THE ROLE OF WILLS IN SUCCESSION: AN APPRAISAL

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C O N T E N T S

D E D I C A T E D

TO

" Baba na Maitu"

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ABBREVIATIONS

1) E.A. .... East African law Report

2) E.A.L.J... East African law Journal

3) J.D.L.S... Journal of the Denning law Society.

TABLE OF CASES

1) In the matter of the Estate of Gacharamu (unreported).

2) Maangi, Re (1958) E.A. 637.

TABLE OF STATUTES

1) Constitution of Kenya No. 5 of 1969
2) East African Order-In-Council 1897
3)H Hindu marriege, Divorce and Succession Ordinance 1946
4) Hindu succession Act Cap. 158
5) Indian succession Act 1865
6) Judicature Act Cap. 8
7) Kadhi's Courts Act Cap. 11
8) Law of succession Act Cap. 160
9) Magistrates Courts Act. Cap. 10
10) Muhamedan marriege, Divorce and Succession Act. Cap. 156
11) Native Courts Regulations 1897
12) Native Chritian marriege Ordinance 1904
13) Probate and Administration Act. 1881.

I N T R O D U C T I O N

The law of Succession Act (Cap.160) became operational from 1st. July 1981.(1) No sooner was this fact gazetted than a hue and cry was raised from several quaeters of the Kenyan sociaty. The new law was received with mixed fellings. This ranged from praise to open hostility.(2) It received a debate that had been sparked of after the report by the commission on the law of Succession was first published. The greatest attack came from the Muslim Community and some quarters of the African Community. The Muslims openly attacked it and eventually sent a delegation to the President to have their case reviewed. The President reffered the matter to the Attorney Generals Chambers for further discussion with the Muslim representatives and as of now negotiations are still going on.(3) All its critics had their own reasons for attacking it. The main tread among all these was the philosophical framework of a particular society. Succession is considered a highly personal matter which each community should be left alone to regulate as it sees fit. To back up such reasonnings the critics used the Kenyan constitution which recognises the need for freedom in the regulation of personal matters.(4) The new law was seen as an infrigement of this constitutional provisions.

On the other hand the new law had its suporters. These gave it praises as a long awaited piece of legislation that would go a long way towards promoting unity that is much desired in the country through application of one uniform law.

law for all Kenyans. It was seen as a law that would overcome tribal and racial barriers. This was more so among the government circles. Further it was seen as a law that would alievate a lot ofproblems on matters of succession as previous law were seen as confused. These problems of deciding who to get what of the deceased's property. The new law also improves the position of women and childr n and understandably it received praise from women agroups. Still the new law was seen as an elitist legislation faithfully performing the Act of anglicising the Africans which started in the legal system way back 1897.

With these few introductory observations it is clear that intrest sorrounding the new law are conflicting. The new law is centred around controversy and has not been accepted wholesale. The new law radically alters the partern and system of succession particulary among the Muslims and African Communities. Previously before its inception there were four systems of succession. These were the African customary law Islamic law, Hindu law, and Emglish law. The new law purported to blend all these into one ~~kaw~~ uniform legislation This papers seeks to examine these aspects of succession laws in Kenya. It will trace the matter historically looking at the four prevous systems individually and find the root ceuse of the problem. Towards the end it will look at the new position with the introduction on thenew law. The paper will highlight the major issues involved in all the four systems and look at areas of conflict. This will be done systematically through all the four systems starting with customary law followed by Muslim, Hindu and English law. Finally the new law will be examined. The paper will examine especially the role of wills in succession through all the systems and the place of wills under the new law.

CHAPTER ONE

CUSTOMARY LAW SYSTEM

The law of succession is the law governing the transmission of property vested in a person upon death to some other person or persons. This involves two aspects. The first one is the transference to a person who will act as the representative of the deceased person and secondly the transference by the representative to the persons entitled to the enjoyment of the property.[1]

In this chapter the law of succession will be considered among the Africans in Kenya who are governed by customary law illustrating with one community in the first section. The second and third sections will be devoted to considering the position in Islamic and Hindu succession law respectively. To illustrate the customary position the Kikuyu community will be used. This is of course not to argue that Kikuyu law is necessarily representative of all the African communities in Kenya. The fact is that due to limitations of time and space only one community can be considered. It is considered safe to do this as in the main customary law among the different African communities applies largely the same principles and the variations where they exist are relatively minor. A quick look through Eugene Cotran's books[2] will support this proposition.

The first part of this section will look at the position of customary law before being influenced by the socio-economic changes that have occured and the second part will look at the position as influenced by these changes. The Kikuyu, better spelt Gikuyu, is the largest tribe in Kenya and traditionally occupies the Central part of the country. The community has however spread far and wide into the whole country and beyond. According to legend the Kiukuyus are the offsprings of Gikuyu and Mumbi, the father and mother of the tribe. These two originated from Mount Kenya having descended from there on the instructions of Murungu, Ngai or the Kikuyu God. He gave them the now Kikuyu Country.[3]

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This pioneer couple bore nine daughters who were later married to nine men provided by Murungu, Ngai. There constitute the nine clans or Mihiriga which survive today. The Gikuyu and Mumbi family expanded as they multiplied forming the Mbari or large family which in turn forms the Muhiriga or clan and ultimately the ruriri or the tribe. The Kikuyu having been given fertile land by their creator in the Central highlands are agriculturists mainly crop farmers and land was the chief form of property. Due to this the system of land tenure was carefully laid down and the effect of this was that every person or family unit had a land right of one form or another. The whole tribe collectively protected the whole kikuyu land but every piece of land within the territory had its owner.[4]

A brief summary can be given of how land was acquired. As already seen the initial positon was that land was given by the creator. Once the families multiplied they moved further into the forests and whoever acquired the land first by clearing the forests became the owner. In the later stages land was also acquired by purchasing from the Ndorobos or Gumba and the purchaser became the owner. Land was also acquired by inheritance. The position then was that there was individual private ownership but this differed from the European sense of ownership in that it did not necessarily mean the exclusive use of land by the owner. A man had pride in owning property but equally allowed collective use of such property. This facilitated communal use of property and this is what was to be mistaken by the Europeans to mean communal ownership and that most lands were no man's land.[5] The fact is that a man had his own land and it was used for the benefit of his family though he could give rights to others such as a Muhoi or tennants at will in the modern context. On his death such land plus other property passed on to the heirs as determined by the customary law which will be the subject of this section.

The kikuyu system of succession and inheritance is patrileneal. Initially however, legend relates that it was matrileneal. This was because the tribe was borne by nine daughters who became heads of the family and also practised the system of polyandry or acquiring more than one husband. But as time went on, men dissatisfied with this system staged a "coup" and overthrew the women and introduced a polygamous and patrileneal system.

The man is therefore the head of the family and owns the land. On his death land and other property passed to his sons. The sons of a man were thus the heirs and daughters and widows, save as will be seen later were excluded.

IN the transmission of property for the purposes of succession there was the institution of Muramati. Muramati was the equivalent of a personal representative or adminstrator of property. He was the trustee who acted as a guardian of the property of the deceased. He distributed the estate according to the wishes of the deceased and where there were no expressed wishes, then according to the rules laid down by customs. Muramati was normally the eldest son of the deceased or he was appointed by the deceased during his lifetime in old age. In case the eldest son was for some reason not able to act as a muramati then the next son following him in age acted as the muramati. If this one failed too, then a younger brother of the deceased assumed this responsibility. The last resort was that the muhiriga determined who was to act as a muramati and appointed one from among the nearest male relatives, ussually the closest in relation to the deceased. The muhiriga derived their power from the fact that they were accepted as the final authority on all matters. The muramati however acted in consultation with other members of the family and had no bigger rights than the rest to an inheritance. His primary duty was to assume control of the estate of the deceased. He determined the heirs and their shares in the estate. Having entered the shoes of the deceased he also became head and guardian of the family. He was in charge of the running of the estate. In this regard he carried out various functions. The muramati started with making arrangements for the burial of the deceased. He then repaid only debts of the deceased out of the estate and recovered any debts owed to the deceased.

The muramati then distributed the estate to the heirs following the customary law. He exercised overall supervision and finally acted as trustee for the minor heirs. Inspite of these ownerous responsibilities /had in law no right to remuneration. The institution was however very honoured and no one would refuse to act as Muramati by reason only of lack of remuneration. However if he was a good muramati he could get a bigger share as a token of appreciationof of his good work. It must be stressed this was not a right but elders could direct it if he was good.

The muramaticould however be dismissed by the muhiriga. This was where he mismanaged the estate or was unable to execute his duties effectively. Where the muramati was appointed by the deceased during his lifetime, this could also be revoked. His duties could also be terminated by reason of accomplishing the assigned duties. This occured when the estate was distributed and all heirs obtained the age of majority. Needless to say, termination also occured on death. That is how the institution of muramati worked.[6]

Kikuyu were and still are polygamous though the practise has largely died out today. The nature of the distribution will therefore be considered firstly in a monogamous household. This will be followed by a consideration of a polygamous household. In a monogamous household the land was distributed among the sons equally. The widow of the deceased took the personal and household effects of the deceased. During the lifetime of the deceased, the wife was given lands for cultivation and personal use. Upon death of the deceased, the widow continued to retain these cultivation rights during her lifetime. Thus a widow had cultivation rights only which were a mere life interest. This was because women did not own any property. Upon her death the lands were divided among the sons equally. The daughters did not inherit any land. They remained with their mother untill such time as they got married. The society expected everyone to get married. However, incase they remained unmarried, they were entitled to cultivation rights or a life intrest. On death or subsquent marriage the lands reverted to the sons. If however they had children and remained unmarried, the sons inherited the lands allocated to them. Livestock was distributed normally when all got married. The widow got a small share and the rest was divided equally among the sons. The widow took the household goods. Personal effects were taken by the eldest son. These were items such as weapons and ornaments. Though there could be slight variations, in the main this was the pattern in a mongamous family although this was rare.

In a polygamous situation the homestead was divided into nyũmba or "houses". One house comprised a wife and her own children. Property of a deceased person was then divided according to the number of houses. Each house took equally irrespective of the number of children, male or female it had. Thus if a man had three wives, his property was divided into three equal shares. This was inrespect to land.

As for livestock this depended on whether it was livestock received as ruracio or not. Ruracio was the dowry or marriage consideration paid to a house from which a daughter being married came from. If it was ruracio livestock then went to the house from which the daughter who was married came from. The rest of the livestock was then divided equally among the houses just as was the case with land. As for other forms of property each widow kept her own household and personal effects. The eldest widow took and kept the personall effects of the deceased while the eldest son took the ornaments and weapons. After this first division among the houses then the share going to each house was once again divided among the members of that particular house. This share was divided following the pattern already seen as if it was a monogamous house.

Due to the polygamous mature of kikuyu marriages, it was rare not to have sons in a house. But there could of course be cases where there were no sons and in such cases, inheritance depended on what course the wife adopted upon her husband's death. There were several actions she could take. She could remain in her husbands homestead where upon she had the option of entering into a levirate union. This union was entered into with a close male relative of the deceased. This was for the purpose of enabling her to get children. Where she got such children through a levirate union, they were treated as if they were actually children of the deceased for all purposes. The second option she could take was to be inherited by a younger brother of the deceased. In case of such an option she became the wife of her inheritor for all ~~pu~~purposes. Finally she could go back to her father's home. In case of her adopting such an option she could not inherit anything from her husbands home.

If a man was not married his property was inherited by his closest relatives starting with his father. Failure to this it was inherited following the priority of: his brothers; his half brothers; his brothers sons; his half brothers sons ; his peternal uncle ; his peternal uncle's sons and finally the closest male relative on the paternal side as determined by the muhiriga. In the absence of all theses the son of his eldest sister inherited. But undoubtedly such an eventuality was almost unknown due to the extended family system and polygamy.

In the case of widow, her property was inherited in equal shares by her sons. In the absence of this by the deceased husbands father then the deceased husbands full brothers and so on following the above pattern of the case of an unmarried man. The property of married women was inherited by the husbands. In the case of unmarried women their property was inherited firstly by their fathers once again following the above pattern but in case they had children then the sons inherited.

A man had also power of distribution during lifetime. Using this power he could alter the shares to which each heir was entitled. Thus a man could give more shares to a favourite son during his lifetime but in such a case, his wishes were to be expressly stated. But this power to distribute among heirs would not be used to deprive an heir of his whole inheritance except in very few exceptional cases. This was where a person would disinherit an heir for reasons such as a son being extremely cruel to his parents or acts contrary to the law by being a thief or other sufficient course. This was very rare. Alienation of land to strangers was also not allowed unless with the sanction of mbari and muhiriga elders. This was in order to protect land and boundaries of territory. One could however alienate livestock to strangers.

That was the position of customary law on succession and inheritance before being influenced by modern changes. This second part will consider the present day situation as influenced by socio-economic changes. For the majority of the people the new laws which have been introduced are alien and they still regulate their affairs according to customary law. The only difference is that customary law is now more dynamic and is changing rapidly in order to accommodate some new values. It also affects th people of different generations and places differently unlike before when it was very unified.

Today we have very few cases of polygamous marriages. This is as a result of embracing new western values which are rooted in christian norms. The family unit has been greatly reduced and controls of the clan tampered with. There is much more individual freedom in the running of one property. Due to modern education and feminst propaganda women have asserted their so called rights and pressed for equallity among the sexes. This has resulted to women owning separate and personal property.

This has liberalized the daughters who are now largely considered sometimes even equally with sons in succession. It is submitted that things depend on an individuals wishes. Rarely does such an individual seek the sanction of the clan. The clans are now very loose and one does not have to adhere strictly to customary law. Nowadays customary law can only be effectively enforced through the present day courts. Thus customary law is recognised by statute. The magistrates' courts Act Cap. 10 section 9 (a) provides that the District Magistrate may exercise jurisdiction and power in proceedings of a civil nature where proceedings concern a claim under customary law which is defined in section 2 of the said Act and includes succession both testate and intestate.[7] The Judicature Act cap. 8 section 3 (2) however limits application of customary law in so far as it anticioates some customary laws to be "repugnant to justice and morality" which are then excluded from recognition and application by courts.[8]

The position is one of a mixture of cultural valves. The educated class of people and others who have embraced the western styles of living especially the urbanized populace regulate their lives largely according to modern statute law. On the other hand we have the rural communities which still regulate their lives according to customary law. This is more so of the older generations now dissappearing. In between these two there are other classes torn in between and it is difficult to identify a clean cut system which they adopt. This is as a result of the mixture of customary law with English law.

In practise however the majority of the people still regulate their succession laws according to customary law irrespective of what the statute law is. This is saving however for a small elite class. The only difference is that customary law has been largely modified to suit the modern day conditions. The position now is that distribution of property is confined strictly to a particular family. The whole affair is a question of the choice of an individual family. In a monogamous household the property is distributed among the sons just like before. But due to education and introduction of modern forms of property rights in most cases daughters are also considered. Unlike before, in case a man has no sons then he will give his property to his daughters as against other male relatives. Similary a widow normally inherits the

property of a deceased husband.

In a polygamous home the property, is still divided according to the number of houses. But this has also been modified and as will be seen later radically changed by statute law. There have been many changes and innovations trying to accommodate new ideas . Some of them have been introduced by modern courts as some cases end up in courts. Such innovations are the ones seen in a highcourt case of In the matter of the estate of Gacharamu (deceased) 8a ( )

Unreported. In that case it was held that before property was divided equally among the houses provision had to be made for children of tender years and in effect took regard of the children in a particular house. This altered the shares as under customary but that looks the trend in modern days to bring about changes by these innovations.

In summary then the modern position is that individuals regulate the affairs according to their whims and wishes. They can safely ignore provision of customary law and yet not adopt the statute law. However there is evolving what can be called urban customary law which derives its norms and principles from both customary law and English law. As society develops no doubt a clear cut system will emerge that will harmonise the two systems.

Section 82 (1) provides that no law which is discriminatory either in itself or in its effect shall be enacted. This is however qualified by subsection (4) and the relevant part here is (b) which provides that no law shall be deemed discriminatory if it relates to personal matters, which includes devolution of property on death. Section 66 (1) then establishes the office of chief Kadhi and Kadhi's Courts.[10] In pursuance of this section the Kadhi's Courts Act Cap/ II was enacted. THis reinforces the recognition of Islamic personal law.[11] Another relevant law is the Muhammedan Marriage, Divorce and succession Act Cap. 156. Section 4 provides,

> " Where any person contracts a marriage, or being male contracts marriages in accordance with Muhammedan Law... the law of succession applicable to property both movable and immovable ..... shall be in accordance with the principles of Muhammedan law, any provision of any Act or rule of law to the contrary not withstanding."[12]

It is this clear that Islamic Law has a legal basis in this country. It is on this premises that Islamic position of succession is being considered. (This was before operation of the new law of succession which will be considered later).

Having established the constitutional and legal basis attention is now turned to considering how the property of a person professing the Islamic faith devolves. Islam is not only a religion but is a way of life. There is no distinction between the secular law and orthodox divine muslim law revealed to the prophet Muhamed. For this reason the law relating to succession is divine and laid down by the Holy Quaran.[13] It is quite complicated and very extensive. It has even been claimed to constitute one half of the total human knowledge.[14] Hence it is not possible to go deep into succession laws but what will be done here is merely to state how property is distributed to the heirs. The Quaran is the authoritive and final source of the law. It sets out the categories of heirs and their shares and

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the powers to be exercised by an individual. Among [15] the muslims there are three reasons for inheriting property. These are, blood relationship, marriage relationships and relationship of master and slave.

An individual power of testamentary disposition is limited to one third of the whole property. This third can only be alienated to strangers but not to his heirs.[16] The reason for this is because for all the heirs there are certain fixed shares laid down by the Quaran and one has no power to upset this or alter the amount entitled to any heir. Upon death of a muslim the distribution of his property takes place after the funeral expenses have been deducted. THese always take first priority. This is followed by settlement of any debts he may be owing to others. Only then will the remaining property be distributed among the heirs, the heirs are both male and female. Basically the property is normally divided into two parts. One part consisting of one third of the whole property goes to non heirs or strangers. The other two thirds are what the heirs take, Each heir takes a fixed share. The heirs have also been determined by the Quaranic law. It is not easy to find a simple classification of the different kinds of heirs that there are. As this is not the main body of the paper, a simple classification as that adopted by Mirathi will be adopted. This classifies the heirs being on the male side to be; son. (2) Grandson, son of son and so on. (3) Father (4) Grandfather and so on. (5) Brother (6) Brother's son and so on. Uncle (7) male children of the foregoing and so on. On father's side only (8) Husband. On the female side they are: (1) Daughter (2) Granddaughter, daughters of a son and so on (3) Mother (4) Grandmother and so on. (5) Sister (6) Wife.[17]

This is the simplest classification one can come across in the mass of literature on the subject in various texts. The breakdown of various shares for each individual will not be considered as it will not serve any purpose here. But it should be mentioned that generally a male takes double the share of a female in the same category.

HINDU LAWSYSTEM

The final section of this chapter deals with the position of the Hindu law. Just like Islamic law, Hindu law is also complex. Hindu is a way oflife to those who have embraced it. Hindu law has had very little impact on the other communities. This system originated with migration of Hindus from the Indian sub-continent. It is practised by a small Asiatic Community in Kenya who look to India for cultural guidance. It is common knowledge that Asians keep to themselves and interaction with other communities at a social level and otherwise is minimal. This is why it has had no influence on the rest and it is not easy to get the inside knowledge of it if one does not belong to that community. However, that is not the main concern here. To find the legal basis for application of Hindu law to day in Kenya, the previous pattern followed in Islmic law will have to be used.

As already, mentioned the constitution is the supreme law with which all other laws must confirm. Hence once again section 78 is the relevant one. This is protects the freedom of religion and the Hindu practise the Hindu religion and are therefore covered by this section. Further section 82 (4) PUTS AT PER the four different systems of customary, Islam Hindu and English and they require equal respect. This is because in personal matters all different views of these four communities are placed on equal footing. It is this section which has enabled laws which are apparently discriminatory be enacted in relation to personal matters. These laws apply to different communities on tribal or racial grounds which otherwise would be discriminatory within the meaning of section 82 (1) [18]. Pursuant to these Constitutional provisions there is the Hindu succession Act Cap. 158. This Act in section 3(1) provides,

> " The succession to the movable property in Kenya of a deceased Hindu who at his death is domiciled in Kenya, and to the immovable property of a deceased Hindu whether domiciled in Kenya or not at his death, shall be regulated by Hindu law".

Hindu law is defined in section 2 of the same Act as,

> the law relating to succession adopted by any school or subschool of Hindu law"[19].

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The foregoing is therefore enough authority to regulate succession matters for Hindus according to Hindu law.

The mode of succession is very much dependent on the type of property and form of ownership. The Hindu property ownership is said to hang upon the joint family Institution.[20] This is an institution where all members of a particular family tracing themselves from a common ancestor, have a common home. This is the place where each family in the Hindu context keep their God. This kind of a family has a n joint ownership of property. This property is enjoyed in common. The system is however changing in modern trends. There are exceptions and individuals have separate property. But this is the exception and not the rule. The eldest male in the family is responsible for the property and manages it. He is a Kurta. He however derives power from the rest of h the family members.

Inheritance is the change of ownership that occurs at death in consequence thereof. It is hence evident from the Hindu joint family that there cannot be such a thing in their system. This is because the property is always there as a joint family's succession for Hindus is what is called "partition" This is the equivalent /distributing property. This is occuring in modern of times when the manager of the joint family property distributes to the others. A man may also distribute property among his sons if he is the father. This is what is a natural family meaning where the father is alive, In such a case then there is no partition. Partition occurs where for some reason it is deemed necessary to distribute the property. This is where a member may complain or where some leave the family to establish another. also it is done where the Kurta IS Incapable of managing the property. In such situations then a partition is effected. If the property is such that it is impartible the eldest son retains it but gives the rest allowances. There

There are some categories of persons who are excluded due to some disabilities. These are normally dissabilities by reason of diseases such as being blind, deaf or insane. Modern changes are however altering this position and including such persons in the partition.

Modern changes are also penetrating this core of family togetherness. Due to this there are individuals owning separate property through earning it in their professions or trade. In such cases they are not bound to channel it to the common stock. But this is os only if they hwe not used any capital out of the common stock to acquire their own property. This is so if it will not affect the joint family estate. On death of such a person with personal wealth,if once again becomes family property after being taken by his sons. It is now considered as ancestral property. It is evident that this insitution of joint family is quite unique form of ownership. The family is formed by male members and females are excluded as they go to form their own families with their husbands.

In Hindus system, as in most other systems the nearest male relatives take the property. These are agnates or those who trace their relation through the male as opposed to cognates who trace their relation through the female. The position is that a man's nearest relatives arethe sons. Thus male children take the property but the general rule is that persons take upto the third degree. The classification below will be taken as representative of the Hindu position though there are variations as the schools are different. The son takes the property, if not, his son, if not his son. This is the limit as it is the third degree. From here the widow becomes the heir. This is because she has a right to be maintained by the males. If shee does not take then the daughter takes, if not her son. Failure to this the parents of the deceased takes property The mother takes first, if not the father. Failure to this the

Failure to this the parents of the deceased takes property. The mother takes first, if not the father. Failure to this the brothers of the deceased take, if not, their sons and the third degree is reached. From here the position goes backwards to the deceased father's mother, if not, the father, if not, the brothers and finally in the third degree their sons.[21] Beyond this it is not easy to ascertain what happens but obviously such a situation is too remote and can be ignored.

In conclusion of this chapter it is submitted that this is the general position regarding succession. As seen the chapter is largely descriptive as it simply let out to present the position before the law of succession Act was passed. An analysis will be considered in later chapters when the Act and its effects will be considered.

FOOTNOTES TO CHAPTER ONE

1. PARRY, D.H. "The law of Succession" (Fifth Editoon, sweet and maxwell ltd. London 1966) p. 1
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3. KENYATTA, J. "Facing Mount Kenya" (Heineman group of publishers 1961)p.4
4. Ibid p.25
5. Ibid p. 26
6. Supra footnote no. 2 at p. 9
7. Magistrates Courts Act cap. 10 laws of Kenya.
8. Judicature Act Cap. 8 laws of Kenya.
8a. In the matter of the Estate of Samuel Hopewell Gacharamu (deceased) High Court at Nairobi Miscellaneous case no.139 1974.
9. Constitution of Kenya no. 5 of 1969
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12. Muhammedan Marriage, Divorce and Succession Act cap. 156
13. ABDULLAH,Y.A. "HOLY QUARAN: Translation and Text"
14. COULSON, N.J. "Succession in the Muslim family" (Cambidge University Press 1971) p. 3
15. PEARL, D "Textbook on Muslim law" (Croom Helm Ltd. 1979)
16. Supra, Footnote 13
17. EL BAHURI, S.A.B.H. "Hand book on Muhamedan Law of in heritance" Translation by mitchell, P.E. (D.L. patel press for Government Printer)p.3
18. Supra, footnote 9
19. Hindu succession Act cap. 158 laws of Kenya
20. MARKBY,W. " Hindu & Muhamedan law" (M'C' Mitlal Publishers 1977) p. 25
21. Ibid.

CHAPTER TWO

ENGLISH LAW SYSTEM

This second chapter deals with the fourth system of succession in Kenya. This is the English or statute form of succession. As seen in chapter one the majority of the Kenyan people are governed by the three systems which were considered in that chapter. The fourth system therefore mainly governs the Europeans. However statute law as well governs the affair of others, especially the Africans who have embraced the western style of living and opt to govern their succession matters through statute law. Unlike the other three systems the statute law is more brief as it is clearly defined in the relevant statutes and is more definite. It is easily indentifiable in the statutes and as such only a brief treatment and reference to the statutes will be given here.

This fourth system has its background is the English common law. It was introduced to Kenya through India. This was in the general process of mass reception of English law to Kenya. In order to understand it therefore, it is imperative that as historical approach be adopted to see how it was introduced and ultimately codified into statute law applicable to Kenya. Needles to say, English law was introduced to Kenya through the process of colonisation. The declaration of a Protectorate over what is now Kenya in 1895 marked the beginning of official British rule in Kenya. However the process of control had started much earlier during the era of scramble for Africa. The year 1885 can be taken to be landmark and starting point. This is because that was the year that the imperial powers divided among themselves in Africa at the Berlin conference of that year.

The now Kenya was given to the British. Hence Kenya as a nation can be traced to the year 1886 after the partition. (1)

Initially acquisition and administration was effected through chatered companies but in 1895 it was declared to be East African Pritectorate and the Brtish government assumed direct control. With assumption ofdirect control it was necessary to lay a firm and regal basis to justify aquisition, occupation and control of the Protectorate. This because initially most acts apertaining to aquisition were mere political acts. What was the needed was a legal basis (2) This has been doubled as early as 1840s and the Forein Jurisdiction Act 1843 had been enacted to fill this vaccum. It was in 1890 that a simmilar Act was enacted again. This was the Forein Jurisdiction Act 1890. Using that Act the British government found legal justification to administer the Protecto-Protectorate. (3)

It was under that Act that orders-in-Council were enacted to provide for administration of the protectorate Acts and Orders-In-Council were made under these schemes of legislation and they provided statutory base for exercise of jurisdiction by the British government in the East African Protectorate as Kenya was then known. The famous East African Order-In-Council 1897 was made under the authority of that Act. It is from the 1897 Order-In-Council that ordinances that followed for effective adminstration of the Protectorate were made and legal validity of Kenyan laws can be traced from that Order-In-Council 1897. (4)

That order-In- Council established a legal system that reflected the four philosophies of life that were led by the four different communities. These were the Africans, Muslims, Hindus and English. Separate courts were established at the surbordinate level. A court for East African presided over by a judicial

officer was created (5)

The forein secretary was empowered to establish provincial courts. These had jurisdiction over British subjects and protec ted persons and certain classes of foreiners. Indian Legislation was applied to the whole Protectorate by that Order-In-Council. These Indian Acts had been a codification of English Common Law. That is how Indian Legislation came to be applied to Kenya. Further section 11(a) of the Order-In-Council had a reception clause which was simmilar to its present day version found in section 3(1) of the Judicature Act Cap.8. It is in this way that English law was received in Kenya and is still existent to this day. The receiving date was fixed to be the 12th August 1897.[6] Though there were series of amendments and repealings such as those of 1902, 1907, 1911 and 1920, these provisions still applied and as mentioned culminated to the clause in the Judicature Act. Cap. 8. Through these Acts the hierarchy of law and to whom they were to apply to in terms of racial attributes were defined.

The 1897 East-African Order-In-Council had clearly sanctioned racialism in the legal system. This led to the development of the four systems already mentioned and continued upto independence time and after. The first three system have been considered in the proceeding chapter. Now attention is turned to the fourth system of succession. Having traced how English law was received to Kenya and established a legal base, now a look will be made at the relevant statutes.

The statutory mode of succession is to be found in two Indian Acts that have been applied to Kenya. These are Indian succession Act 1865 and the Probate and Administrated on Act 1881.[7]

These two chiefly govern the English although the High Court In the case of RE MAANGI [8] applied the Indian Probate and Administration Act 1881 to people of the Kamba community. This was however in the belief, which a writer has indicated is mistaken that administration of estates is not personal law.[9] The Indian Succession Act 1865 contains a complete code of Succession law. Section 331 of the 1865 Act provides that the Act shall not apply to intestate and testamentary succession of the property of any Hindu, Muhammedan or Budhist. Section 8 of the Indian Probate and Administration Act 1881 shall not apply to persons excluded from the ambit of 1865 Act that is Hindu, Budhists and Muhammedans[10]. This however has the effect of applyin the Indian Succession Act 1865 to the Europeans. It is hence evident from the foregoing that the four systems are distinct This last and fourth system governing Europeans is what is being called here English or statute system.

This does not however mean that only Europeans are governed by statute law. African as well are governed by statute law. This is because the above Acts have been applied to them. But this application of statute law to the Africans has been restricted only to those who opt to be governed by it. The way to do this is by making a will. This is provided for through the African Will Act Cap. 169. This Act enables Africans to make wills. But all that the Act does is merely to provide that where an African has made a will then his succession matters will be governed by Indian Succession Act 1865.[11] The total effect therefore is that the Indian Succession Act 1865 in the substantive law of statutory succession.

Act 1865 is the substantive law of statutory succession. Statutute law also exists for the other two communities vis the Hindu and Muslims. The Hindu are governed by Hindu Succession Act and Hindu will Act. But this merely provide that the law applicable will be the Hindu customary law which has already been considered.[12] The same case applies to the Muslims.

Having laid down the legal Historical basis for application of statutory succession law of Kenya, attention is now turned towards seeing the actual provisions of the rules This will be done briefly stating the rule by way of summary. This is because the rules are laid down by the relevant statutes mentioned and it would not be worthwhile to the reproduce the various sections. Further this chapter will deal mainly with Interstate Succession. This is because the rules of intestate succession. This is because the rules for Intestate Succession are laid down as to how property will devolve upon the death of a person. In the case of testamentary disposition of property, property devolves not according to set out rules. The property devolves according to the expressed wishes and desired intentions of a person or testator. This is because a testator makes a will to declare those intentions.

First by way of introduction and for comparative reasons a general look will be made of the rule as they were at common law. This is because the provisions of the Act were derived from and are a codification of the common law.[13] That is the way it was in England then imported to Kenya via India. On death of a person, the assets of such person devolve to other persons who become new owners.

Some clearly defined rules oe pattern of devolution and institutions charged with control must exist. The common law set out to meet these requirements. There were three approaches to this end. Firstly there could be rigid scheme containing rules of descent. That is property passed to person whom had, except the widow, blood relation with the deceased. There could also be complete freedom on a person as to determine how his property would pass and be distributed and finally there could be freedom coupled with some limitations.[14] At common law when will were developed a person had complete freedom although in modern times laws in England have limited this.[15] On the other hand if no will was made there were rules regulating mode of devolution of the property. These rules of inheritance were fixed by custom and also later partly by courts.

According to these rules inheritance descended lineally. The lined descendants were entitled before ancestors. Thus children would inherit before parents and grand children before the grandparents. This was described as natural. Also the maleswere preffered to females if they were in the same degree. Among the males the eldest was preffered to others. The lined descendants of a person they survived sttod in his place if he was dead. If there were no males, the femalea of the same degree took the share together. An eldest son was preffered but females took together as co-parceners. If there were no lined descendants then inheritance went backwards to ancestors. Thus the father of the deceased person took the property following the above principles.

There are the rules as laid down by the Act.

The rules for the actual distribution are also laid down. Where property goes to the children it is divided equally. The same case applies to the grandchildren or lineal descendants. In a like manner all in the same degree of lineal descendants of great grandchildren take equally. If the descendants are not in the same degree and the persons through whom they descended are dead, the property shall be devided among such number as to correspond with the nearest lineal descendants who are dead and then distributed to the remote ones surviving. Where there are no lineal descendants the property is distributed firstly to the widow then the next in degree starting with the father. In the event of failure of this the mother of the deceased and his brother and sisters take in equal shares. If they are dead their children take equally their parents shares. If the brothers and sisters are dead and have no children, the mother takes all.

In case there are no lineal descendants at all nor the father or mother the position is that brothers and sisters and their children take equally. But in case none of all of them is alive the property will be divided to the kindred or those of his relatives who are in the nearest degree to him. Finally it is provided that when distribution is being done and a distributive share goes to a child or such other person, any advancement made shall not be taken into account.[17]

This concludes consideration of this system of succession which as stated governs those who adopt English mode of life styles.

FOOTNOTES FOR CHAPTER TWO

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4. East African Order In Council 1897.
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6. Supra footnote no. 4
7. Indian Succession Act 1865 and Probate and Adminstration Act. 1881.
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CHAPTER THREE

WILLS

CUSTOMARY WILLS

This chapter will concern itself with wills. The first two chapters have been concerned with succession among the four communities that we have in Kenya and emphasis has been placed on intestate succession. Before the new law of succession which unifies all the four systems and forms one single succession law for all persons is considered, wills will be considered in this chapter. This is because wills play and will continue to play a major role in succession in Kenya and it is this role that is being examined. Importance has been placed on wills and people have been urged to make wills. This has been said to solve a lot of problems of identifying who gets what of the deceased property as the attorney General said.[1]

This chapter like the previous ones, will be divided into sections considering the role of wills among the four communities separately. The first section therefore will deal with wills under customary law to be followed by wills under Islamic, Hindu and English law respectively. However the section will start by a general definition of what constitutes a will or what is a will. Halsbury's law of England define a will otherwise called a testament as a declaration in a prescibed manner of the intentions of the person making it with regard to matters which he wishes to take effect upon or after death. A supplemeatary will is called a codicil and is simmilar in nature to a will only that it is supplementary and annexed to a wil previously made. This is executed for the purpose of adding to varying or revoking provisions of that will[2].

For the time being this definition will suffice. Thus the main characteristics of a will are that it is a declaration of a person called the testator, of the intentions as to how his property should devolve upon his death. and takes effect only after death. A will can be oral or written. When there is

a will there is testate succession. In traditional African societies, the art of writing not being known, the only wills that were known were therefore an oral wills[3]. This is the case then under customary law which regulates the Africans. The majority of the rural community who comprise the greatest percentage of the Kenyan population are illiterate and so cna only make oral wills. Oral wills are therefore significant. As it has been shown in chapter one succession under customary law was largely intestate and there were fixed rules and customs that regulated the disposition of property. It was however stated that a man had some power of testamentary disposition during his lifetime.

Among the kikuyu a man had power to make a will. The requirement as to capacity and circumstances under which one could make a will were regulated such that those powers could not be misused. This was to ensure that one did not depart from the general rules of intestate succession.[4] One could only make a will when one was advanced in age or when one was on deathbed. Thus a young man could not be allowed by the muhiriga to make a will. Both a man and a woman could make a will but as it was seen women rarely had personal separate property but in case one had, the one could make a will disposing it. It is inferred from the above that one had to be an adult and under no circumstances could a minor make a will. One could also not make a will while drunk or being of unsound mind. Extreme age as to render one senile and not able to fully appreciate what was going on also incapacitated one from making a will and the muhiriga determined this.[5]

However as will be seen when will under the other systems are considered, wills under customary law had very few formalities. They were simple in nature and relied more on trust and understanding that prevailed among the whole society than an intrinsic technical rules. The will was a declaration as to the intentions of the testator. The procedure followed was also very simple. To make a will one simply summoned the close relatives of the clan. This was when one was fairly advances in age and apprehended death. When they were assembled one gave one's intentions and directions as to how property should devolve. One spelt out clearly who should get what of the testators property in the event of death.

There was no specific number of witnesses required but they had to be a reasonable number and key persons in the testators clan had to be present. This power of testamentary disposition was exercised within the limits of customary rules. Using this power the testator could vary the shares of the heirs by expressely stating so. Thus one could give more shares to an heir at the expense of the others. Further in pursuit of this power of making a will one could also appoint the adminstrator or muramati reffered to in chapter one. The will became operative only upon death of the testator and not other wise. There were some limitiations however which were imposed in order to protect the property and ensure that the family members were adequatly provided for. This was in the sense that one could not alienate property to strangers by way of a will particularly land. Also one would not use the power of making a will to completely disiherit an heir. This was however subject to good conduct on part of an particular heir and as seen in chapter one, one could disinherited for reasons such as being extreemely cruel to the parents or for being a habitual thief among other reasons.

Just as one had power to make a will, one had also power to vary or totally revoke it. This was done by following the same procedure descibed above of making it. That is calling witnesses from close relatives and intimating thoses intentions 5
It should be mentioned that the role of wills was not very significant among the Kikuyu. It played a relatively minor part and rarely did people bother to make wills. This was due to the very nature of societal fabric. The societywas organised in such a manner that everything was clearly looked after. There were firm rules to be followed in event of death add the society looked after the affairs of an individual by supervision from the clan 6 .
The Need to make a will did not therefore assume importance. The rules as seen in chapter one adequately covered every possible situation and the heirs and the deceased's property which was relatively simple was known. Infact one often made a will when for some reason one wanted to make provision different from those of general custom or one wanted to give a specific thing to a specific individual. In most cases where a will was made, the total effect of succession was the same as that would have been effected by intestate succession.

By means of a will under this system one could make two kinds of bequests. The first is a bequest not stating expressly who could enjoy the bequethed property and the second was a bequest to a specific person for his own enjoyment. The first one was in nature of a public benefaction analogous to the English charitable bequest. An example of this was a bequest for the purpose of building a mosque or other reason for public benefit to the muslim religion or giving to the poor [12]. Contrasting such a case with the customary law it is found that no such thing existed under customary law. Such a point also emphasises the role of wills as in such a case were it not for such a will such devolution could otherwise not take place. The bequest should also be something capable of being enjoyed and could not be something such as a tree or other such thing. The muslem aspect of making a will was also more complex than the customary law as there were such rules that a bequest could be made to an unborn child. Such a thing could not be thought of under customary las as it only considered there that were living. This was however qualified by the fact that such a child had to be conceived at the time of making a bequest. As evidence of this the rule was fixed that a child had to be born within six months of making the bequest. Property had also to be existing at the time of making the bequest.[13]

There was no particular form that was required. The muslim will was not hampered by technicalties and what was necessary was merely to infer the intnetions of the testator. The will had also to be witnessed but no particular number of witnesses was required. The witnesses to a will were not barred from inheriting under it. But this was provided the other heirs consented. If a legatee died before the testator the bequest became invalid. But if he dies after the testator but before accepting, his heirs accepted the property for him and took it.[14] Wills under Islamic System unlike English system were largely an open affair and not intrigued with secrecy associated with English Wills. In making a will one could impose conditions under which devolution could take place to the beneficiaries and if they were not fulfilled then they do not take. Express words had to be used in a will and no particular words were required.[15] It was also under the will that one appointed an executor to

carry out the administration of property. The will could also be varied, added to or totally revoked. This could be done expressly or by subsquent making of a bequest already made to others.[16]

That was the position and role of wills under this system and as seen it was significant in that it has far more effecta than under customary law.

HINDU WILLS

Coming now to the Hindu system a simmilar pattern emerges. The main ideas behind a will are common to all systems except variations due to diversity of the communities they serve. The early origin and history of a will under Hindu law is doubtful. It is not clear whether the will was introduced from Europeans or borrowed by Hindus from the muslims[17] However the concept of a will was known and it is this that will be looked at briefly. As seen earlier the type of succession is very much dependent on the mode of property ownership. It was further seen that Hindus largely had the idea of joint ownership of property. this was also reflected in their nature of wills. The property being joint, no one would dispose of it by means of a will. However there later emerged a system of separate ownership when one was able to acquire some property without using the common stock. This separate property one could dispose of by means of a will.[18] The fact is that Hindus had testamentary capacity so long as one did not purport to dispose of the family property by means of a will. Thus there was distinction between testamentary capacity and dispositive power. One could have testamentary capacity but yet lack power of disposing some property.[19]

The main features of the will as known to Hindus however are more or less simmilar to these in other systems. These were developed and ultimately introduced to apply to Hindu in Kenya. As earlier seen the development of Hindu succession law in Kenya started with the 1897 East Africa Order-In-Council. Thus Hindus were to be regulated by Hindu customary law. Also by order 22 of 1898 the Hindu wills Act 1870 was applied.[20] The Hindus thus have testamentary capacity during lifetime.

For one to have capacity one must be an adult having attained the age of majority. Soundness of mind is also another requirement.

These are the main essentials and there are no restrictions except one cannot dispose by means of a will what one could not have been able to do so intervivos.[21] The other main features are a kin and simmilar to English wills as in the Hindu Wills Act 1870 as the major characteristics are the same. These are in matters of execution, forms, revocation and so on and it is considered better to deal with the will generallyas known today in the following chapter. So now it will suffice that Hindus can make wills but ideas are largely English and simmilar and will be considered next. This is because the Act, Hindu wills Act 1870 is a mere application of the Indian succession Act 1865.[22]

ENGLISH WILLS

The final section of this chapter deals with the English form of wills known understatute law. The early history of wills is not clear although it is clear wills were developed quite early. Early wills took many forms and were very much tied up with religion. This was in fear of death and what was awaiting one beyond this world propmted one to make peace with one's God and wills were used to provide for the church and other charitable institutions. For better treatment of these early forms of wills the reader is reffered to Pollocks' ENGLISH LAW VOLUME II [23]

What is clear is that wills became developed to the forms they are now known today. As has already been seen the idea of a will in all societies was characterised by common objectives This was to enable one to dispose off one's property during one's lifetime. The will has therefore all along been an instrument declaring the testators' intentions as to what should happen on death. The will as known to the English Community was much more developed and imbued with great technicalities of forms and procedure which often hampered their operation. This was unlike the very simplified ones known to systems such as customary law. The will was the intrument or testament of declaration of intentions as to the disposition of property on death. It was ambulatory in that it took effect only on death or after death. [24]
There were various essentials that were prerequisities to the making of a valid will, The main were that one had to have capacity. For one to have capacity one had to be an adult. Both men ad women if adults had capacity to make wills if they had a sound mind to have a sound memory and understanding of the nature of the act. This was to enable one to appreciate the effects and consequences attendant upon making a will. Unsoundness of mind could be caused by any reason such as being sick or due to the effects of alcohol. This capacity had to exist at the actual time of making a will.

After these requirements as to capacity of making a will, then there were requirements as to the form of the will. The will had to be in writing. The testator had to sign the will but someone else could sign for him on his behalf provided that someone else did so in the presence and under the direction of of the testator.

If course the will had to be witnessed. The number of witnesses was fixed at two. These two witnesses had to be present at the same time and actually witness the testator signing the will which signing had to be at the bottom or foot of the will. The witnesses attested the will by also signing it to signify their fact of witnessing it. A supplement could also be made to the English will.

This is of course the codicil. The codicil was no different from the will only that it acted as a supplement to it. Its function was to add to, vary or even revoke the will. It was annexed to the main will to effect these changes [25]. There were also situations whereby a joint will could be made. That is two or more persons in most cases, husband and wife made one joint will. This joint will atempts to dispose of property belonging to two or more testators but owned separately. This was simply the amaking of one single intrument. There was also the mutual will. This is a will whereby the parties thereto agree to confer reciprocal benefits to each other. These are however separate wills but they may be made in single documents or even separate ones [26].

It was these kind of cases that often complicated the nature of English wills. Having complied with all these substantive and procedural requirements as to the making of a will, the testator then declared his intentions in the instrument. That is how property would devolve. Through the will the testator also appointed an executor who would administer the will to effect the wishes of the testator and distribute the property. There were however factors far more complicated than in other systems that could vitiate a will and render it in effective. Some factors had to be observed. The property desired to be disposed of had to be ascertainable . The will itself had to be certain. Also one could not use a will to intend unlawful activities or use of property. The beneficisries under a will also had to be as certainable. There were also some factors that could disqualify one from inheriting under a will. On top of the list was a murderer of the testator. That is if one caused the death of the testator then one would not inherit and thereby benefit due to a death one had brought about. Use of undue influence on the testator in order to influence on the testator in order to influence him to give property under a will also disqualified a pontential beneficiary.

This included coercion and committing some fraud in order to gain under a will. The witnesses to a will and their close kindred were also barred from taking under it.[27]

Just as one had power to make a will, so did one have power to revoke it. There were several ways of doing this. One could revoke it by means of a codicil. One could also do it by execution of a subsquent will. Physical destruction of the will coupled with intention to revoke it also served this purpose. A will also terminated automaticcally upon the marriage of a testator unless it was made in contemplation of that marriage. However a revoked will could be revived. This was done by means of re-execution of the original will.[28]

These were the basic concepts of a will as known under English law. These ideas were later to be imported to Kenya This was through the process of reception of English law via INdia that was looked at in chapter two. The will being the form of testamentary succession came through the Indian succession Act 1865 that was seen in connection with intestate succession. As was mentioned in that chapter the Act was a codifying Act that codified the English Law and simply modified it. This law was received to Kenya from India. The position of the will under the English System therefore is found in the provisions of the Act. It is to the Act that attention is now turned. The new law of succession Act also borrows heavily from this Act as it seeks to impose English System to all communities.[29] Hence it is necessary to look at this Act. As in the previous chapter the position of the wills as provided in the sections of the Act will be summarised here. These are contained from sections.46[30]

under the Act for one to make a will one has to have attained the age of majority and be of sound mind. Women can also make wills. Deaf, dumb or blind persons can also make a will if they are able to know what they do by it. The will is categorised in two, one is the unprivileged will and the other is the privileged one.[31] Starting with the unprivileged will, it has to be in writing and has to be signed by the testator or by some other person under this direction andin his presence.

The will was has to be attested by at least two witnesses who must actually have seen the testator sign or fix his mark on the will. Each of the witnesses has to sign in the presence of the testator. These are the basic requirements to bring about a valid will. Under it one can also appoint an executor or administrator who will adminster the estate.

Under the Act also a will may be invalidated by some vitiating circumstances.This is where it is obtained or made due to a fraud or the testator coerced into making it or pressurized by some undue influence to make it by anyone. A codicilcan also be made to add to, vary or outrightly revoke a will. Thus a will under the Act can also be revoked. Marriages here also terminates the will unless will made in contemplation of the marriage. This can also be brought about by express writing or some other Act that destroys the will with an intention to revoke it. Likewise the will can be revived and this is done by re-execution once again by express acts. Mention should also be made of rpivileged wills. These are wills that are made by soldiers involved in an expendition or engaged in actual warfare or a mariner at sea. One must however have completed the age of eighteen years. Privileged wills may be oral or in writing. These are privileged in so far as some requirements to a valid will are dispensed with. If it is written by the testator, it need not be signed or attested. One can also simply give instructions to witnesses and there may later be reduced to writing and form a will. These are the main characteristics of this kind of will. They may also be revoked and further they become null after expiration of one month after the testator ceases to be a privileged person. The reasons behind such rules are sound and really obvious as to need explanation. It would be difficult for these servicemen to be able to comply with all requirements at difficult and often urgent situations. The foregoing are the main issues that may be mentioned under English and statute or modern form of wills.

In conclusion of this chapter it has been seen that idea of a will was known to all systems. The basic concepts were the same and the will played an important purpose in effecting the wishes of a deceased person. The customary will has been shown to have been relatively simple and rare It was highly regulated by rules to rprevent misuse and distribution of property at mere whims of a testator but rather to try and follow some general standards and pattern just as in intestate succession. Its form is still used now in rural communities but the elite follow the English form of wills under The African Wills Act cap. 169. This was imposition of the English idea of a will. Partly for this eas the belief that customary law cannot be able to dispose of modern forms of property.[32]

The Islamic will was also shown as important but restricted it was more advanced than customary one and entailed more formalities and use of a will or not, had great effects on Islamic succession. As for Hindu amd English will it has been seen that the former now follows the principles of the later and are contained in statute. It is more substantive and involves lots of technicalties of procedure in making, execution construction and is most developed.

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CHAPTER FOUR

THE LAW OF SUCCESSION ACT

The fourth and final chapter will deal with the law of Succession Act (cap.160)[1]. Having seen what the previous Succession laws were under the four systems, the new position will be considered here. The four systems it was seen were due to some historical factors which need not be repeated here. At the time of Independence the constitution further recognised the existence of the four systems and various section were entrenched in it to protect them. These were seen earlier but will briefly be repeated for clarity. Section 3 provides that the constitution is the supreme law and that all other laws have to be consistent with it.[2]

Section 70 protects fundamental right genarally[3]. Section 78 specifically protects the freedom of conscience which includes freedom of thought and of religion[4]. Section 82(1) outlaws discriminatory laws along tribal or racial lines.[5] This is however qualified by section 82(4) which provides subsection (1) shall not apply so far as discriminatory laws relate to personal matters.[6] It was on this basis that the four systems were thriving.

However it was realised that for the sake of national unity, a unified legal system was indispensable. It was in this light and to achieve this unity that the then President of Kenya appointed a commission on law of succession to

The Act was however not to come into effect untill nine years later and it only started operating fron July 1981. This postponement of operation was in accordance twith the Commissioners recommedations. This according to the Commissioners would give time to train personnel that would be required especially in matter relating to admin: stration and in order to give the desired publicity to make people aware of the provisions particulary with respect to will making aspects.[12] One may also add here that people were not yet ready for it. This was because the Act introduced radical and revolutionary changes and no doubt and adjust accordingly to accommodate the new notions it introduced. Now a look will be made at the major provisions of the Act starting with provisions for intestate Succession.

(it needed time f people to b prepared

The provisions for intestate succession are contained in sections 32 to 40. It is firstly provided that the Act shall not apply to certain areas as the Minister may by notice in the Gazette Specify. This was also in accordance with the Commissioners recommedations as they felt some areas are less developed and are not yet ready for the new law but need much more time.[13] The following areas have been specified; West Pokot, Turkana, Marsabit, Samburu, Isiolo, Mandera, Wajir, Garisa, Tana River, Lamu Kajiado and Narok.[13a] In areas that may be specified, it is the law or custom of the deceaseds community that will apply. Intestacy is deemed to be a situation whereby a person dies without either having

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made a will or having made one but which for some reason is not capable of taking effect.

In this kind os case, in a monogamous household where the deceased had children and also leaves a surviving spouse then the personal and household effects will be taken by the spouse. The spouse will also have a life intrest in the whole residue of the net intestate estate. This life intrest will however determine upon re-marriage if the spouse is a widow. The converse position of a widower is not provided for and one can conclude it does not apply to a widower. Thus if the spouse is a widower his estate will not determine by reason of remarrying. The rationale for this one can only speculate is because that in the case of a widow the goes to join another family altogether upon remarriage while in the case of a widower, he still remains in the same family and only joined by an extra member upon re-marriage. Upon determination of the estate going to the spouse or in event of death of the spouse the estate will then devolve to the surviving children equally. This is irrespective of sex or marital status and as will be shown later, is a major departure from the previous position. The spouse has however the power of appointment during lifetime. This cannot be exercised by way of a will. This is the power to allot some property to the surviving children according to the wishes of that spouse. This power can however be challe nged in court by a child where achild consider that the power of appointment is being improperly exercised or withheld.

In the case of a polygamous household the estate of deceased shall in the first instance be divided among the "houses". A house here comprise a wife and her own children This division will be proplionate according to the number of children in each house but also adding any wife surviving the deceased as an additional unit tothe number of children. The total effect of this is that a house with more childen will take a bigger share than one with lesserennumber of children. This is also another major departure from the previous position where the property would have been divided in equal shares to all wives. This will be developed more later in the chapter. After this first division of the property according to the houses, the property going into each house is once again divided following the principles set out above applicable to monogamous households.

Where there us one surviving spouse but no children,the spouse shall be entitled to the personal and household effects of the deceased absolutely and first ten thousand shillings out of the residue or twenty percentum thereof whichever is the greater and life intrest in the remainder. which determines upon remarriage if the spouse is a widow Upon determination the property shall devolve upon the kindred as will be seen shortly. Where there is no spouse but only children the property shall devolve tbe them equally. Where however there is no spouse or children left then the property shall devolve to the kindred according to a priority set thus; father, mother, brother and sister and any child or chidren of deceased brother and sisters in equal shares; half brothers and half sisters and any of their children if they are dead,

relatives who are in the nearest degree of consanguinity uptoand including the sixth in equal shares. Failing survival of any of the above the property devolves to the state as BONA VACANTIA. The above priority also follows when a life interest determines. Where there had been some advancement to any heir or house, this will be taken into account in determining the share to accrue to such heir or house.[14] Those are the basic provisions of the Act as regards intestate succession. Now follows a short analysis of these provisions in the light of the previous position of the four systems.

Starting with African Customary law, it is clear that these provisions are revolutionary and radically depart from the previous position seen in chapter one. Whereas the commission had started that it set out the recommended a law compatible with African way of life[15] it is clear that this is not the case. The Act does not incorporate any of the main principles formaly governing the majority of Kenyans. The most conspicous areas are those dealing with widows, daughters and the distribution among the houses. The previous idea have been completely abandoned and the nw law runs counter to customary law[16]. The reason for these, one is convinced are due to the fact what the commission in reality did was to impose the English Succession in Kenya on all people whether, they like it or not.

d it is submitted is the case though Mr. Justice Contran retary and member to the Commission denied this at a ture he adressed to the University[17]. The new position

is that the widow in effect takes all the property unlike before. It is she then who apportions to the other heirs. The daughters now have equal rights with the sons and share equally. This is contrary to the African philosophy. Ideally daughters are supposed to get married and go to live with their husbands. They become part of a new family and are in assence divorced from their father's family. The sons are left at home and continue building the home. Only an awkward situation would result where daughters, part of a new family have to divide land with their brothers at home. As it were, they will be having one fact in one home and the other in a different one. double portions This is just like two strange families sharing a common land. This cannot augur well for the development of the family network. It is true it does happen in other legal systems like the English one, but the point is that it is not in harmony with the African philosophy. The Commission itself reported that there was "a very strong feeling amongst the African population that married daughters should receive no part of the Inheritance."(18) This goes to show the African view, not because of any specific legal reason that they should not inherit, but simply due to the "strong feeling" and this is what is being referred to as the African Philosophy. The Commissioners Simply dismissed this on the ground that they did not think it desirable in the Kenyan circumstances to differentiate between sons and daughters. However this recommendation was not ill-intentioned as they felt the paramount consideration should be the means and needs of children. This it is submitted is good but the outcome should have been some kind of proportion other than outright equal shares. This could be by way of

giving married daughters some shares should they be needy. It should be noted that males have duty to maintan the female and hence the distiction at the customary law.

This position was brought about by a misapprehension on the part of the Commissioners that African Customary law did not provide for widows and daughters.(19) This may be explained by the composition of the commission. The Commission was largely and out of proportion constituted of non-indigenous persons and no doubt this influenced the end result of the Commissioner's work by being heavily leaned against indeigenous notions. But as going through chapter one will reveal the fact is not that the widows and daughters were not provided for. To quote from a writter widows and daughters had a kind of "floating charge". They were entitled to be maintained in the case of a widow during lifetime and had a life intrest. The same applied for daughters untill such time as they got married and if they did not they were entitled to remain on the father's lands.(20) There may not have been equality in this system but it was accepted as just and fair among the African and it surely deserved to be respected. However it is accepted that things have changed and the rule needs modification but it is submitted this should be gradual and not outright imposition of a system not familiar to most people. The Commissioner viewed it as if they were not provided for at all.

These provisions will only enhance many disputes among the children, widows, parents, and brothers.

The new law provides only widows and children iherit. This excludes others like brothers of the deceased who might be needy and would have been entitled under customary law. Such brothers cannot take well married daughters taking all when they ahve ntothing. It is not argued here that they should take to the exclusion of daughters but hey should have been provided for whether they were maintained by thedeceased or not.

Another major departure is concerned with distribution among houses. The new position is that property shall be divided according to the number of children in each house. Whereas this might sound equitable and just, and it is submitted it is so, the Commissionera did not seem to have looked into the underlying rational behind equal distributuin to all houses irrespective of the number of children. This like many other rules was widely practised by practically all African Communities and therefore embodies the African philosophy of life. It was the value therof which was important. The rule was based on equal recognation of all widows as being equal worth and respect.(21) This may be another ground for litigation. These are the major highlights where the new law did not seriously take account of the customary law. The differences are grave and it is ddifficult to reconcile the new Act with Customary law. The exceptions where they are provided for are lukewaem but these will be looked at when considering the place of wills. Though there are no doubt some noble provisions in the Act as society is changing and soon will adopt itself to modernrconditions when the new law might be best, thecommission should at least have honest and openly say that the new law is forein modeled along the Indian Succession Act 1865 and not akin to Customary law or the other

communities. The Act did not take into account the lifestyles of the people. Further illustrations on this will be made when dealing with the will making aspect of the new. Now to turn to the Islamic system, here it is equally disastrous if not worse. As a writer has charged the Islamic law of Inheritance has been completely abandoned and that the Muslim world knows no parallel to such wholesale abandonement of Islamic principles.(22) All the provisions in the new Act have no congruence with the Islamic system as seen in chapter one. The Islamic law of Succession is derived from the Quaran which the true believers of Muslim faith are not prepared to dessert. This will only pose problems for the new law. Law is clearly supposed to give effect to the wishes and aspirations of the people. This is in order to enable them to lead the kind of life that they want. If the law falls short of this then it is apt to be disrespected. If the objections of the Muslims to the new law are not considered, then the true believers may simply ignore the provisions of the Act. In this way they will continue regulating succession according to the Islamic law the provisions of the Act notwithstanding.

This is because the new law has no relation at all to the Islamic position. The new law is not based on a system of fixed share. Unlike before. All parties under the new law have equal shares. Regard is not given to whether they are not male or female, married or unmarried. It is these kind of disparities that led to strong objections from the Muslim Community. The Muslims were unanimous and adamant in their petitions that they wanted to be exempted from application of the new law.(23) The constitutionality of the Act may even be challenged by the community on the grounds mentioned earlier

with regard to protection of personal law by the constitution.(24) Indded Mr. Justice Contran says he would not be surprised to see the constitutionality of the Act being tested in the High Court which interprets the Constitution.(25) Even the Commission report records the dissent of of one of its members (who is assumed to have been a Muslim) who took the view that Muslim law should not be tampered with due to the "overwhelming evidence" received from the Muslim Community (26) Islamic law was said to be fair and equitable and there was no reason why it should be tampered with was the unimous view of the Muslim Commnity. With all these the new law is bound to have problems with this Community and there is a strong case for further review of the matter.(27) Much need not to be said of the Islamic position as it is clear that the Act was no ralation at all to the Act. However more will be said in the section on wills. This further reinforces the assertion that the Act is an English model imposed on the other systems much as the commission would like Kenya to thimk otherwise.

The Hindu position is no better. Professor Derrett has also charged that the new law evidently suits Europeans Kenyans and may be Africans who have been westernised but has no contact with Hindu law.(28) In chapter one it was seen that succession among Hindus revolves around the institution of a joint family. In the proper understanding of this institution, it was seen, strictly there cannot be successions. This is because the property is always there as a joint family property. Many businesses of Hindus are jointly owned and some self-acquired property is later merged with family property by a man is his old age and [illegible]se becomes part of the common stock. When the need arose to divide the property, it was seen this was effected by way of partition.

The principals that were followed in effecting this have largely been ignored by the new Act. The daughters could not succed so long as the widow was living. The daughter further on marriage became part of a new family and ceased to have a claim on their father's side. Therefore comparing the new law with the key principals of the Hindu position one sees a major departure from the Hindu position. Such a departure can only lead to disrespect of the law and people may simply ignore the new law and follow the former position in the absence of a dispute it is submitted the need to resorting to the new law would not arise.

However despite the great erosion by the Act of the three systems(it is deemed not necessary to go into the fourth one, that the English as the new position is more like the former under the Indian Succession Act 1865) there could be a possible avenue to escape the provision of the new Act. This is by making a will. But this as will be shown is largely inadequate. The provision of the Act pertaining to wills are contained in sections 5 to 25. A will in the Act is defined as the legal declaration by a person of his wishes of intentions regarding the disposition of his property after his death and includes a codicil. A will it is provided, may be made by any person of sound mind and not a minor. One may thereby make any reference to any secular or religious law. A female married or not has the same capacity as a male. One is to be assumed to be of sound mind unless suffering from a state of mind arising from mental or physical illness or other cause. One may appoint an executor. A will caused by fraud or coercion or such other importunityas takes away the free agency of the testator is void.

As for the formalities, a will may be either written or oral. To be valid an oral will must be made before at least two witnesses and the testator must die within a period of three months from the date of making it. However an oral will which is privileged, that is one made by a soldier in active servises or mariner at sea is not invalidated by reason of the testator not dying within the fixed period of three months. It is therefore exempted from the requirement that a testator must die within three months from the date of making the oral will. Further it is provided that an oral will shall be invalid if it is superseded by a written will. Thus where one makes an oral will and then makes a written will, the written will shall prevail and the oral one will be invalidated. An oral will shall not be valid if there is conflict of evidence unless it's contents are proved by an independent witness. A written will must be sig by the testator who has to sign or affix his mark to the will. In the alternative the will has to be signed by some other person in the presence and under the direction of the testator. The will has to be attested by two or more competent witnesses each of whom must have seen the testator sign or affix his mark. If another document is mentioned, it will be incorporated into the will.

A will may be revoked or altered anytime before death by the testator. This may be done by means of another will or codicil orby physically destroying it with intention to revoke it A written will however cannot be revoked by an oral wil. These are the basic provision of the Act as regards the nature and form that wills may take under the new law.(29)

Further scanning of the provisions reveal that the sections are drawn from the Indian Succession Act 1865 and are quite comparable with it. It should be remembered the Indian Succession Act 1865 was a codification of English common law. How then can the new Act incorporate local ideas? A brief analysis of the place of will will be made through the four systems to demonstrate this.

With regard to customary law, the only gesture towards adopting customary law was provision for the making of oral wills. This it is suspected was only because were it otherwise, it would have been unworkable given that the majority of the population cannot write. But all the same the fomalities envisaged by the Act for making of wills, both oral and written are more demanding that at customary law. The customary will was simple and straight forward. One simply summoned the close relative and declared one's intentions. The oral will innovation has further been belittled by the qualifications. Firstly it is inferior to a written will which may revoke it. The oral will it was seen becomes invalid if the testator does not die within three months from the date of making it. This erodes the oral will of all its effect and dillutes the nobel provision of the Act. Though wills under customary law were made in old age, there was nothing wrong with the living long after making it. It is submitted that the three month limit merely inhibits the working of the wills. In effect if is assuming that one knows the date of one's death abd then Act accordingly by making a will that will be within the limited period.

Further the privacy of the family is infringed upon by the requirement of an independent witness who is not a member of the family. The customary will was witnessed by ralatives who were also beneficiaries under it. The new Act infact prohibits beneficiaries to witness. This might further hamper its working as most people would go for relatives for witnesses whom they trust and also leave property to. The idea of it also gives one a largely freehand . One is not restricted from alienating property outside the family so long as one provides maintenance for dependants. This is contrary to spirit of customary law. And while on this it should be mentioned that the defination of a dependant under the Act is narrow. One should be entitled to benefit from a wealthy relative if one is needy even if one is not a dependant of that relative. The whole idea in the Act is misconceived and not as claimed based or compatible with African way of life. Most of the disagreable features of the Act were based on false premises. The Commission took a static view of customary law. With this it thought customary law cannot adopt and incorporate modern forms of property, however the fact is that customary law is dynamic. Just as common law developed, so does customary law. A further assumption was that Africans are now wholly used to English way of life and the English legal system. This might appear to be the case especially when one looks at the urban populace who mix freely with Europeans in working and social places. But one only has to go to the rural areas where the majority of the population stay and see that this is far from the case. The idea of a lawyer is strange to most people (30) These are a few highlights that may be discerned by a critical look viewed against the customary law.

The consequences on place of wills under the Act have also far reaching consequences on the Islamic system which is governed by the Quaran. Most of the provision run counter to Islamic principles as seen in chapter three. The Islamic will is limited only to disposition of one third of property which has also to be given to stranger or non-heirs.

This fundamental principal of Islamic is violated by the new Act. Under Islamic wills also one cannot make a bequest to an heir for it will be invalid. These are always fixed shares in the Islamic system which will now disintegrate and become meaningless. An heir is entitled to a certain fixed propotion (31) but now this has also been upset. According to all the provisions on the will, unless one makes a will providing that succession should take place according to Islamic law than the whole law totaly departs from the Muslim faith and this may lead to the new law being ignored. The Muslims have put forward as a solution that the provision should be the other way round. That is unless one makes a will declaring that succession should take place according to the provision of the new Act, then it should take place according to the law relating to one's community, tribe or religion as the case may be.(32)

Even minor provisions such as the age at which one may make a will are points of difference. Under Islamic law one need not necessarily be of majority age but under the new law this is the the case. These are major issues of the Act and one can only opt out of them by making a will and it is the idea of making a will in order for succession to be in accordance with Islamic faith that Muslims are opposed to. In any case that not everybody will be able to make a will goes without saying thereby forcing one to adopt the universal system against one's wishes and contrary to one's religions belief.(33) As alluded to earlier the constitutionality of the Act is questionable. All these explain why the Muslim community displayed much hostility towards theAct.(34)

As for the Hindus the wills aspect of the Act does not arouse much contraversy. If anything it does infact improve the situation for the benefit of Hindu which was not clear before.

Something like oral wills, Proffessor Derrett has urged,(35) should be out of place for Hindus. He is of the view that the entire Hindu law of succession leaves a lot to be desired and in this respect the will under the Act may help. But it is submmited that as this may not be the case with all Hindus then the best position would be to adopt a position like that proposed requiring that whoever his succession to be in accordance with the new Act, then should make a will providing so otherwise the law of his comminity applies. As mentioned earlier the Hindu Community often look to India for cultural guidance. Given that the law has been changed and modified and much influenced by the English system and the same changes have effects on the community here, then the whoel idea is not strange to Hindus as far as testamentary disposition is concerned.

The position of the English system is not affected as the previous position largely applies. All principles known to that Community under the Indian Succession Act 1865 and the common law have been adopted and incorporated. The Community is well versed with the nature of wills as they appear in the new Act and may be, save slight exceptions, the position is as before. The Community is not in any way adversely affected by the new Act.(36)

In conclusion of this chapter only a few observations need to be made. The object of the new Act it was seen was to ensure that there is one system for all. This uniformity of the law for all persons was deemed necessary for national unity to facililitate sound economic development. Whereas no one would have any quarel with such well intentioned objectives, it is submitted they should be viewed against the whole socio-economic historical background. One has to look at the expense at which this uniformity of law has to be achieved. Thaat is why the

commission had been cautioned to recommend application of one law "as far as possible" (37) The whole exercise was motivated by good intentions but the end results leaves a lot to be desired as is seen from above analysis. Of course it is not being argued that there is nothing good in the Act, Far from this there are quite a number of good points in it. The Act if it is succesiful brings the law in one codified form and it will be easy to ascertain other than investigate the law aplicable to each individual case. But perhaps the problem in reality is that not all persons are as yet ripe for one universal law. This could be due to the diversity of peoples life styles and backgrounds.

The four systems it was seen were based on acceptance of equality and human dignity. This was respect for the views of all the persons though they may be differing. Each community was allowed to lead its good life as it percieved it according to its philosophy. The constitution in the sections mentioned earlier guranted this and this is the reason for saying the new Act may be unconstitutional. For the law to be effective it has to repond to the needs of all people. If it is out of touch with the people it is supposed to govern then it will not be respected and it becomes meaningless. The law is there for the people and not the people for the law. The commission was so obsessed with the idea of uniformity of the law and stressed it so much irrespective of race, religion or tribe so much so that it forgot there are other forms of classes that may hamper achievemnet of unity. More achievement of one law will not guratee unity. This is because there other forms of classes. There could be economic, Political or even geographical. One has to accept for example, the fact that there are rich and poor people and that people also come from different localities and this brings about differences among them irespective of what the law may provide. All these other forms of classes

have to be take

It has also been shown that the final law was not really a creature of merging all the sytems. Rather it was an application to all persons of the English law. This was based on the assertion that all people have interacted and lead modern lives according to western nations but this is far from the case. The whole Act therefore was just part of a process that began way back in 1897. That is the process of anglicising all people. Not that there is anything wrong with the adoptation of English law, but this should be done gradually and not wholesale untill such time as when people are ready for it. The Act is good, it is submitted, but only that it is premature. Given time it may well operate easily. This was even not at the time of anachtment and it had to be stored for a good nine years. The time should have been extended.

It is with this in mind that the will, will particulary be useful. For those who are not content with the universal provisions of the Act, one can only get round them through the process of will making and lay down specific individual wishes as to the law that should govern them. The wills have therefore a key role to play in the devolution on the property. But as seen they are not without their shortfalls and communities like the Muslims are hostile to the idea of making a will in order to facilite enjoyment of their faith, it is theie case that they should enjoy it without resorting to wills. The wills property so called will also take quite sometime before becoming a real part of the majority of Kenyans and this militates against their effectiveness. Thus the whole issue will remain confusedand only substitute the problems that were found in the era of the four systems with others.

FOOT NOTES TO CHAPTER FOUR

1. The law of succession Act cap. 160 laws of Kenya.
2. Constitution of Kenya no. 5 of 1969 sec. 3
3. Ibid section 70
4. Ibid section 78
5. Ibid section 82 (1)
6. Ibid section 82 (4)
7. KENYA GOVERNMENT "Report of the commission on the law of Succession" (GOVERNMENT PRINTER 1968 Nairobi)
8. Ibid at page 2 and 3 .
9. Ibid appendix 1
10. Ibid
11. Supra footnote no. 1
12. Supra footnote 7 at para. 230 and 231
13. Supra footnote 7
13a. Legal notice no. 94 of 1981
14. Supra footnote no. 1 section 32 to 40
15. Supra footnote 7 para. 3
16. COLDHAM, S "The law of Succession Act 1972 A Comment" (E.A.L.J. 1974)
17. JUSTICE E. CONTRAN "Law Reform in Kenya: past, present future" (Lecture delivered at University on 19th May, 1982)
18. Supra Commission Report at para. 137.
19. Kuria G.K. "Muslims and Africans and the law of Succession Act Cap. 160"
20. Ibid
21. KURIA G.K. "Customary law-Inheritance in a polygamous household today"

22. ANDERSON, J.N.D. "The law of Succession Act: comments with reference to the Muslim Community" (E.A.L.J. 1969)

23. See a statement by the Supreme Council of Kenya Muslims at a meeting of the Attoney General's panel on 15th January 1982.

24. Supra, Constitution section 66

25. Supra footnote 17

26. Supra Commission Reprot.

27. Negotiations between the Muslims and the government are still going on.

28. DERRETT, J.D.M. "Report of the commission: comments with reference to Hindu law." (E.A.L.J. 1969)

29. Supra law of Succession section 5 to 25

30. Supra footnote 19

31. See chapter one section two.

32. See paper entitled "Statement of Supreme Council of Kenya Mulims"

33. Supra footnote 28.

34. See daily papers July - September, issues 1981

35. Supra footnote no. 28

36. CF. with Indian Succession Act. 1865

37. Supra footnote 28.

C O N C L U S I O N

To conclude the paper a review of the issues raised is necessary. The paper has discussed some aspects of succession law operating inKenya. This was done by laying down the previous position whereby there were four systems of succession law. Each system of succession was dealt with individually . The four systems were seen to have been necessary to give effect to the aspirations of the people they serviced. The role of wills under the four systems was also looked at and it was seen that will were known to all the systems. However they differed in form and degree of importance. These four systems were seen to have been at par at the time of Indipendence and a situation was envigaged whereby they could co-exist. However it was realised that is one united nation was to be created then all unstitutions including the legal system ahad to be unified. Towards this end a commission it was seen was appointed with instruction to investigate into existing succession law and come up with recommedation that would as far as possible provide for one uniform law for all people. The commission published its report and this made into law in 1972. This law made the subject matter of chapter four.

An analysis of the Act was made vis-a-visthe previous four systems some shortfalls of the Act were considered. The place of wills was also considered in the Act. The will emerged as an instrument that will be particulary useful. This is because it is only through the process of making a will that one can determine what succession law is to govern one's property. Failure to such express intentions then the universal law under the Act will apply.

Having seen all the previous four systems, and seen what their shortcomings were and compared them with the new position after looking at its shortcomings,

also it is evident then that this area of law leaves a lot to be desired. Despite attempts to have uniformity of law that is acceptable to all people success has yet to be achieved. It is therefore submitted that this area need further review in doing this the various groups and communities that have intrest in the matter need to be consulted and adquately represented. One reason why the new law did not take proper account of the laws of some communities was because of its compositon. A more indegenous commission it is submitted would come up with a law that is much more acceptable to the indegenous people. As of now the representation being made by some especially the Muslims Community should not be ignored but should be thoroughly considered and where there are major differences, concessions should be made to them. This will be the only way of ensuring that the law is accorded the respect it deserves. It is not being submitted that the law should revert to the old position as it is realised that as time goes on so do things change. But it is argued that people should be given a bigger degree of autonomy. That is of deciding what law suits them best in order that hey may give effect tp the philosophy of life they understand best.

In conclusion it is recommended that something should be done about the new law. This can be done in several ways. The whole ;aw may be repealed but as this would be too drastic a step to take so soon after parring it, it is not the best. The new law may also be made aptional in the sense that those who want it to regulate their succession may do so by providing so in a will. This is a solution Muslims would highly appreciate The law may be applied to some communities only depending on the acceptability to particular communities. Fianlly the law may be also postponed further in operation. This it is submitted

would be the best alternative but at the same time those who want it may provide so in a will and have applied to them. This was the solution that was adopted immediately after its era it ment and the law had to be stored for nine years. It is submitted the period should be extended further untill such time as there is much more interation among all the communities.

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