INTESTACY LAWS AND THE INFLUENCES OF COLONIALISM – THE CASE OF KENYA, IN COMPARISON WITH THE ENGLISH AND AUSTRALIAN LAWS OF SUCCESSION

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Intestacy law is derived from the traditional values, but it can be also under the influences of societies across the world. As a field of private law, the law of intestate succession can, in the long run, resist the non-voluntary, i.e., imposed reception of such rules of and forced by a coloniser. Compared to the flexible regulations, e.g., of the law of obligations, which are therefore more capable of legal transplant, intestate succession is based on deeply enrooted customs of a nation. Thus, these rules can rigidly persist under the pressure of colonisation. Kenya and Australia, two countries with significant differences in their cultural and legal traditions, were, in a diverse way, colonised by England. The article analyses the intestacy laws in these three countries, with the emphasis on Kenya. It especially discusses the reasons for pushing for strong intestacy laws to protect the widow in Kenyan Laws compared with the Australian and English Laws.

Keywords: comparative law; intestate succession; colonisation; Kenyan, Australian, and the English Law of succession; formation of law of diverse countries under the same coloniser

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1. INTRODUCTION AND METHODOLOGY**

The failure by many people to leave behind a valid will has given birth to the intestacy laws, which is a branch of the law of succession. Intestacy law is derived from societies' traditional values and foreign influences since ancient times.[1] The primary reason I have chosen to compare the three countries (Kenya, Australia, and England) is to show the influence of England as the coloniser[2] in the development of the law of succession in Kenya and Australia and the transplantation of English laws to Kenya during colonization, and how the coloniser applied different sets of laws to govern different people based on culture and religion during the English rule in Kenya.[3] The choice of the object, which is a special field of private law, was based on the idea that some branches of private law are usually not easily transplantable, and the reception of which shows an exceptional rigidity compared to the flexibility and reformability[4] of the law of obligations. As a field of private law, intestate succession can, in the long run, resist the non-voluntary, i.e., imposed reception of such laws of and forced by the coloniser. Some institutions thereof, however, like the protection of widows and women, behave peculiarly. The article brings out the real reason for pushing for strong intestacy laws and rules: to protect the widow from the in-laws who might want to take advantage of the breadwinner's death. The advocates for reforms in this area of succession law are pushing for the countries mentioned to prioritise the reforming of intestate succession for the sake of the widows and children left behind by the intestate.

I have specifically analysed the historical development of intestate succession; the rights of a widow to the marital property upon the death of the husband; children's right including those begotten out of wedlock, adopted or created

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1 E.g., see van Blerk, N. J., *The Basic Tenets of Intestate (Customary) Succession Law in Ancient Egypt*, Fundamina, vol. 25, no. 1, 2019, pp. 170–194.

2 For a similar idea of research regarding Singapore by Fiona Burns, with respect to populations' ageing issues, see Burns, F., *Intestacy Law in Australia, England and Singapore – Another Aid to Social Sustainability in an Ageing Population*, Singapore Journal of Legal Studies, no. 2, 2012, pp. 366–390.

3 *Commissions on the Laws of Marriage and Succession in Kenya Notes and News*, Journal of African Law, vol. 11, no. 1, 1967, pp. 1–5.

4 To the contrary, see e.g., Reid, D., *Why Is It So Difficult to Reform the Law of Intestate Succession?*, Symposium: Reforming Intestate Succession Law, Edinburgh Law Review, vol. 24, no. 1, 2020, pp. 111–118.

by science, to inherit the properties of the parents in case of the intestacy; the study has also covered the rights of those who were dependent on the intestate, especially the aging parents; and if the said countries have permitted same-sex couples and those cohabiting (living together without formalising their marriage) to inherit the property of the other, in case one dies intestate.

I have given special attention to the historical development of the intestate succession in the three mentioned countries, as this will help in understanding the way succession laws of England were introduced in Kenya during colonization and how various amendments to the different laws dealing with succession have extended the rights of inheritance to multiple groups that were erstwhile ignored.

This article is divided into four parts:

- The first part deals with methodology and a thematic aperçu and describes the specific situation in Kenya.
- The second part discusses the Australian and English law systems and their development to accommodate various people under the intestate system. The study will delve into the place of women in the society from the pre 19th century to date; the rights granted to illegitimate children regarding inheriting the estate of an intestate; the rights of other dependents like aging parents to the intestate's estate; and the extent to which same-sex couples and cohabitants can inherit the property of the other in case of the intestate. The study will give the requisite attention to the New South Wales succession law and its development in the 19th, 20th, and 21st centuries.
- The third part outlines the development of succession law in Kenya, the features borrowed from England and Indian laws of succession, and how the Islamic laws dealing with succession apply in Kenya.
- The final part will attempt to compare and contrast the laws of succession in the three countries mentioned, which will also delve into the historically recognised procedure for dealing with intestate succession in Kenya and how that has transformed with the enactment of the Succession Act; this study will compare the same with England and Australia and put forth recommendations at the end of the paper.

1.1. Specific situation in Kenya

Intestate succession deals with situations where there is no valid will left behind by the deceased; hence there is no clear framework on how the property

left behind is to be dealt with other than by the country's laws.[5] This is not always easy, in a country like Kenya, where there are 45 tribes with different customs and beliefs regarding property and family association, especially in the rural regions that still rely heavily on their traditions[6] and how a deceased's property should be dealt with, which in many cases have brought frictions in the deceased's homestead.[7] The Law of Succession Act in Kenya from 1981 mostly regulated these issues with the inclusion of the rules of inheritance to intestate property in Part 5 of the Act, reflecting also the community's aspirations.

Kenya's laws that deal with intestacy, even though to a more significant degree similar to those applicable in England and Australia, they differ to the extent that in Kenya, customary laws[8] of various tribes still form part of property distribution of the intestate's estate. Kenya, just like Australia, was for a very long time under British colonial rule[9], and that brought with it the enactment and application of the British common laws.[10] However, this transplantation was of limited scope. The English colonisers' desire not to interfere with the traditional systems of indigenous Kenyans is the reason they did not touch the customary laws of various tribes dealing with intestate succession.[11] Also, they have permitted the use of the Quran and the teachings of Prophet Mohamed to govern the division of property for Muslims, and in Kenya today as well,

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5 See England, The Law Commission, *Intestacy and Family Provision Claims on Death*, London, 2009 [hereinafter: 2009 LC Consultation Paper], § 1.7.

6 See e.g., Kamau, W., *Law, Pluralism and the Family in Kenya: Beyond Bifurcation of Formal Law and Custom*, International Journal of Law, Policy and the Family, vol. 23, no. 2, 2009, pp. 133–144.

7 As was the case of universal ownership regarding the tribe of *Jibana* which is in the coastal part of Kenya and is part of a prominent tribe known as *Mijikenda hegemony*. See Jibana Tribe v. Abdul Rasool Alidina Visram (1913-14) 5 K.L.R. 141.

8 See recently e.g., Kamau, W., *Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya*, East African Law Journal, New series, 2015, pp. 140–164.

9 See generally e.g., Wabwile, M. N., *The Place of English Law in Kenya*, Oxford University Commonwealth Law Journal, vol. 3, no. 1, 2003, pp. 51–80.

10 Musyoka, W., *Law of Succession*, African Book Collective Publishers, Kenya, 2006, p. 1.

11 Deflem, M., *Law Enforcement in British Colonial Africa: A Comparative Analysis of Imperial Policing in Nyasaland, the Gold Coast and Kenya*, Police Studies: The International Review of Police Development, vol. 17, no. 1, 1994, pp. 45–68.

they (Muslims) are exempted[12] from the application of some of the provisions of the Succession Act.[13]

Concerning the contemporary issues, as it will be seen in the study, England and Australia have laws permitting same-sex couples and cohabitants to inherit the property of the other in case of intestacy. In Kenya, on the contrary, homosexuality is a crime punishable by a jail term of up to seven years under Kenya's penal code[14], and practically it is not supported by the Kenyan society; hence they cannot inherit property from the other.[15] Children born out of wedlock can inherit the property of deceased parents in Kenya. Kenya's succession regimes favour children and relatives of the man instead of the widow/woman of the deceased – another point of contrast in English and Australian succession law regimes; this is covered in detail in the third part of the paper.

Even though inheritance of some sort is practiced in every society, the customs and laws dealing with the devolution of property are not always similar.[16] In England and Australia, several reforms have been put forth to deal with intestacy and make the law responsive to modern matters, like the rights of women over the deceased's property[17], whether the deceased was a husband, a father, or relative, and the modern types of relationship including cohabitation, and the way the society perceives those kinds of changes.[18] Parliament and activi-

12 Succession Act, Cap. 160, (Rev. 2012) 1981 (Kenya) section 3(4). http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/LawofSuccessionAct_Cap160.pdf (01 March 2021).

13 *Rose Mueni Musau v. Brek Awadh Mbarak, CA. No. 267 of 2011;* http://kenyalaw.org/caselaw/cases/view/107754 (01 March 2021).

14 Penal Code, Cap. 63 (Rev. 2012) 1967 (Kenya) sections 162–163.

15 In a wider sense see e.g., Wood-Bodley, M. C., *Intestate Succession and Gay and Lesbian Couples*, South African Law Journal, vol. 125, no 1, 2008, pp. 46–62.

16 Musyoka, *op. cit.* (fn. 10), p. 3.

17 To gender equality questions see e.g. Maina, R.; Muchai, V. W.; Gutto, S. B. O., *Law and the Status of Women in Kenya,* Symposium on Law and the Status of Women, Columbia Human Rights Law Review, vol. 8, no. 1, 1976, pp. 185–206; House-Midamba, B., *The Legal Basis of Gender Inequality in Kenya*, African Journal of International and Comparative Law, vol. 5, no. 4, 1993, pp. 850–868; Asiema, J. K., *Gender Equity, Gender Equality, and the Legal Process: The Kenyan Experience*, Symposium: Africa in the Third Millennium: Legal Challenges and Prospects. Transnational Law & Contemporary Problems, vol. 10, no. 2, 2000, pp. 561–582; Venter, T.; Nel, J., *African Customary Law of Intestate Succession and Gender (In)equality*, Journal of South African Law, no. 1, 2005, pp. 86–105.

18 Kareithi, M.; Viljoen, F., *An Argument for the Continued Validity of Woman-to-Woman Marriages in Post-2010 Kenya*, Journal of African Law, vol. 63, no. 3, 2019, pp. 303–328.

sts for various rights have explained the need for legislative transformation to accommodate everyone.

2. INTESTATE SUCCESSION IN ENGLAND AND AUSTRALIA

2.1. The general sketch of the common law rules on intestate succession in the 19th century

Australian succession laws, specifically the New South Wales Succession Act of 2006 (which I have relied on in this article), just as the Kenyan Succession Act of 1981, have been derived from the English common laws. The devolution of property in case of intestacy was contingent on the type of the property; that is, whether the property was *realty, personality*, or both, they were disseminated disjointedly based on different customs. *Realty type* of property devolved to the heir under the strict rules of *parentelic calculus*[19], which was meant for only those related by blood to the deceased to inherit their estate.[20] The priority was given to the first male child of the deceased.[21] The other deceased's children would be given second priority[22], followed by any relative in the bloodline of male descendants.[23] If a known relative could not be traced, the property would be surrendered to the Crown.[24] Surprisingly, widows of the deceased could not inherit the intestate's realty, but this was changed with the introduction of the law of *dower*, which gave widows a one-third life interest in their deceased husband's property. However, a widower had the right to inherit his intestate wife's property under the doctrine of curtesy.[25] In the 19th century, both *dower* and

[19] Sanger, C. P., *Lord Birkenhead's Proposals for Altering the Law of Intestate Succession in England*, The Yale Law Journal 30, no. 6, 1921, pp. 588–92, https://doi.org/10.2307/789229.

[20] Baker, J. H., *An Introduction to English Legal History*, 4th ed., Butterworths, London, 2002, pp. 266–268.

[21] Macfarlane, A., *The Origins of English Individualism: The Family Property and Social Transition*, Basil Blackwell, Oxford, 1978, pp. 109–117.

[22] *Ibid*., pp. 2–3.

[23] *Ibid*., p. 267.

[24] Sherrin, C. H.; Bonehill, R. C., *The Law and Practice of Intestate Succession*, 3rd ed., Thomson and Sweet & Maxwell, London, 2004, p. 2-3.

[25] *Ibid*., p. 2-4.

curtesy were obliterated, which again exposed widows to vulnerability, stopping them from inheriting their intestate husband's property.[26]

The second part of the property dealt with (which was known as personality) was about taking care of widows and daughters.[27] This was governed by the Statute of Distribution 1670.[28] A widow would be permitted to inherit one-half of the deceased husband's personality if there were no surviving children[29], and the next of kin to the deceased was entitled to the other half. But, if there was a surviving child of the deceased man, the widow was allowed to take only one-third of the property, and the child would inherit the remainder; this was based on the *per stirpes* distribution.[30] In the case of a widower, he was permitted to take over the entire personality of his deceased's wife.[31] In case there was no surviving spouse or child of the deceased, the next of kin were allowed to take the entire estate in the personality of the deceased[32]; the parents of the deceased were the primary next of kin in case the deceased left no surviving spouse or issue, but in case there was no known next of kin or relative of the deceased left behind by him, the property would be surrendered to the Crown.

The primary reason for giving the deceased's widow a small fraction of the estate was to maintain the property in the family; there were concerns that if the widow remarries, the property would leave the family and pass on to her new husband and family.[33] The definition of the family was extensive enough to include everyone who shares the same bloodline with the deceased.[34]

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[26] *Ibid*., p. 2-5.

[27] Holdsworth, Sir W., *A History of English Law*, 3rd ed., vol. III, Methuen and Co Ltd, London, 1923, pp. 556–562.

[28] Statute of Distribution 1670 Act (U.K.) sections 22–23.

[29] Sherrin *et al.*, *op. cit.* (fn. 24), p. 2-15.

[30] *Ibid*., p. 2-14.

[31] Macfarlane, *op. cit.* (fn. 21), pp. 109–117.

[32] Sherrin *et al.*, *op. cit.* (fn. 24), p. 2-15.

[33] Elliott, F. U., *Question of Intestate Succession*, South African Law Journal, vol. 19, no. 3 (1902) pp. 265–269.

[34] Gary, S. N., *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy Symposium: The Uniform Probate Code: Remaking American Succession Law*, University of Michigan Journal of Law Reform, vol. 45, no. 4, 2012, p. 787.

2.2. Changes in the succession laws of 20th–21st century England

England enacted the Administration of Estates Act of 1925[35], essentially getting rid of the centuries-old customs of intestate succession. Rules of personality and reality were brought under the same umbrella of common law[36], granting widow a share of the deceased's property; and the determination of who is to be considered as next of kin of the deceased was by *a graduated system*, as it was the case in the Statute of Distribution 1670. The changes also brought widows and widowers under the same category in the spousal property inheritance. The rights of first preference were accorded equally to all children regardless of their gender. The Act did away with the principle of primogeniture in England as everyone had an equal right to the deceased parent's property.[37]

The Administration of Estates Act of 1925 also rebalanced the entitlement of the deceased's property; initially, the issues (children) were given the priority, but that changed, and the widow got a reservation over children in regard to some interest, that is, the intestate's personal belongings[38], and life interest in half of the remainder of the deceased's property.[39] The remaining half was entirely given to the children of the deceased. If what was left behind by the deceased was little, the surviving spouse would be entitled to either the whole of it or a good percentage of it.[40]

The 1925 Act also changed the definition of family; it got rid of the remote next of kin and narrowed it to just parents, brothers, sisters, grandparents, uncles, and aunts[41] as the only relatives allowed to inherit the intestate's property. The older members of the family were given priority over the younger members, especially where the deceased left no surviving spouse or an issue, which meant that, if the deceased parents were surviving, they would be given the whole property over the intestate's siblings.[42]

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35 See Administration of Estates Act 1925 (U.K.) (hereinafter: AEA) Geo. V, Cap. 23, sections 15–16 (in effect 1 January 1926). https://www.legislation.gov.uk/ukpga/Geo5/15-16/23/contents (01 March 2021).

36 See AEA (fn. 35), sections 32–33(1).

37 See AEA (fn. 35), sections 46(1), 45(1)(b)-(c).

38 See AEA (fn. 35), section 46(1)(i) Table (2), 55(1)(x).

39 See AEA (fn. 35), section 46(1)(i) Table (2)(a).

40 Crane, F. R., *Matrimonial Property Law in England: A Survey Articles-Articulos*, Inter-American Law Review, vol. 4, no. 1, 1962, pp. 1–20.

41 See AEA (fn. 35), section 46(1)(ii)-(v).

42 See AEA (fn. 35), section 46(1)(i) Table (3).

The subsequent amendments have also given the surviving spouse more power in having a say on how the intestate property is to be distributed, and so, if there are issues (children) and the spouse left behind, the widow is permitted to decide to exchange the statutory life interest and receive it from the representatives of the estate of the deceased. When the intestate left no surviving child but a surviving widow, she would be entitled to personal belongings and half of the remaining deceased's estate.[43] Regarding the matrimonial home, the surviving widow has a right to buy the remaining half of the interest on the house.[44]

Same-sex partners have been included in the broader definition of family in 1952, as long as their partnership is registered and recognised[45], extending the right of inheritance to them in case of intestate succession.[46] However, those just cohabiting with no legal document for their relationship[47] have been left out in the definition of the family.[48] Children of any kind have been brought under the ambit of children in the definition to include children acquired through adoption[49], children born within the wedlock[50], children acquired out of wedlock[51], and children who were conceived artificially.[52] Surprisingly, children considered as step issues to the deceased are still not permitted to inherit the intestate's estate.[53]

In 1989, the Law Commission report *Family law: distribution on intestacy* recommended that the surviving spouse be permitted to inherit the whole of the deceased property in case of intestacy, excluding all other relatives of the fami-

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43 Kerridge, R.; Brierley, A. H. R.; Parry, D. H., *Parry and Kerridge The Law of Succession*, 12th ed., Sweet & Maxwell / Thomson Reuters, London, 2009, p. 2-19.

44 U.K., H.C., Report of the Committee on the Law of Intestate Succession,' 310 in Sessional Papers, The Stationery Office, London, 1951, p. 23.

45 See AEA (fn. 35), sections 46(1)(i), 47(2)(a) -(c); and Intestates' Estates Act 1952 (U.K.), Geo VI, Cap. 64, sections 15-16, Second Schedule.

46 Gallanis, T. P., *Inheritance Rights for Domestic Partners*, Tulane Law Review, vol. 79, no. 1, 2005, pp. 55–92.

47 Kerridge *et al.*, *op. cit.* (fn. 43), p. 2-6.

48 See Law Reform (Succession) Act 1995 (U.K.), Cap. 41, section 1(2) dealing with the deaths that occurred after 1st January 1996.

49 See Adoption and Children Act 2002 (U.K.), section 67, 144(4).

50 See Legitimacy Act 1976 (U.K., hereinafter LA, 1976), sections 4-5(1), 10(1).

51 See Family Law Reform Act 1987 (U.K.), Cap. 42, section 18.

52 See Human Fertilization and Embryology Act 2008 (U.K.), Cap. 22, section 27.

53 Sherrin *et al.*, *op. cit.* (fn. 24), pp. 10-18.

ly[54]; this was due to the concern that the statutory legacy could be inadequate to ensure that the surviving spouse retains the family house. The Commission also assumed that this kind of inheritance would occur where the deceased's children were independent adults and would not be entitled to their deceased parent's property over their surviving parent. The aged surviving spouse is to inherit the intestate's property based on his/her financial need.[55]

The second recommendation made by the same Commission in 2011 avoided the controversial part, which advised the surviving spouse to inherit the whole of the intestate property to exclude the rest of the surviving family members. Instead, the Law Commission *On intestacy and family provision claims on death* recommended that the surviving spouse be permitted to inherit enough estate to live contentedly.[56] The Commission recommended for the broader definition of the intestate personal belonging to have all property come within its ambit other than money, shares, and any assets which form part of an investment.[57] It also sought to include the cohabitant in the intestate property, in particular situations, to be allowed to have a stake in their deceased cohabitant's property.[58] Surprisingly, the Commission recommended that the deceased's children from the previous relationship not be accorded any special treatment in the inheritance process.[59]

2.3. The development of Australian (New South Wales) succession law in the 20th–21st century

English laws dealing with intestacy were also adopted in Australia[60], including the practice of male primogeniture, in which the property devolved to the

[54] See U.K., The Law Commission, *The Law Commission Report on Family Law, Distribution on Intestacy* (hereinafter: Law Com. No. 187), Her Majesty's Stationery Office, London, 1989, sec. 28.

[55] See Law Com. No. 187, (fn. 54), sect. 23, 26, 42.

[56] Renwick, S., *Responsibility to Provide: Family Provision Claims in Victoria*, Deakin Law Review, vol. 18, no. 1, 2013, pp. 149-190.

[57] See U.K. The Law Commission, *Intestacy and Family Provision Claims on Death* (hereinafter: Law Com. No. 331), The Stationery Office, London, 2011, § 2.85, 2011 Law Commission Intestacy and Family Provision Claims on Death Report (hereinafter: Report), § 2.111; Recommendation 9.3.

[58] See Law Com. No. 331, (fn. 57), Report, (fn. 55), Part 8. Recommendations 9.26-9.32.

[59] See Law Com. No. 331, (fn. 57), Report, (fn. 55), §§ 2.67-2.85.

[60] Australian Courts Act, 1828 (U.K.), Geo. IV, Cap. 83, section 9. https://www.legislation.act.gov.au/a/2002-49 (01 March 2021).

eldest male member of the family, but this was later abolished with the reforms in succession law that followed.[61] During the call for independence across the world, Australia got the opportunity to have some independence in enacting laws on issues affecting Australia, including intestacy matters. Australia being a federal state, the laws dealing with intestacy have been devolved to the states, making it a bit complicated.[62] The reforms initiated by various states differ, while at the same time, most states have intestate laws which are similar to the one practiced in England. In general, the Australian intestacy laws provide for the bulk of the deceased's property to be inherited by the immediate family members, i.e., the surviving spouse and the issues, and in case of remnants, then the rest of the family members get that part.[63] The best approach to understanding the succession law in Australia is by going through the previous laws in New South Wales (hereinafter N.S.W.) before the current 2006 Succession Act.[64] The then laws (N.S.W.) were in agreement with the Administration of Estates Act of 1925 in England, especially in combining the reality and personality, the equality of spouses, in other words, permitting widows and widowers to inherit the property of the deceased spouse as the said Act did it in England.[65]

During the 20th century, the intestacy laws of N.S.W. included children acquired through adoption[66], born out of wedlock[67], within wedlock[68], and the children begotten through science or artificial insemination[69], but in contrast

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61 Burns, F., *The Changing Patterns of Total Intestacy Distribution between Spouses and Children in Australia and England*, University of New South Wales Law Journal, vol. 36, no. 2, 2013, pp. 470–513.

62 Croucher, R. F.; Vines, P., *Succession: Families, Property and Death*, 3rd ed., LexisNexis Butterworths, New South Wales, 2009, p. 5.

63 *Ibid*., pp. 5.9–5.38.

64 Australia, NSW, Law Reform Commission, Uniform Succession Laws: Intestacy (Report No. 116), Sydney, 2007, (hereinafter: NSW Law Reform Commission Report No. 116), p. 1. For some actualities see e.g., Burns, *op. cit.* (fn. 61), 470.

65 Certoma, G. L., *Intestacy in New South Wales: The 1977 Statutory Amendments*, The Australian Law Journal, vol. 53, 1979, p. 77.

66 See Adoption of Children Act 2000 (NSW), No. 75, section 95; http://classic.austlii.edu.au/au/legis/nsw/consol_act/aa2000107/s95.html (01 March 2021).

67 See Status of Children Act 1996 (NSW), section 5 & 8. http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_act/soca1996199/. (15 June 2018).

68 See Marriage Act 1961 (Commonwealth), No. 12, section 89–91; https://www.legislation.gov.au/Details/C2016C00938 (01 March 2021).

69 See Status of Children Act 1996 (NSW), section 14. (In regard to artificial insemination).

with the prevailing laws in England, in N.S.W., if the cohabitants had been living together for continuous two years, the surviving one could inherit the intestate's property.[70]

This succession Act was initially about the testamentary succession, but later on, Succession Amendment (Intestacy) Act 2009 (N.S.W.)[71] introduced the intestacy provisions.[72] This was due to the recommendation given by the N.S.W. law reform commission on *Uniform Succession Laws on the part of an intestate.*[73] In the recommendation, the term 'spouse' was given a broad definition to include same-sex marriage, as long as the union was registered.[74] Cohabitants are also permitted to inherit the intestate's property if they can prove that they have been together for at least two continuous years before the deceased's passing or if the relationship brought forth a child.[75] This has given the position of a spouse more power while lessening one of the immediate relatives because this ensures that a spouse is considered first in the division of intestate property to the detriment of the other relatives, including the deceased's children. Where there is no surviving issue, then the whole of the deceased's property is given to the surviving spouse; in cases where the deceased has left behind a spouse and a child, sired by them, then, the spouse can rightfully assume the ownership of the whole of the intestate's property.[76] If the deceased has not left a spouse but is survived by children, then they are equally entitled to the intestate's property regardless of their gender.[77] If the deceased had more than one spouse or, while married, had an issue out of wedlock, then all the surviving spouses can claim his property[78] unless they have agreed to share the property in another manner.

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[70] See Wills, Probate and Administration Act 1898 (NSW), sections 61a (2), 61b(3a), 61b(3b); https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/act-1898-013#sec (01 March 2021).

[71] McGowan, P., *Recent Amendments to the Succession Laws in New South Wales*, Elder Law Review, vol. 6, no. 1, 2010, pp. 1–17.

[72] See Succession Amendment (Family Provision) Act 2008, No. 75 (NSW), Section 59; https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2008-075#sec.3. (01 March 2021).

[73] See NSW Law Reform Commission Report No. 116, (fn. 65), p. 5.

[74] See Relationships Register Act 2010 (NSW), sections 3–6.

[75] See Succession Act 2006, No. 80, (NSW), (hereinafter: SA, 2006) section 105; https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/act-2006-080 (01 March 2021).

[76] See SA, 2006, (fn. 75), section 112.

[77] See SA, 2006, (fn. 75), section 127(1) & 127(3).

[78] See SA, 2006, (fn. 75), section 125.

If there is no child or spouse surviving the deceased, then the property left behind would be distributed among the relatives close to the intestate, beginning with the parents.[79] If there are no parents, the siblings of the deceased would be considered next.[80] The grandparents would be next if there are no siblings or if the property remains[81], and the last to be considered are the intestate's Aunts and Uncles, inclusive of their children.[82]

Following *the Law Reform Commission*[83] proposals, amended Succession Act 2006 was enacted, which has to a more significant part been borrowed from the intestacy laws of England; however, the Australian reform has included the children born out of wedlock by the intestate into the sharing of the deceased's estate. This was done to alleviate the concern that the surviving spouse might deny the children of the deceased born outside marriage a share of the intestate's estate.[84] The Law Reform Commission also ensured that the surviving spouse is well taken care of by giving them the full ownership of the deceased spouse's personal properties, apart from those meant for businesses[85], and the surviving spouse also gets one-half of the residue of the intestate property; however, the assumption has always been that the surviving spouse would be old[86] and in need of financial assistance to survive, hence the favouritism over the intestate surviving children, and that the children would be adults and independent.[87]

Section 101 of the Australian Succession Act 2006 defines native Australians as *Aboriginal or Torres Strait Islander descent,* and according to sections 133, 134 and 135, the distribution of their estate is first, *spouse and children;* second, *parents;* third, *siblings;* fourth, *grandparents…* fifth, *aunts and uncles* and finally cousins.[88]

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79 See SA, 2006, (fn. 75), section 128.

80 See SA, 2006, (fn. 75), section 129.

81 See SA, 2006, (fn. 75), section 130.

82 See SA, 2006, (fn. 75), section 131.

83 See NSW Law Reform Commission Report No. 116, (fn. 64).

84 See Law Com. No. 331, (fn. 57), Report, (fn. 57), sects 2.67&2.85.

85 See NSW Law Reform Commission Report No. 116, (fn. 64), §§ 4.1-4.30; Recommendation 5.

86 See NSW Law Reform Commission Report No. 116, (fn. 64), §§ 3.23-3.25, Recommendation 8.

87 See *Competing Claims: Spouses v Adult Children*, Hentys Estate Lawyers (blog), January 29, 2018, https://www.willcontesting.com.au/competing-claims-spouses-v-adult-children/.

88 Vines, P., *Consequences of Intestacy for Indigenous People in Australia: The Passing of Property and Burial Rights*, Australian Indigenous Law Reporter, vol. 8, no. 4, 2003-2004, pp. 1–10.

3. THE KENYAN LAWS OF INTESTACY

3.1. The diverse systems of intestacy in Kenya under British colonial rule

In Africa, there are contradictions of laws concerned with family matters[89], causing issues with the codification of laws concerning family, custom, and matrimonial property[90], which has also created problems regarding the laws dealing with intestacy.[91] In the last third of the 20th century, among African countries, it was not only the intestacy system of Kenya which, for similar reasons, had to be reformed, there were others as well, like Ghana[92], but I will focus here on Kenya as the example I am closest to.

Kenya was under British rule until 1st June 1963, when she became independent. While it was a colony of England, the laws that operated in Kenya were enacted by the colonial government, apart from the African customary laws applied to Africans by the 1897 Order-in-Council.[93] During the colonial period, but also after gaining independence, Kenya's succession law was divided into various sections based on tribe, religion, and socio-cultural organization. Before

[89] In a wider sense see e.g., Bakari, A. H., *Africa's Paradoxes of Legal Pluralism in Personal Laws: A Comparative Case Study of Tanzania and Kenya*, African Journal of International and Comparative Law, vol. 3, no. 3, 1991, pp. 545–557; Mamashela, M.; Freedman, W., *The Internal Conflict of Law and the Intestate Succession of Africans*, Journal of South African Law, no. 1, 2003, pp. 201–207.

[90] Cotran, E., *Marriage, Divorce and Succession Laws in Kenya: Is Integration or Unification Possible?*, Special Fortieth Anniversary Number Liber Amicorum for Professor James S. Read, Journal of African Law, vol. 40, no. 2, 1996, pp. 194–204.

[91] For further issues see e.g. Bennett, T. W., *The Conflict of Personal Laws: Wills and Intestate Succession*, Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law), vol. 56, no. 1, 1993, pp. 50–64.

[92] Woodman, G. R., Ghana Reforms *the Law of Intestate Succession,* Journal of African Law, vol. 29, no. 2, 1985, pp. 118–128; Coldham, S., *The Wills and Administration of Testate Estates Act 1989 and the Intestate Succession Act of 1989 of Zambia*, Journal of African Law, vol. 33, no. 1, 1989, pp. 128-132; Hammond, A., *Reforming the Law of Intestate Succession in a Legally Plural Ghana*, Journal of Legal Pluralism and Unofficial Law, vol. 51, no. 1, 2019, pp. 114–139.

[93] Cotran, E., *The Development and Reform of the Law in Kenya*, Journal of African Law, vol 27, no. 1, 1983, pp. 42-61.

the Law of Succession Act of 1981 and the consolidation of different rules[94], four different sets of laws were dealing with succession, and they were as follows:

- The African Wills Act of 1961; was exclusive to indigenous Kenyans and Asian-Kenyans.
- The Hindu Succession Act 1956; applied to Kenyans of Asian descent, most so those practicing the Hindu religion.
- Mohammedan, marriage, and divorce Act 1920; this applied to Kenyans practicing the Islamic faith.
- The Indian Succession Act 1925; was applicable to Kenyans of European and Indian origin.

Additionally, there was also African customary law, which was applicable to Kenyans of African descent before 1981, so this will be explained first.

3.1.1. The Law of succession that was applicable to indigenous Africans

The indigenous Kenyans of various tribes were permitted under colonial rule to follow their customs in matters of succession, as long as they were not contrary to the written laws, justice, morals, and constitution.[95] The essential principles of customary laws were that land as a measure of wealth belonged to the clan, and upon the death of a father, the eldest son or male member of the family would inherit, women were subservient to male, and there was no freedom of testamentary dispositions[96]; a woman had no right over her father's or husband's property – this was predominantly practiced by the *Nilotes* which included the *Luos* and the *Kalenjins*, and some *Bantus* like the *Luhya* and the *Kisiis* embraced the practice as well.[97] As time progressed, some Africans working with the missionaries joined Christianity and in 1879 Native Courts Regulation Act was introduced to Kenya by the colonisers. Article 64 of the Native Courts Regulation Act governed Africans who had embraced Christianity, which provided testamentary freedom, so Kenyans who were Christians

[94] See Succession Act 1981 (Kenya) (hereinafter: SA, 1981), which consolidated all the succession laws. http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/LawofSuccessionAct_Cap160.pdf. (01 March 2021).

[95] The 1897 Order in Council, (hereinafter: OC, 1897), Art. 2.

[96] Owino, L., *Application of African Customary Law: Tracing Its Degradation and Analysing the Challenges It Confronts*, Strathmore Law Review, vol. 1, no. 1, 2016, pp. 143–164.

[97] Okumu, O. S., *The Concept of Intangible Cultural Heritage in Kenya*, in: Deisser, A.-M.; Njuguna, M. (ed.) *Conservation of Natural and Cultural Heritage in Kenya*, 1st ed., UCL Press, London, 2016, pp. 45–58.

could dispose of their property as they wished.[98] However, it was amended in 1902 and renamed the African Christian Marriage and Divorce Ordinance; section 39 of the ordinance specifically dealt with the inheritance rights of the African Christian. The Indigenous Africans who chose to be governed by the 1902 ordinance had to give up their African ways of living and fully embrace western life, including monogamy.[99]

However, in 1904 with the enactment of *The Native Christian Marriage and Divorce Order No. 9*, all Africans, whether Christian or not, were removed from the governance of any Act that governed Europeans and Asians and were relegated to the African customary laws. The matter was interpreted in the *Benjawa Jembe vs. Priscilla Nyondo*[100], where the parties were married in Anglican church under the western laws. Upon the death of the husband, the wife wanted the property to be dealt with under the Indian Succession Act, which allowed the property to devolve to a widow, and not African customary law; the Court held that just because the intestate married under the western laws in Anglican Church, that cannot change his birthplace. The customs applied to him, so his properties were to be dealt with under the customs of the deceased who belonged to the *Giriama tribe*. The matter came up again in *Miney Francis vs. Samwel Batholomew*[101], and the Court supported the earlier decision that native Kenyans were to be governed by their customs and not the Indian succession Act, even though they married under a different law. In *Re Maangi*[102], the issue again came up for the decision by the Court, the question presented was, "if the Indian Probate and Administration Act came within the terms' devolution of property on death or other matters of personal law," and the Court responded that it did not, which further cemented the earlier decision that native Kenyans were not governed by any other laws other than their various customary laws in matters of succession.[103]

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98 MacDougall, K., *Tribal Rights in Kenya and Zimbabwe: To Promote or Not to Promote, That is the Question*, Connecticut Journal of International Law, vol. 27, no. 1, 2011, p. 167.

99 Further see e.g. Kuria, G. K., *Christianity and Family Law in Kenya*, East African Law Journal, vol. 12, no. 1, 1976, pp. 33–82.

100 *Benjawa Jembe v. Priscilla Nyondo* (1912)4 EACA 160,161, http://kenyalaw.org/caselaw/cases/view/38809 (01 March 2021)

101 *Miney Francis v. Samwel Bathlomew* 1 KLR 24- HCCC NO. 286 OF 1950.

102 Re Maangi (1968) EA 637.

103 Kamau, *op. cit.*, (fn. 8) p. 40.

3.1.2. The Law of succession that was applied to Hindus in Kenya

In 1896, the English colonisers in Kenya brought Indians from India (a country that was also their colony) to build a railway line linking Kenya, Uganda, and Tanzania; after the railway line was completed, the Indians chose Kenya as their home, and then some laws that were operating in India were brought to Kenya to govern them;[104] this subchapter is about that.

With the introduction of the Indian Wills Act in 1898 to Kenya, those professing the Hindu religion became governed by it. However, this Act left out the intestate succession, which was still governed by the Hindu Customary laws.[105] The application of the Act went on until 1956 and the coming into force of the Hindu Marriage, Divorce and Succession Act, which applied to those professing Hindu religion and died in Kenya and those who got married under the laws that were applicable in Kenya at that time.[106] The Court interpreted the matter of intestate succession regarding Hindus in the case *Bessan Kaur v. Rattan Singh*[107], where a widow sought to inherit her deceased husband's properties in Kenya, which were given to the only son. The Court decided that the marriage having been solemnised outside Kenya, the widow was not entitled under the Hindu Marriage, Divorce, and Succession Act to inherit any part of it.[108] The statute was later divided into the Hindu Marriage and Divorce Ordinance, applied to Kenyans of Asian descent, most so those practicing the Hindu religion and, the Hindu Succession Act 1956; this recognised intestate succession and governed it.[109] The Act permitted inheritance of an intestate's property and classified the heirs as follows:

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[104] Singh, C., *Hindus and Hindu Law in Kenya*, East African Law Journal, vol. 7, no. 1, March 1971, pp. 69–75.

[105] Derrett, J. D. M., *The Administration of Hindu Law by the British*, Comparative Studies in Society and History, vol. 4, no. 1, 1961, pp. 10–52. (The British government brought Indians in Kenya to help build the railway line and the emigrants chose Kenya as their home, and so the then colonisers government transplanted the laws they had enacted in India, to be used in Kenya to govern Kenyans of Indian origin.)

[106] Cotran, *op. cit.*, (fn. 90), 195–199; Order No 22 of 1898 That Applied to Kenya the Hindu Wills Act That Was a Mere. Course Hero, accessed May 12, 2021, https://www.coursehero.com/file/p489jod/Order-No-22-of-1898-that-applied-to-Kenya-the-Hindu-Wills-Act-that-was-a-mere/.

[107] 25 KLR 24.

[108] Kameri-Mbote, P. G., *Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences,* Verfassung und Recht in Übersee = Law and Politics in Africa, Asia and Latin America 35, no. 3, 2002, pp. 373–398.

[109] Cotran, *op. cit.*, (fn. 90), pp. 200–204.

- Class I: Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre-deceased daughter; widow of a pre-deceased son; son of a pre-deceased son of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-deceased son 1 [son of a predeceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son].
- Class II – I. Father. – II. (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister. – III. (1) Daughter's son's son, (2) daughter's son's daughter, (3) daughter's son, (4) daughter's daughter. – IV. (1) Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter. – V. Father's father; father's mother. – VI. Father's widow; brother's widow. – VII. Father's brother; father's sister. – VIII. Mother's father; mother's mother. – IX. Mother's brother; mother's sister.[110]
- Where Class I were given the priority, if there is no survivor, then class II and the last to be considered were Class III.[111]

3.1.3. The Law of succession that applied to Muslims

In 1897, the Native Courts Regulation Ordinance Act, under Article 57, clarified that Muslims in Kenya, who were majorly Arabs, were governed by the Sharia laws as stated in Quran. The 1907 Native Courts Ordinance further cemented the Quran's applicability to Muslims in Kenya by creating the *Liwali courts* and giving the courts the exclusive jurisdiction to decide on marriage, divorce, unmarried minors, and inheritance. After gaining independence, the government of Kenya supported the Muslims by adding article 66 to the constitution of Kenya, which created *Kadhi's courts*.[112]

Under Quran, 2/3 of the property must be distributed under intestacy, whether there is a will or not. The definition is inclusive to cover widows, widowers,

[110] Derrett, J. D. M., *The Hindu Succession Act, 1956: An Experiment in Social Legislation*, American Journal of Comparative Law, vol. 8, no. 4, 1959, pp. 485–501.

[111] Derrett, J. D. M., *Comments with Reference to Hindu Law,* East African Law Journal, vol. 5, no. 1 and 2, March-June 1969, pp. 21–53.

[112] Constitution 1964, (defunct), (Kenya), Article 66. See e.g. Singh, C., *The Republican Constitution of Kenya: Historical Background and Analysis*, International and Comparative Law Quarterly, vol. 14, no. 3, 1965, pp. 878–949.

fathers, mothers, children, and Grandparents. A male descendant takes twice the amount a woman gets, and sons get over 2/3 the daughter's amount. If a widow and children survive the man, she will get an eighth of the estate, and if there are no children, she gets just a quarter of the estate. In polygamous unions, all the wives get to share an eighth of the estate if children survive the deceased, but without children, the wives would share half of the estate.[113]

3.1.4. The Law dealing with succession applied to Europeans

The modified English succession laws were governing Europeans who had chosen Kenya as their country. The ordinance in council enacted in 1897[114] brought Kenyans of European background within the ambit of the Indian Succession Act[115] (this law applied to Europeans in India and was brought by colonisers to Kenya). The statute catered for both testamentary and intestate succession. The later amendments to the Act provided for the freedom in bequeathing of property by will, which allowed the testator to pass the property to whomever he pleased, including the exclusion of the dependents.[116]

3.2. The procedure of intestate succession after the introduction of the Succession Act 1981

In Kenya, the consolidation of succession laws in force during colonisation into one Act was done in 1972, and after various amendments, it came into force on 1st July 1981.[117] The framers collected all the laws dealing with inheritance in Kenya that were either transplanted from England and their colonies abroad or enacted in Kenya by the coloniser and worked them into one document, which indicates the influence of the English coloniser in the framing of the Act.[118] However, when the Act came into force in 1981, the Muslim community in Kenya argued that it included the secular parts that were against the Islamic

[113] Ahangar, M. A. H., *Succession Rights of Muslim Women in the Modern World: An Analytical Appraisal*, Arab Law Quarterly, vol. 28, no. 2, 2014, pp. 11–35.

[114] See OC, 1897 (fn. 95), Art. 11(b).

[115] See Succession Act No. 10 of 1865 (Indian Law), https://babel.hathitrust.org/cgi/pt?id=hvd.hl68cf&view=1up&seq=5 (01 March 2021).

[116] See Commissions on the Laws of Marriage and Succession in Kenya, (fn. 3), p. 1.

[117] See Martin, R., *The Kenya Law of Succession Act, 1972*, East African Law Journal, vol. 10, no. 1, 1974, pp. 93–122.

[118] *Ibid*.

faith and it compromised their freedom of religion[119] as it was envisaged in section 78 of defunct Kenya's constitution[120], which led to the 1990 amendment of the succession Act to exclude Muslims.[121] Muslims were then allowed to follow the laws according to Quran and prophet Mohamed's writings and teachings. It suffices to add that between 1981 and 1990, the succession Act 1981, governed Muslims.[122] The current study deals with part V of the Act, which covers intestate succession.[123]

Kenya's succession Act 1981 (revised 2012) defines the intestate as *A person is deemed to die intestate in respect of all his free property of which he has not made a will capable of taking effect*.[124] The main reason for the intestacy law is to determine who is eligible to inherit the intestate property, as elaborated in the Act under Part V.[125] The Act goes ahead to state that it is applicable to all matters regarding succession that have arisen after it entered into force in July 1981.[126]

Kenya's succession law does not confer the right over intestate's property to cohabitants, and it limits the right to widow(s) of the deceased[127] over their deceased spouse's property. It confers the intestate property only to blood relatives, excluding the deceased's in-laws[128] (in case of a husband). The Kenyan rules of intestacy are similar to the ones in English Law to the extent that they cover only properties that can be otherwise disposed of by a will, which goes further

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119 See Cotran, *op. cit.* (fn. 90), *passim*.

120 The Constitution of Kenya Act 1969, No. 5 of 1969, accessed May 11, 2021: http://kenyalaw.org/kl/fileadmin/pdfdownloads/Constitution/HistoryoftheConstitutionofKenya/Acts/1969/ActNo.5of1969.pdf.

121 Ndzovu, H. J., *Muslim Politics in the Legislative, Judicial, and Constitutional Arenas*, in: *Muslims in Kenyan Politics: Political Involvement, Marginalization, and Minority Status*, Northwestern University Press, Evanston, 2014, pp. 107-138.

122 *Ibid.*

123 Daniels, R. J.; Trebilcock, M. J.; Carson, L. D., *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, The American Journal of Comparative Law, vol. 59, no. 1, 2011, pp. 111–178.

124 See SA, 1981 (fn. 94), section 34.

125 See, Ang'Awa J's analysis of Part V in In the Matter of the Estate of Benjamin Mugunyu Kiyo (deceased) Nairobi HCSC No. 2678 of 2001, http://kenyalaw.org/caselaw/cases/view/75383 (08 March 2021).

126 C.O.A. in Roman Karl Hintz v. Mwang'ombe Mwakima [1984] eKLR; http://kenyalaw.org/caselaw/cases/view/8532/ (08 March 2021).

127 Badness, K., *Till Death Do Us Part: The Ailment Affecting the Widow's Life Interest in Kenyan Intestate Succession*, Strathmore Law Review, vol. 4, no. 1, 2019, pp. 1–18.

128 See SA, 1981 (fn. 94), section 26.

to exclude properties held jointly or the ones that devolve through survivorship or life policies held under trust or *donatio mortis causa*.

The Kenyan Succession Act under section 35 awards women life interest in the intestate's property. The Act states *that where a spouse and children or child survive the deceased, the spouse is entitled to the intestate's personal and household properties, exclusively, and a life interest to the residue of the deceased property, which comes to an end when the widow remarries or dies*. The same is not the case if the surviving spouse is a widower. The widower can remarry and still hold on to the life interest.[129] The Act goes on to state that, if there is a surviving spouse but no child, then the survivor is entitled to the entire household belongings of the deceased and the first ten thousand shillings out of the remaining deceased's property, or twenty percent, whichever is greater, plus a life interest of the whole of the residue.[130]

In case the deceased being a man was polygamous and is survived by children from various women and a wife or wives, then the law allows the property to be divided to everyone, taking into consideration the number of children in each house[131]; this part to some extent is similar to the Australian law of succession in cases where the deceased before passing was married severally and had kids with more than one woman.

Kenya's Succession Act does not cover the estate of an intestate that occurred before 1981.[132] However, in conforming to the Act, the customs that are not contrary to morality and justice can be applied to cases that happened before the Kenyan Law of Succession Act of 1981.[133] The law of succession applicable in Kenya gives the government power to designate specific property deemed for Agricultural purposes, including the ones meant for livestock rearing, as excluded from the intestacy succession.[134] The 1981 Act has thus extended the use of customary succession laws to communities considered pastoralists and nomads, such as *Marsabit, Narok, Tana River, Samburu, West Pokot, Turkana, Isiolo, Mandera, Wajir, Garissa, Lamu, and Kajiado*.[135] The justification for the exemption of the areas mentioned above is that there is communal ownership of property,

[129] See SA, 1981 (fn. 94), section 35.

[130] See SA, 1981 (fn. 94), section 36.

[131] See SA, 1981 (fn. 94), section 40.

[132] See SA, 1981 (fn. 94), section 2(1).

[133] See SA, 1981 (fn. 94), section 2(2).

[134] See SA, 1981 (fn. 94), section 32.

[135] Legal Notice No. 94 of 1981, Page 92 of 249. https://www.coursehero.com/file/psrv1om/81-By-Legal-Notice-No-94-of-1981-Page-92-of-249-Mayende-P-A-Compiled-the-Act/ (Accessed on 8th March 2021).

and the tribes are nomads who move from one place to the next in search of water and grass for their cattle.[136] The interpretation of exemption was brought to the High Court in *Mwathi vs. Mwathi and another.*[137] In this case, the deceased's will was declared invalid by the High Court, and the property of the deceased was dealt with under intestate succession; the deceased was unmarried and was survived by a brother and two sisters. The Court directed the siblings to share the intestate's properties equally, which aggrieved the brother, and he appealed to the Court of Appeal. The Court of Appeal agreed with the decision of the High Court to the extent of invalidation of the will and declaration of the deceased as an intestate but directed the deceased's customary laws to apply to the property instead of the Succession Act 1981.

A similar matter came for determination in the *Estate of Benson Kagunda Ngururi*[138]; the deceased left behind a property in Nakuru District. The point decided was whether the customary laws applied to the intestate properties. The Court determined that because the deceased passed on after the coming into force of the Act, the properties left behind were to be dealt with under the Kenyan Succession Act 1981, under part V of the Act and Nakuru not being part of the excluded areas of the application of the Act under Legal Notice No. 94 of 1981, the property could certainly not be dealt with under the deceased's customary laws. The matter of exclusion or suspension of the Law of Succession Act of 1981 in the areas mentioned was brought up again for determination in the case of *the Estate of Elijah Mbondo Ntheketha (deceased)*[139], and *Justice Koome* clarified that the areas included in the Gazette notice following section 32 of the Act are exempted from the application of the Act.[140] The exclusion of the application of Part V of the Act remained controversial in Kenya even later on;

[136] See Munene, I. I.; Ruto, S., *Pastoralist Education in Kenya: Continuity in Exclusion in Arid and Semiarid Lands (ASAL)*, Journal of Third World Studies, vol. 32, no. 1 (2015) pp. 133–158.

[137] Gicheru, Kwach and Shah JJa (1995-1998) 1 EA 229, https://www.coursehero.com/file/pa2k0vb/In-Mwathi-vs-Mwathi-and-another-1995-1998-1-EA-229-Gicheru-Kwach-and-Shah-JJA/ (24 Febr. 2021).

[138] Ondeyo J. in the Matter of the Estate of Benson Kagunda Ngururi (deceased) Nakuru HCSC No. 341 of 1993.

[139] Nairobi Hcsc No. 193 of 1997. http://kenyalaw.org/caselaw/cases/view/130550. (08 March 2021).

[140] "Succession Cause 193 of 1997 – Kenya Law", accessed May 10, 2021, http://kenyalaw.org/caselaw/cases/view/130550.

in *Rono v. Rono*[141], Kenya's Court of Appeal was moved to interpret sections 32 and 33 of the Succession Act 1981, and the Court reiterated that the Act is evident in the areas where it is not applicable, and if the Act does not exclude the area in question, then it is within the ambit of the Act. The property of intestate in those areas must be dealt with under part V of the Act.

4. DISTINCTIONS AND SIMILARITIES OF KENYAN, ENGLISH, AND AUSTRALIAN INTESTACY LAWS

There are cultural, religious, and historical differences in the three countries; in Kenya, Muslims are governed by the Quran in matters dealing with succession and family and there is the extension of tribal customs to specific regions and tribes, which is not the case in England, in which, the same law of succession applies to everyone within the geographical area of England; however, in the greater United Kingdom, the law of succession applicable in Scotland[142] is different from the one in England. In the common dealing with reality and personality[143], every heir has an equal right to the intestate's property[144], apart from polygamy. In Kenya, Australia, and England, the hotchpot was removed.[145] But still, there are some differences worth mentioning.

Male primogeniture: Kenya's customs dealing with intestate succession were similar to the laws that were in operation in Australia and England before the current modern laws of succession, where preferential treatment was accorded

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141 Omolo, O'Kubasu and Waki JJa on Rono v. Rono and another (2005) 1 EA 363. https://opil.ouplaw.com/view/10.1093/law:ildc/1259ke05.case.1/law-ildc-1259ke05 (08 March 2021).

142 See Succession (Scotland) Act 1964 (U.K.), section 41. https://www.legislation.gov.uk/ukpga/1964/41/contents (08 March 2021). For recent details see e.g. Norrie, K., *Reforming Succession Law: Intestate Succession*, Edinburgh Law Review, vol. 12, no. 1, 2008, pp. 77–80; Burns, F., *Surviving Spouses, Surviving Children and the Reform of Total Intestacy Law in England and Scotland: Past, Present and Future*, Legal Studies, vol. 33, no. 1, 2013, pp. 85–118.

143 In a wider sense see e.g. Cushman, B., *Intestate Succession in a Polygamous Society*, Connecticut Law Review, vol. 23, no. 2, 1991, pp. 281–332.

144 Freedman, M., *Colonial Law and Chinese Society*, Royal Anthropological Institute of Great Britain and Ireland, London, 1952, p. 115.

145 Mackie, K., *Principles of Australian Succession Law*, LexisNexis Butterworths, Sydney, 2007, § 9.15.

to the eldest male over the rest of the family.[146] Under the customary laws, the firstborn son had the priority to inherit the father's property over the rest of the family in all three societies. However, the modern intestacy laws in all three societies have abolished male primogeniture rule.[147]

On *same-sex couples and children born out of wedlock* right to intestacy: Australian laws[148] and English laws[149] recognize the rights of same-sex couples and children born out of wedlock[150] as heirs of the intestate. Kenya does not recognise same-sex marriages, and for that matter, they are not accorded the right of inheritance. In Kenya, same-sex relationships are criminalized and at no point recognised by the laws.[151] However, both the 2010 Kenya's Constitution[152] and the Succession Act[153] recognise child(ren) born out of wedlock as legitimate heirs of the intestate.[154]

Personal effects: The Law of succession in all three countries grants widows the personal effects of the intestate, including the matrimonial property and life interest in the residue, but the rights end when the widow dies or gets remarried.[155] However, Kenyan law is different from English and Australian. If the spouse, children, and any other relative who until his death were dependent on the deceased, survive him, the widow will not be entitled to the whole

146 Omotola, J. A., *Primogeniture and Illegitimacy in African Customary Law: The Battle for Survival of Culture*, Indiana International & Comparative Law Review, vol. 15, no. 1, 2005-2004, pp. 115–146.

147 See Burns, *op. cit.* (fn. 61), p. 470.

148 See Relationships Register Act 2010 (NSW), Part 2, section 5-9, and Civil Unions Act 2012 (Australia), section 6-10. https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2010-019 (08 March 2021).

149 See Civil Partnership Act 2004 (U.K.), 2004, cap. 33, section 71 & Schedule 4.

150 Mackie, *op.cit.*, (fn. 145), § 9.9.

151 See Smith, G.; Bartlett, A.; King, M., *Treatments of Homosexuality in Britain since the 1950s. An Oral History: The Experience of Patients*, BMJ, 328, no. 7437 (February 21, 2004) pp. 427–430, https://doi.org/10.1136/bmj.37984.442419.EE. "Kenya's Judges Uphold Laws That Criminalize Gay Sex," NPR.org, accessed May 12, 2021, https://www.npr.org/2019/05/24/726541735/kenyas-judges-uphold-laws-that-criminalize-gay-sex.

152 See the Constitution of Kenya 2010, Art. 27(1)(4) and 53(1)(e). To family law issues see in context e.g. Banda, F., *Changing the Constitution and Changing Attitudes: Recent Developments in Kenyan Family Law*, International Survey of Family Law, 2014, pp. 255–274.

153 See SA, 1981 (fn. 94), section 3(2).

154 See LA, 1976 (fn. 50), Cap. 3, sections 5(1)-(4), 10(1).

155 See LA, 1976 (fn. 50), Cap. 3, sections 5(1)-(4), 10(1).

property of the deceased. She will have her percentage, which is 15 percent, and the personal effects of the deceased. The remainder will be shared among the surviving dependents, so it can be said that the law dealing with succession in Kenya is not only focused on the spouses but also on dependents. Even though this is a point of similarity in applying the law of succession in those three jurisdictions, it is also a point of contrast; in England, if there is a surviving spouse, the blood relatives cannot inherit the deceased's property. At the same time, in Kenya, the law has provided for dependents, including blood relatives and children, the right to inherit the intestate's property, whether there is a surviving spouse or not.[156]

Parents of the intestate: Kenyan law grants parents of the intestate some entitlement different to those provided under the scheme in England and Australia. In Kenya, if the intestate left behind a living parent, issues, and a spouse, the parents are not automatically entitled to the property unless they can prove that they (parents) were entirely dependent on the deceased, but in case the survivors are just the parents and the spouse without any issue, then the parents are entitled to a share of the estate, and the whole estate reverts to the parents upon either the death of the spouse or when she gets remarried.[157] The difference is that in Australia when the deceased is survived by both the parents and the spouse, the spouse is entitled to the whole estate unless the deceased has left behind an issue from a different or previous relationship. If the intestate has left a surviving child and his parents in Australia, the child will be entitled to the whole estate without considering the parents[158]; the parents get to inherit the entire estate only if a child and a spouse do not survive the deceased.[159]

In Kenya, to protect the *widow* from her in-laws, the customary laws have been made inapplicable in many parts of the country. The laws have recognised the widow's right to claim and use the deceased's matrimonial property and personal and household effects. At the same time, a life interest of the residue has been granted to the widow until the widow dies or remarries.[160] In England and Australia, there have been talks about creating a scheme in which the family/matrimonial property is protected from being sold or auctioned to grant the children their shares[161], so this would be the area where Kenya is slightly

156 See Kamau, *op. cit.*, (fn. 8) p. 140.

157 See SA, 1981 (fn. 94), section 39.

158 See SA, 2006 (fn. 75), section 127.

159 See SA, 2006 (fn. 75), section 128.

160 See SA, 1981 (fn. 94), section 35 (1).

161 See 2009 LC Consultation Paper, (fn. 5), §§ 3.22-3.28.

ahead. Blood relatives of the intestate are the subject of the intestacy laws in Kenya, but it deems the deceased owes a duty to the spouse he is leaving behind – that is the reason when just the spouse survives the deceased, and the survivor inherits no one else, then the whole property.

Kenya's law of succession recognises the *legitimate, legitimised, and adopted children* of the intestate. The deceased's duty to the mentioned descendants is acknowledged, which contrasts with the English laws where children can inherit only when the spouse is no longer surviving or if the estate is extensive that it can be shared. In Australian law, children can inherit only if there is no surviving spouse. Even though the law of succession in Kenya is more spouse-centred, it does not ignore the children and the parents of the deceased. In case the deceased is a woman, all of her property is inherited by her spouse. Suppose she was not married under section 39 of the succession Act. In that case, the parents of the deceased are entitled to inherit if there is no surviving spouse and issues of the intestate[162], which is similar to the provision in Australian and English laws of succession, so it is possible for parents of the deceased not to inherit from the estate of an intestate if there are surviving issue(s) and/or spouse.

Lastly, on the administration of the intestate's property: English and Australian law of succession can be contrasted in the context of intestacy in that; parents of the deceased, in England, are not part of those who can apply to be a representative or administrator under the family provision scheme[163], or under the N.S.W. scheme of succession, but still, the category of those who can apply has been broadened in N.S.W. to include anyone having been dependent on the deceased, before the death[164]; this is similar with the Law in Kenya, which allows anyone to apply for the letter of representation as long as they can show some connection to the deceased.[165] So, under Kenyan Law of succession and NSW-laws of succession, any parent who can show that he or she was dependent of the deceased before the deceased's passing, is permitted to apply for the letter of representation.

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[162] Henrysson, E.; Joireman, S. F., *On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya*, Law & Society Review, vol. 43, no. 1, 2009, pp. 39–60.

[163] See generally the Inheritance (Provision for Family and Dependants) Act 1975 (U.K.), Cap. 63, section 1.

[164] See SA, 2006, (fn. 75), section 57(1)(e).

[165] See SA, 1981 (fn. 94), section 50.

5. CONCLUSION

Framing the intestacy laws is rife with complexities and risk since the laws must align with the possible wishes of the intestate – how he (intestate) would have wished his property be distributed – and those of a community he or she lived in. Kenya's 1981 Succession Act resulted from the consolidation of the colonisers' laws fused with some of the good customs that Kenyans practiced before and during colonisation. The impact of the English laws can be seen in part V of the Act, which deals with intestate succession, which has heavily borrowed from the laws dealing with intestacy in England. The 19th-century laws and customs of succession, especially the parts dealing with intestacy, were against some of the closest members of the deceased's family, especially the women. At the dawn of the 21st century, Australia and England have made appreciable strides towards making changes to intestacy laws to deal with discrimination that existed before. From the 1970s up to date, Kenya has made steps, including the amendment of the Succession Act to protect the interests of the widows in matters of intestate succession. Some of the customs used against women to deny them the right to inherit their spouse's property have been dealt a death blow by the Succession Act of 1981 and the subsequent amendments, which do not discriminate based on gender. In Kenya, the nature of family inheritance is a bit larger than in England and Australia, a surviving spouse is entitled to the whole property only if the deceased left no surviving issue or parents, and the widow's inheritance is terminated if she gets remarried, something that is not the case in England and Australia.

BIBLIOGRAPHY

1. Monographs, books, studies in books

Baker, J. H., *An Introduction to English Legal History*, 4th ed., Butterworths, London, 2002

Croucher, R. F.; Vines, P., *Succession: Families, Property and Death*, 3rd ed., LexisNexis Butterworths, New South Wales, 2009

Deisser, A.-M.; Njuguna, M. (ed.), *Conservation of Natural and Cultural Heritage in Kenya*, 1st ed., U.C.L. Press, London, 2016

Freedman, M., *Colonial Law and Chinese Society*, Royal Anthropological Institute of Great Britain and Ireland, London, 1952

Holdsworth, Sir W., *A History of English Law*, vol. 3, 3rd ed., Methuen and Co. Ltd., London, 1923

Kerridge, R.; Brierley, A. H. R.; Parry, D. H., *Parry, and Kerridge: The Law of Succession*, 12th ed., Sweet & Maxwell/Thomson Reuters, London, 2009

MacFarlane, A., *The Origins of English Individualism: The Family Property and Social Transition*, Basil Blackwell, Oxford, 1978

Mackie, K., *Principles of Australian Succession Law*, LexisNexis Butterworths, Sydney, 2007

Musyoka, W., *Law of Succession*, African Book Collective Publishers, Kenya, 2006

Ndzovu, H. J., *Muslims in Kenyan Politics, Political Involvement, Marginalization, and Minority Status*, Northwestern University Press, Evanston, 2014

Okumu, O. S., *The Concept of Intangible Cultural Heritage in Kenya*, in: Deisser, A.-M.; Njuguna, M. (ed.), *Conservation of Natural and Cultural Heritage in Kenya*, 1st ed., U.C.L. Press, London, 2016, pp. 45–58.

Sherrin, C. H.; Bonehill, R. C.: *The Law and Practice of Intestate Succession*, 3rd ed. Thomson and Sweet & Maxwell, London, 2004

2. Journal Articles

Ahangar, M. A. H., *Succession Rights of Muslim Women in the Modern World: An Analytical Appraisal*, in Arab Law Quarterly 28/2 (2014) pp. 11–35.

Asiema, J. K., *Gender Equity, Gender Equality, and the Legal Process: The Kenyan Experience*, in Symposium: Africa in the Third Millennium: Legal Challenges and Prospects. Transnational Law & Contemporary Problems 10/2 (Fall 2000) pp. 561–582.

Badness, K., *Till Death Do Us Part: The Ailment Affecting the Widow's Life Interest in Kenyan Intestate Succession*, in Strathmore Law Review 4/1 (2019) pp. 1–18.

Bakari, A. H., *Africa's Paradoxes of Legal Pluralism in Personal Laws: A Comparative Case Study of Tanzania and Kenya*, in African Journal of International and Comparative Law 3/3 (1991) pp. 545–557.

Banda, F., *Changing the Constitution and Changing Attitudes: Recent Developments in Kenyan Family Law*, in International Survey of Family Law 2014, pp. 255–274.

Bennett, T. W., *The Conflict of Personal Laws: Wills and Intestate Succession*, in Journal for Contemporary Roman-Dutch Law 56/1 (1993) pp. 50–64.

Blerk, N. J. van, *The Basic Tenets of Intestate (Customary) Succession Law in Ancient Egypt*, in Fundamina 25/1 (2019) pp. 170–194.

Burns, F., *Intestacy Law in Australia, England, and Singapore – Another Aid to Social Sustainability in an Ageing Population*, in Singapore Journal of Legal Studies 2 (2012) pp. 366–390.

Burns, F., *Surviving Spouses, Surviving Children and the Reform of Total Intestacy Law in England and Scotland: Past, Present, and Future*, in Legal Studies 33/1 (March 2013) pp. 85–118.

Burns, F., *The Changing Patterns of Total Intestacy Distribution between Spouses and Children in Australia and England*, in University of New South Wales Law Journal 36/2 (2013) pp. 470–513.

Certoma G. L., *Intestacy in New South Wales: The 1977 Statutory Amendments*, in The Australian Law Journal 53 (1979) p. 77.

Coldham, S., *The Wills and Administration of Testate Estates Act 1989 and the Intestate Succession Act of 1989 of Zambia*, in Journal of African Law 33/1 (Spring 1989) pp. 128-132.

Cotran, E., *Marriage, Divorce and Succession Laws in Kenya: Is Integration or Unification Possible*, in Special Fortieth Anniversary Number Liber Amicorum for Professor James S. Read, Journal of African Law 40/2 (1996) pp. 194–204.

Crane, F. R., *Matrimonial Property Law in England: A Survey Articles-Articulos*, in Inter-American Law Review 4/1 (1962): 1–20.

Cushman, B., *Intestate Succession in a Polygamous Society*, in Connecticut Law Review 23/2 (Winter 1991) pp. 281–332.

Daniels, R. J.; Trebilcock, M. J.; Carson, L. D., *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, in The American Journal of Comparative Law 59/1 (2011) pp. 111–178.

Deflem, M., *Law Enforcement in British Colonial Africa: A Comparative Analysis of Imperial Policing in Nyasaland, the Gold Coast and Kenya*, in Police Studies: The International Review of Police Development 17/1 (1994): 45–68.

Derrett, J. D. M., *Comments with Reference to Hindu Law*, in East African Law Journal 5/1-2 (March-June 1969) pp. 21–53.

Derrett, J. D. M., *The Administration of Hindu Law by the British*, in Comparative Studies in Society and History 4/1 (1961) pp. 10–52.

Derrett, J. D. M., *The Hindu Succession Act, 1956: An Experiment in Social Legislation*, in American Journal of Comparative Law 8/4 (1959) pp. 485–501.

Elliott, F. U., *Question of Intestate Succession*, in South African Law Journal 19/3 (1902) pp. 265–269.

Gallanis, T. P., *Inheritance Rights for Domestic Partners*, in Tulane Law Review 79/1 (2005) pp. 55–92.

Gary, S. N., *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy Symposium: The Uniform Probate Code: Remaking American Succession Law*, in University of Michigan Journal of Law Reform 45/4 (2012) p. 787.

Hammond, A., *Reforming the Law of Intestate Succession in a Legally Plural Ghana*, in Journal of Legal Pluralism and Unofficial Law 51/1 (2019) pp. 114–139.

Henrysson, E.; Joireman, S. F., *On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya*, in Law & Society Review 43/1 (2009) pp. 39–60.

House-Midamba, B., *The Legal Basis of Gender Inequality in Kenya*, in African Journal of International and Comparative Law 5/4 (1993) pp. 850–868.

Kamau, W., *Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya*, in East African Law Journal, New series (2015) pp. 140–164.

Kamau, W., *Law, Pluralism and the Family in Kenya: Beyond Bifurcation of Formal Law and Custom*, in International Journal of Law, Policy and the Family 23/2 (August 2009) pp. 133–144.

Kameri-Mbote, P. G., *Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences*, in Verfassung und Recht in Übersee = Law and Politics in Africa, Asia and Latin America 35/3 (2002) p. 373–398.

Kareithi, M.; Viljoen, F., *An Argument for the Continued Validity of Woman-to-Woman Marriages in Post-2010 Kenya*, in Journal of African Law 63/3 (October 2019) pp. 303–328.

Kuria, G. K., *Christianity and Family Law in Kenya*, in East African Law Journal 12/1 (1976) pp. 33–82.

MacDougall, K., *Tribal Rights in Kenya and Zimbabwe: To Promote or Not to Promote, That is the Question*, in Connecticut Journal of International Law 27/1 (Fall 2011) p. 167.

Maina, R.; Muchai, V. W.; Gutto, S. B. O., *Law and the Status of Women in Kenya*, in Symposium on Law and the Status of Women, Columbia Human Rights Law Review 8/1 (Spring-Summer 1976) pp. 185–206.

Mamashela, M.; Freedman, W., *The Internal Conflict of Law and the Intestate Succession of Africans,* in Journal of South African Law 2003/1 (2003) pp. 201–207.

Martin, R., *The Kenya Law of Succession Act, 1972*, in East African Law Journal 10/1 (1974) pp. 93–122.

McGowan, P., *Recent Amendments to the Succession Laws in New South Wales*, in Elder Law Review 6/1 (2010) pp. 1–17.

Munene, I. I.; Ruto, S., *Pastoralist Education in Kenya: Continuity in Exclusion in Arid and Semiarid Lands (ASAL)*, in Journal of Third World Studies, vol. 32, no. 1 (2015) pp. 133–158.

Norrie, K., *Reforming Succession Law: Intestate Succession*, in Edinburgh Law Review 12/1 (January 2008) pp. 77–80.

Omotola, J. A., *Primogeniture and Illegitimacy in African Customary Law: The Battle for Survival of Culture*, in Indiana International & Comparative Law Review vol. 15, no. 1 (2005-2004) pp. 115–146.

Reid, D., *Why Is It So Difficult to Reform the Law of Intestate Succession?* in Symposium: Reforming Intestate Succession Law, Edinburgh Law Review 24/1 (January 2020) pp. 111–118.

Renwick, S., *Responsibility to Provide: Family Provision Claims in Victoria*, in Deakin Law Review 18/1 (2013) pp. 149–190.

Sanger, C. P., *Lord Birkenhead's Proposals for Altering the Law of Intestate Succession in England*, in The Yale Law Journal 30/6 (1921): 588–92.

Singh, C., *Hindus and Hindu Law in Kenya*, in East African Law Journal 7/1 (March 1971) pp. 69–75.

Singh, C., *The Republican Constitution of Kenya: Historical Background and Analysis*, in International and Comparative Law Quarterly 14/3 (July 1965), pp. 878–949.

Smith, G.; Bartlett, A.; King, M., *Treatments of Homosexuality in Britain since the 1950s. An Oral History: The Experience of Patients*, in B.M.J., 328, no. 7437 (February 21, 2004) pp. 427–430

Venter, T.; Nel, J., *African Customary Law of Intestate Succession and Gender (In) equality*, in Journal of South African Law 1 (2005) pp. 86–105.

Vines, P., *Consequences of Intestacy for Indigenous People in Australia: The Passing of Property and Burial Rights*, in Australian Indigenous Law Reporter 8/4 (2003-2004), pp. 1–10.

Wabwile, M. N., *The Place of English Law in Kenya*, in Oxford University Commonwealth Law Journal 3/1 (Summer 2003) pp. 51–80.

Wood-Bodley, M. C., *Intestate Succession and Gay and Lesbian Couples*, in South African Law Journal 125/1 (2008) pp. 46–62.

Woodman, G. R., *Ghana Reforms the Law of Intestate Succession*, in Journal of African Law 29/2 (Autumn 1985) pp. 118–128.

3. Statutes

Administration of Estates Act 1925 (U.K.)

Adoption and Children Act 2002 (U.K.)

Adoption of Children Act 2000 (N.S.W.)

Australian Courts Act, 1828 (U.K.)

Civil Partnership Act 2004 (U.K.)

Civil Unions Act 2012 (Australia)
Constitution 1964 (defunct) (Kenya)
Constitution of Kenya 2010
Family Law Reform Act 1987 (U.K.)
Human Fertilization and Embryology Act 2008 (U.K.)
Inheritance (Provision for Family and Dependants) Act 1975 (U.K.)
Intestates' Estates Act, 1952 (U.K.)
Law Reform (Succession) Act 1995 (U.K.)
Legitimacy Act 1976 (U.K.)
Marriage Act 1961 (Commonwealth)
Penal Code, Cap. 63 (Revised 2012) 1967 (Kenya)
Relationships Register Act 2010 (N.S.W.)
Status of Children Act 1996 (N.S.W.)
Statute of Distribution 1670 Act, (U.K.)
Succession (Scotland) Act 1964 (U.K.)
Succession Act 1981 (Kenya)
Succession Act 2006, No. 80 (N.S.W.)
Succession Act. No.10 of 1865 (Indian Law)
Succession Amendment (Family Provision) Act 2008 No. 75 (N.S.W.)
The 1897 Order in Council
Wills, Probate, and Administration Act 1898 (N.S.W.)

4. Cases and Some Judicial Analyses Thereof

Benjawa Jembe v. Priscilla Nyondo (1912) 4 EACA 160,161
Besser Kaur v. Ratan Singh 25 KLR 24.
C.O.A. in Roman Karl Hintz v Mwang'ombe Mwakima [1984] eKLR.
Estate of Benjamin Mugunyu Kiyo (deceased) Nairobi HCSC No. 2678 of 2001
Estate of Benson Kagunda Ngururi (deceased) Nakuru HCSC No. 341 of 1993, Nairobi Hcsc No. 193 of 1997
Jibana Tribe v. Abdulrasool Alidina Visram (1913-14) 5 K.L.R. 141
Miney Francis v. Samwel Batholomew 1 K.L.R. 24- HCCC NO. 286 OF 1950.
Mwathi vs. Mwathi and another (1995-1998) 1 EA 229
Re Maangi (1968) EA 637.

Rono v. Rono and another (2005) 1 EA 363

Rose Mueni Musau v. Brek Awadh Mbarak, CA. No. 267 of 2011

Ang'Awa J's analysis of Part V in In the Matter of the Estate of Benjamin Mugunyu Kiyo (deceased) Nairobi HCSC No. 2678 of 2001

Gicheru, Kwach And Shah JJa (1995-1998) 1 EA 229

Omolo, O'Kubasu and Waki JJa in the Matter of Rono v. Rono and another (2005) 1 EA 363

Ondeyo J. in the Matter of the Estate of Benson Kagunda Ngururi (deceased) Nakuru HCSC No. 341 of 1993

5. Law Commission Reports and Consultation Papers etc.

Australia, N.S.W., Law Reform Commission, Uniform Succession Laws: Intestacy (Report No. 116), Sydney, 2007

Commissions on the Laws of Marriage and Succession in Kenya Notes and News, Journal of African Law vol. 11, no. 1 (1967) pp. 1–5.

Competing Claims: Spouses v Adult Children, Hentys Estate Lawyers (blog), January 29, 2018, https://www.willcontesting.com.au/competing-claims-spouses-v-adult-children/

England, The Law Commission, Intestacy and Family Provision Claims on Death, London, 2009

U.K., H.C., Report of the Committee on the Law of Intestate Succession, 310 in Sessional Papers, The Stationery Office, London, 1951

U.K., The Law Commission, Intestacy and Family Provision Claims on Death (Report No. 331), The Stationery Office, London, 2011

U.K., The Law Commission, The Law Commission Report on Family Law, Distribution on Intestacy (Report No. 187), Her Majesty's Stationery Office, London, 1989

Sažetak

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ZAKONSKO NASLJEĐIVANJE I UTJECAJI KOLONIJALIZMA – SLUČAJ KENIJE U USPOREDBI S AUSTRALSKIM I ENGLESKIM NASLJEDNIM PRAVIMA

Pravila zakonskog (intestatnog) nasljeđivanja proizlaze iz tradicionalnih vrijednosti određenog društva, ali se mogu naći i pod utjecajem stranih prava. Općenito, kao dio privatnog prava, pravila zakonskog nasljeđivanja su pritom onaj dio koji dugoročno može u većoj mjeri odoljeti vanjskim nametanjima, odnosno prisilnoj recepciji pravila nametnutih od strane kolonizatora. Naime, u usporedbi s dispozitivnom prirodom pravila obveznog prava, koja su podložnija stranim utjecajima i prihvaćanju pravnih transplantata, pravila zakonskog nasljeđivanja duboko su ukorijenjena u narodnu tradiciju te se mogu snažnije i u neizmijenjenu obliku održati i pod pritiscima kolonizatora. U radu se obrađuju dva primjera uređenja zakonskog nasljeđivanja, u Keniji i Australiji, objema državama koloniziranima od strane Velike Britanije, između kojih postoje velike razlike glede kulturnih i pravnih tradicija. Također, kao referentni sustav, prikazuje se zakonsko nasljedno pravo i u Engleskoj. Poseban se naglasak u radu stavlja na rješenja prisutna u kenijskom pravu, pri čemu autor ističe razloge za potrebu zaštite udovice pri zakonskom nasljeđivanju, te se ona uspoređuju s australskim i engleskim pravom.

Ključne riječi: poredbeno pravo, zakonsko nasljeđivanje, kolonizacija, Kenija, Australija, Engleska

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