 Journal of African Law 144

276. Mwaka VM, 'Women's Studies in Uganda' (1996) 24 Women's Studies Quarterly 449

277. Mwalimu C, 'The Legal Framework on Admission and Resettlement of African Refugees with an Emphasis on Kenya, Tanzania, and Uganda Essay' (2004) 18 Emory International Law Review 455

278. Mwambene L, 'Marriage under African Customary Law in the Face of the Bill of Rights and International Human Rights Standards in Malawai' (2010) 10 African Human Rights Law Journal 78

279. ——, 'What Is the Future of Polygyny (Polygamy) in Africa' (2017) 20 Potchefstroom Electronic Law Journal 1

280. Mwenda KK, 'Labia Elongation under African Customary Law: A Violation of Women's Rights?' (2006) 10 International Journal of Human Rights 341

281. Nakayi R, 'The Role of Local Council Courts and Traditional Institutions in Resolving Land Disputes in Post-Conflict Northern Uganda' (2013) 7 Malawi Law Journal 119

282. Nanyenya-Takirambudde P, Law Development Centre and Uganda (eds), *A Simple Guide to the Law of Succession in Uganda* (Law Development Centre 197AD)

283. Naranch BD, '"Colonized Body," "Oriental Machine": Debating Race, Railroads, and the Politics of Reconstruction in Germany and East Africa, 1906-1910' (2000) 33 Central European History 299

284. ——, '"Colonized Body," "Oriental Machine": Debating Race, Railroads, and the Politics of Reconstruction in Germany and East Africa, 1906-1910' (2000) 33 Central European History 299

285. Nassoro H, ‘The Process of Constitution Making in Tanzania’ (1995) 22 The African Review: A Journal of African Politics, Development, and International Affairs 5

286. ‘Native Labour in Kenya in 1933 Reports and Enquiries’ (1935) 32 International Labour Review 104

287. Nditi NN, *Succession and Trusts in Tanzania: Theory, Law, and Practice* (LawAfrica Publishing (K) Limited 2017)

288. Ndulo M, ‘African Customary Law, Customs, and Women’s Rights (2011) 18 Indiana Journal of Global Legal Studies 87

289. ——, ‘African Customary Law, Customs, and Women’s Rights Symposium: Part II: Claims in Context’ (2011) 18 Indiana Journal of Global Legal Studies 87

290. Ndzovu HJ, ‘Muslim Politics in the Legislative, Judicial, and Constitutional Arenas,’ *Muslims in Kenyan Politics* (Northwestern University Press 2014) <https://www.jstor.org/stable/j.ctt22727nc.10> accessed 25 November 2022

291. ‘Neuerscheinungen’ (2014) 69 JuristenZeitung 632*

292. Ngwena CG, ‘Taking Women’s Rights Seriously: Using Human Rights to Require State Implementation of Domestic Abortion Laws in African Countries with Reference to Uganda’ (2016) 60 Journal of African Law 110

293. Nicholson MER, ‘Change without Conflict: A Case Study of Legal Change in Tanzania’ (1972) 7 Law & Society Review 747

294. Njambi WN and O’Brien WE, ‘Revisiting “Woman-Woman Marriage”: Notes on Gĩkũyũ Women’ (2000) 12 NWSA Journal 1

295. Nnona CG, ‘Customary Corporate Law in Common Law Africa’ (2018) 66 The American Journal of Comparative Law 639

296. ——, ‘Customary Corporate Law in Common Law Africa’ (2018) 66 The American Journal of Comparative Law 639

297. Nwagbara C, ‘Recognition of Polygamous Marriages under the English Law’ (2014) 26 Journal of Law, Policy and Globalization [i]

298. Nyanzi S, Emodu-Walakira M, and Serwaniko W, ‘The Widow, the Will, and Widow-Inheritance in Kampala: Revisiting Victimisation Arguments’ (2009) 43 Canadian Journal of African Studies / Revue Canadienne des Études Africaines 12

299. ‘O_Ali_African Diaspora_2011.Pdf’ <https://libres.uncg.edu/ir/uncg/f/O_Ali_African%20Diaspora_2011.pdf> accessed 8 May 2023

300. Obiora LA, ‘Reconsidering African Customary Law Customary Law: Problems and Possibilities (1993) 17 Legal Studies Forum 217

301. Oboler RS, ‘Is the Female Husband a Man? Woman/Woman Marriage among the Nandi of Kenya’ (1980) 19 Ethnology 69

302. Odenyo AO, ‘Conquest, Clientage, and Land Law among the Luo of Kenya’ (1973) 7 Law & Society Review 767

303. Ogbu JU, ‘African Bridewealth and Women’s Status’ (1978) 5 American Ethnologist 241

304. Ojore A, ‘LEVIRATE UNIONS AMONG THE LUO’ <https://www.academia.edu/29779374/LEVIRATE_UNIONS_AMONG_THE_LUO> accessed 17 June 2022

305. Ojwang JB and Kinama EN, ‘Woman-to-Woman Marriage: A Cultural Paradox in Contemporary Africa’s Constitutional Profile’ (2014) 47 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia, and Latin America 412

306. Okafor F, ‘From Paris to Theory: A Discourse on the Philosophy of African Law’ (2006) 37 Cambrian Law Review 37

307. Okeke CE, ‘Rethinking the Rights of Indigenous Peoples in International Law: Africa in Perspective’ (2021) 5 African Journal of Law and Human Rights 40

308. Okoth-Ogendo HWO, ‘The Politics of Constitutional Change in Kenya since Independence, 1963-69’ (1972) 71 African Affairs 9

309. Okubuiro JC, ‘Application of Hegemony to Customary International Law: An African Perspective’ (2018) 7 Global Journal of Comparative Law 232

310. Okumu OS, ‘The Concept of Intangible Cultural Heritage in Kenya’ in Anne-Marie Deisser and Mugwima Njuguna (eds), *Conservation of Natural and Cultural Heritage in Kenya* (1st edn, UCL Press 2016) <https://www.jstor.org/stable/j.ctt1gxxpc6.10> accessed 11 May 2023

311. Okumu Wengi J and Uganda) W and L in EA (Research P:, ‘The Law of Succession in Uganda ’: (*Berkeley Law*) <https://lawcat.berkeley.edu/record/156295> accessed 27 June 2021

312. Oloka-Onyango J, ‘Debating Love, Human Rights and Identity Politics in East Africa: The Case of Uganda and Kenya’ (2015) 15 African Human Rights Law Journal 28

313. Omotola JA, ‘Primogeniture and Illegitimacy in African Customary Law: The Battle for Survival of Culture’ (2004) 15 Indiana International & Comparative Law Review 115

314. Onneweer M, ‘Rumors of Red Mercury: Histories of Materiality and Sociality in the Resources of Kitui, Kenya’ (2014) 87 Anthropological Quarterly 93

315. Orago NW, ‘The 2010 Kenyan Constitution and the Hierarchical Place of International Law in the Kenyan Domestic Legal System: A Comparative Perspective’ (2013) 13 African Human Rights Law Journal 415

316. Otieno O, Ayako D, and Kandagor D, ‘The Basis for Beliefs in Luo Ancestral Spirits among the Seventh-Day Adventists Church Members in the Kenya Lake Conference’ (2021) 11 International Journal of Scientific and Research Publications (IJSRP) 203

317. Owino L, ‘Application of African Customary Law: Tracing Its Degradation and Analysing the Challenges It Confronts’ (2016) 1 Strathmore Law Review 143

318. ——, ‘Application of African Customary Law: Tracing Its Degradation and Analysing the Challenges It Confronts’ (2016) 1 Strathmore Law Review 143

319. Pans AEMJ, ‘Levirate and Sororate and the Terminological Classification of Uncles, Aunts, and Siblings’ Children’ (1989) 28 Ethnology 343

320. Parashar A, ‘Nikah under Muslim Law’ (2021) 2 Jus Corpus Law Journal 432

321. Parsons T, ‘Being Kikuyu in Meru: Challenging the Tribal Geography of Colonial Kenya’ (2012) 53 The Journal of African History 65

322. Patel LR, ‘Notes on the Law of Succession in Three Kenya Coastal Tribes: Wadigo, Wadruma and Wagiriama’ (1965) 1 East African Law Journal 184

323. Patin E and others, ‘Dispersals and Genetic Adaptation of Bantu-Speaking Populations in Africa and North America’ (2017) 356 Science 543

324. Peart NS, ‘Section 11(1) of the Black Administration Act No. 38 of 1927: The Application of the Repugnancy Clause’ (1982) 1982 Acta Juridica 99

325. Peatrik A-M, ‘Le Singulier Destin de “Facing Mount Kenya.” “The Tribal Life of the Gikuyu” (1938) de Jomo Kenyatta: Une Contribution à l’anthropologie Des Savoirs’ [2014] L’Homme 71

326. Pedersen RH, ‘Tanzania’s Land Law Reform; the Implementation Challenge’ (Danish Institute for International Studies 2010) <https://www.jstor.org/stable/resrep13467> accessed 13 May 2023

327. ——, ‘Land Tenure and Economic Activities in Uganda: A Literature Review’ (Danish Institute for International Studies 2012) <https://www.jstor.org/stable/resrep13396> accessed 5 February 2023

328. Pedersen RH and Haule S, ‘Women, Donors and Land Administration The Tanzania Case’ (Danish Institute for International Studies 2013) <https://www.jstor.org/stable/resrep13394> accessed 11 May 2023

329. Pesek M, ‘Cued Speeches: The Emergence of Shauri as Colonial Praxis in German East Africa, 1850-1903’ (2006) 33 History in Africa 395

330. Peter CM, ‘Human Rights of Indigenous Minorities in Tanzania and the Courts of Law’ (2007) 14 International Journal on Minority and Group Rights 455

331. ——, ‘Human Rights of Indigenous Minorities in Tanzania and the Courts of Law’ (2007) 14 International Journal on Minority and Group Rights 455

332. Pike C, ‘History and Imagination: Swahili Literature and Resistance to German Language Imperialism in Tanzania, 1885-1910’ (1986) 19 The International Journal of African Historical Studies 201

333. Pimentel D, ‘Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique’ (2011) 14 Yale Human Rights & Development Law Journal 59

334. Polavarapu A, ‘Reconciling Indigenous and Women’s Rights to Land in Sub-Saharan Africa Symposium: International Law in a Time of Scarcity (2013) 42 Georgia Journal of International and Comparative Law 93

335. Pollman T and Edwards LH, ‘Scholarship by Legal Writing Professors: New Voices in the Legal Academy’ (2005) 11 Legal Writing: The Journal of the Legal Writing Institute 3

336. Potash B, ‘Some Aspects of Marital Stability in a Rural Luo Community' (1978) 48 Africa: Journal of the International African Institute 380

337. Prinsloo MW, ‘J C Bekker En J J J Coertze - Seymour’s Customary Law in Southern Africa Note’ (1982) 1982 Journal of South African Law 189

338. Quansah EK, ‘Legal Implication of Death of a Spouse in a Divorce Situation in Botswana Case Note’ (1999) 43 Journal of African Law 244

339. Raday F, ‘Culture, Religion, and Gender Roundtable: An Exchange with Ronald Dworkin’ (2003) 1 International Journal of Constitutional Law 663

340. Rautenbach C, ‘Modern Day Impact of Customary Succession Laws in South Africa’ [2004] International Journal of the Humanities 673

341. ——, ‘Indian Succession Laws with Special References to the Position of Females: A Model for South Africa’ (2008) 41 Comparative and International Law Journal of Southern Africa 105

342. ——, ‘Indian Succession Laws with Special References to the Position of Females: A Model for South Africa?’ (2008) 41 The Comparative and International Law Journal of Southern Africa 105

343. Rautenbach C, Plessis W and Pienaar G, ‘Is Primogeniture Extinct like the Dodo, or Is There Any Prospect of It Rising from the Ashes? Comments on the Evolution of Customary Succession Laws in South Africa’ [2006] South African Journal on Human Rights 99

344. Rauterbach C, ‘South African Common and Customary Law on Intestate Succession: A Question of Harmonisation, Integration or Abolition The Boundaries of Unity: Mixed Systems in Action (2008) 3 Journal of Comparative Law 119

345. Ravnborg HM and Spichiger R, ‘Pursuing Gender Equality in Land Administration’ (Danish Institute for International Studies 2014) <https://www.jstor.org/stable/resrep13231> accessed 13 May 2023

346. Ray M, ‘Law as Resistance (Collected Essays in Law) Book Reviews (2010) 6 Law, Culture and the Humanities 311

347. Read JS, ‘A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania’ (1972) 16 Journal of African Law 19

348. Rebouche R, ‘Labor, Land, and Women’s Rights in Africa: Challenges for the New Protocol on the Rights of Women Note’ (2006) 19 Harvard Human Rights Journal 235

349. Redmayne A and Rogers C, ‘Research on Customary Law in German East Africa’ (1983) 27 Journal of African Law 22

350. Refugees UNHC for, ‘Refworld | General Comment No. 18: The Right to Work (Art. 6 of the Covenant)’ (*Refworld*) <https://www.refworld.org/docid/4415453b4.html> accessed 26 April 2021

351. Reid KGC and others (eds), 'Intestate Succession in Historical and Comparative Perspective,' *Comparative Succession Law: Volume II: Intestate Succession* (Oxford University Press 2015) <https://doi.org/10.1093/acprof:oso/9780198747123.003.0019> accessed 13 May 2023

352. Reid R, 'Past and Presentism: The "Precolonial" and the Foreshortening of African History (2011) 52 The Journal of African History 135

353. 'RESEARCH | Meaning & Definition for UK English | Lexico.Com' (*Lexico Dictionaries | English*) <https://www.lexico.com/definition/research> accessed 25 February 2022

354. Roberts AE, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation (2001) 95 The American Journal of International Law 757

355. Roberts C and Hyatt L, *The Dissertation Journey: A Practical and Comprehensive Guide to Planning, Writing, and Defending Your Dissertation (Updated)* (Corwin Press 2018)

356. Roberts S, 'The Recording of Customary Law: Some Problems of Method' (1971) 3 Botswana Notes and Records 12

357. Robinson KL, 'The Minority and Subordinate Status of African Women under Customary Law' (1995) 11 South African Journal on Human Rights 457

358. Rose LL, 'Women's Strategies for Customary Land Access in Swaziland and Malawi: A Comparative Study (2002) 49 Africa Today 123

359. 'Rwanda Country Reports on Human Rights Practices for 1999: Africa' (1999) 24 Annual Human Rights Reports Submitted to Congress by the U.S. Department of State 402

360. Rwezaura B, 'Gender Justice and Children's Rights: A Banner for Family Law Reform in Tanzania Tanzania' (1997) 1997 International Survey of Family Law 413

361. Rwezaura B and Wanitzek U, 'The Constitutionalisation of Family Law in Tanzania Tanzania' (2006) 2006 International Survey of Family Law 445

362. Rwezaura BA, 'Division of Matrimonial Assets under the Tanzania Marriage Law' (1984) 17 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia, and Latin America 177

363. Rwezaura BA, 'Tanzania: The Law Reform Commission's Paper on Proposed Changes in Family Law' (1987) 26 Journal of Family Law 213

364. Sadique MA and others, 'Socio-Legal Significance of Family Waqf in Islamic Law: Its Degeneration and Revival' (2016) 24 IIUM Law Journal 309

365. Safwat A, 'The Theory of Mohammedan Law' (1920) 2 Journal of Comparative Legislation and International Law 310

366. Sait MS, 'Women's Property Rights in Muslim Matrilineal Communities' (2013) 9 Journal of Islamic State Practices in International Law 1

367. Salah O and Rautenbach C, 'Islamic Finance: A Corollary to Legal Pluralism or Legal Diversity in South Africa and the Netherlands' (2015) 48 Comparative and International Law Journal of Southern Africa 488

368. Salter DR and Ojwang JB, ‘Law Reform in Africa: A Comparative Study of the Tanzanian and Kenyan Experiments’ (1985) 18 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia, and Latin America 123

369. Sanders A, ‘Comparative Law, Law Reform and the Recording of African Customary Law’ (1983) 16 De Jure 321

370. Sanders A, ‘How Customary Is African Customary Law?’ (1987) 20 The Comparative and International Law Journal of Southern Africa 405

371. Says N, ‘Legal Sharing of the Property of a Deceased’ (*Valuer Kariùki, MRICS*, 28 July 2016) <https://kariukiwaweru.com/legal-sharing-of-the-property-of-a-deceased/> accessed 28 June 2022

372. Schatz E, Seeley J and Zalwango F, ‘Intergenerational Care for and by Children: Examining Reciprocity through Focus Group Interviews with Older Adults in Rural Uganda’ (2018) 38 Demographic Research 2003

373. Schmidt H, ‘(Re)Negotiating Marginality: The Maji Maji War and Its Aftermath in Southwestern Tanzania, ca. 1905–1916’ (2010) 43 The International Journal of African Historical Studies 27

374. Schoeman-Malan MC, ‘Recent Developments Regarding South African Common and Customary Law of Succession’ (2007) 10 Potchefstroom Electronic Law Journal 1

375. Shackelford S, ‘Legal Research Methods in the U.S. and Europe. By J. Paul Lomio and Henrik Spang-Hanssen. Copenhagen, Denmark: DJØF Publishing, 2008. Pp 329. ISBN 978-87-574-1715-9 US$34.95.’ (2008) 36 International Journal of Legal Information 216

376. Singh C, ‘The Republican Constitution of Kenya: Historical Background and Analysis (1965) 14 The International and Comparative Law Quarterly 878

377. ——, ‘The Republican Constitution of Kenya: Historical Background and Analysis (1965) 14 The International and Comparative Law Quarterly 878

378. ——, ‘Hindus and Hindu Law in Kenya Rejoinder’ (1971) 7 East African Law Journal 69

379. Singh IK, ‘Rights of Hindu Women in Ancestral Property: A Review of Succession Laws’ (2017) 2 Supremo Amicus 163

380. Sippel H, ‘Customary Family Law in Colonial Tanganyika: A Study of Change and Continuity (1998) 31 The Comparative and International Law Journal of Southern Africa 373

381. ——, ‘Customary Family Law in Colonial Tanganyika: A Study of Change and Continuity (1998) 31 The Comparative and International Law Journal of Southern Africa 373

382. ——, ‘Die Bedeutung Afrikanischen Gewohnheitsrechts Im Nationalstaat: Entwicklungen in Tanzania Und Südafrika’ (1998) 33 Africa Spectrum 39

383. Smith EW, ‘A Survey of African Marriage and Family Life’ (1953) 5 Journal of African Administration 102

384. Songa A, ‘Addressing Statelessness in Kenya through a Confluence of Litigation, Transitional Justice, and Community Activism: Reflecting on the Cases of the Nubian, Makonde and Shona

Communities Section I: Articles Focused on Aspects of the African Human Rights System and African Union Rights Standards' (2021) 5 African Human Rights Yearbook (AHRY) 253

385. Soyapi CB, 'Regulating Traditional Justice in South Africa: A Comparative Analysis of Selected Aspects of the Traditional Courts Bill' (2014) 17 Potchefstroom Electronic Law Journal 1440

386. Ssenyonjo M, 'Culture and the Human Rights of Women in Africa: Between Light and Shadow' (2007) 51 Journal of African Law 39

387. ——, 'Women's Rights to Equality and Non-Discrimination: Discriminatory Family Legislation in Uganda and the Role of Uganda's Constitutional Court' (2007) 21 International Journal of Law, Policy and the Family 341

388. ——, 'Women's Rights to Equality and Non-Discrimination: Discriminatory Family Legislation in Uganda and the Role of Uganda's Constitutional Court' (2007) 21 International Journal of Law, Policy and the Family 341

389. Stamp P, 'Burying Otieno: The Politics of Gender and Ethnicity in Kenya' (1991) 16 Signs 808

390. 'Succession Cause 2678 of 2001 - Kenya Law' <http://kenyalaw.org/caselaw/cases/view/75383> accessed 12 May 2023

391. Sun Y and others, 'Forests: Gender, Property Rights and Access' (Center for International Forestry Research 2012) <https://www.jstor.org/stable/resrep01905> accessed 5 February 2023

392. Sunseri T, 'Statist Narratives and Maji Maji Ellipses' (2000) 33 The International Journal of African Historical Studies 567

393. Tamale S, 'Think Globally, Act Locally: Using International Treaties for Women's Empowerment in East Africa' [2001] Agenda: Empowering Women for Gender Equity 97

394. Tanzania, Commission on the Law of Succession/Inheritance, and Law Reform Commission of Tanzania, *Report of The Commission on the Law of Succession/Inheritance.* (publisher not identified 1995)

395. 'Tanzania | Culture, Religion, Population, Language, & People | Britannica' (25 April 2023) <https://www.britannica.com/place/Tanzania> accessed 2 June 2023

396. Tebbe N, 'Inheritance and Disinheritance: African Customary Law and Constitutional Rights' (2008) 88 The Journal of Religion 466

397. Thuku N, 'A Comparative Analysis of Judicial Councils in the Reform of Judicial Appointments between Kenya and England' (2013) 19 Annual Survey of International & Comparative Law 45

398. Torkelsson A and Onditi F, 'Addressing Gender Gaps in Agricultural Productivity in Africa: Comparative Case Studies from Tanzania, Malawi and Uganda Competing Claims for Land, Food, Water and Agricultural Resources: Perspectives from the Global South (2018) 9 Journal of Sustainable Development Law and Policy 34

399. Tripp AM, ‘A New Look at Colonial Women: British Teachers and Activists in Uganda, 1898-1962’ (2004) 38 Canadian Journal of African Studies / Revue Canadienne des Études Africaines 123

400. Tsikata D, ‘Gender, Land Rights and Inheritance Securing Women’s Land Rights: Approaches, Prospects, and Challenges (International Institute for Environment and Development 2005) <https://www.jstor.org/stable/resrep16513.12> accessed 13 May 2023

401. Turnbull B, Graham M, and Taket A, ‘Hierarchical Femininities and Masculinities in Australia Based on Parenting and Employment: A Multidimensional, Multilevel, Relational and Intersectional Perspective’ (2020) 10 Journal of Research in Gender Studies 9

402. Turshen M, ‘The Impact of Colonialism on Health and Health Services in Tanzania’ (1977) 7 International Journal of Health Services 7

403. Turyahikayo-Rugyema B, ‘The British Imposition of Colonial Rule on Uganda: The Baganda Agents in Kigezi (1908-1930)’ (1976) 5 Trans African Journal of History 111

404. Twaddle M, ‘Some Implications of Literacy in Uganda’ (2011) 38 History in Africa 227

405. Uganda Women’s Network (ed), *Gender Audit of Key Laws Affecting Women in Uganda* (Uganda Women’s Network 2006)

406. Van Hook MP and Ngwenya BN, ‘The Majority Legal Status of Women in Southern Africa: Implications for Women and Families (1996) 17 Journal of Family and Economic Issues 173

407. van Niekerk GJ, ‘A Common Law for Southern Africa: Roman Law or Indigenous African Law’ (1998) 31 Comparative and International Law Journal of Southern Africa 158

408. ——, ‘A Common Law for Southern Africa: Roman Law or Indigenous African Law’ (1998) 31 Comparative and International Law Journal of Southern Africa 158

409. van Rensburg AMJ, ‘Mthembu v Letsela: The Non-Decision’ (2001) 4 Potchefstroom Electronic Law Journal 1

410. Venter T and Nel J, ‘African Customary Law of Intestate Succession and Gender (In)Equality (2005) 2005 Journal of South African Law 86

411. Verstraelen FJ, ‘Review of Religious Plurality in Africa: Essays in Honour of John S. Mbiti’ (1998) 28 Journal of Religion in Africa 247

412. Wabwile MN, ‘Rights Brought Home: Human Rights in Kenya’s Children Act 2001 Kenya’ (2005) 2005 International Survey of Family Law 393

413. Waller RD, ‘Witchcraft and Colonial Law in Kenya’ [2003] Past & Present 241

414. Wamue-Ngare GN, ‘Gender Roles and Status of Agikuyu Women: A Religio-Cultural Approach’ (Thesis, 2012) <https://ir-library.ku.ac.ke/handle/123456789/3702> accessed 8 May 2023

415. Weeks SM, ‘Customary Succession and the Development of Customary Law: The Bhe Legacy Part III: Reflections on Themes in Justice Langa’s Judgments’ (2015) 2015 Acta Juridica 215

416. Welsh AS, ‘Native Customary Law in the Union of South Africa’ (1958) 10 Journal of African Administration 83

417. Werbner RP, *Postcolonial Subjectivities in Africa* (Zed 2002) <http://catalogue.library.ulster.ac.uk/items/1116385> accessed 8 May 2023

418. West F, ‘Review of Oral Tradition. A Study in Historical Methodology (1966) 5 History and Theory 348

419. Wicomb W and Smith H, ‘Customary Communities as Peoples and Their Customary Tenure as Culture: What We Can Do with the Endorois Decision Focus: 30 Years of the Africa Charter on Human and Peoples’ Rights: Looking Forward While Looking Back (2011) 11 African Human Rights Law Journal 422

420. Wilson J and others, ‘Cultural Considerations in Will-Making in Australia: A Case Study of Islamic or Sharia-Compliant Wills’ (2016) 41 Alternative Law Journal 23

421. Wipper A, ‘The Maendeleo Ya Wanawake Organization: The Co-Optation of Leadership’ (1975) 18 African Studies Review 99

422. Wooldridge F and Sharma VD, ‘The Expulsion of the Ugandan Asians and Some Legal Questions Arising Therefrom’ (1974) 7 Comparative and International Law Journal of Southern Africa 1

423. Wordofa D, ‘Poverty-Reduction Policy Responses to Gender and Social Diversity in Uganda’ (2004) 12 Gender and Development 68

424. Zartner D, ‘The Culture of Law: Understanding the Influence of Legal Tradition on Transitional Justice in Post-Conflict Societies (2012) 22 Indiana International & Comparative Law Review 297

425. Zuckerman E and Greenberg M, ‘The Gender Dimensions of Post-Conflict Reconstruction: An Analytical Framework for Policymakers’ (2004) 12 Gender and Development 70

426. ——, ‘The Gender Dimensions of Post-Conflict Reconstruction: An Analytical Framework for Policymakers’ (2004) 12 Gender and Development 70

427. Zvobgo EF and Dziva C, ‘Practices and Challenges in Implementing Women’s Right to Political Participation under the African Women’s Rights Protocol in Zimbabwe’ (2017) 1 African Human Rights Yearbook (AHRY) 60