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Dissertation

Topic:

**A CRITICAL APPRAISAL
OF HUMAN AND PEOPLES RIGHTS
IN KENYA'S
LAW OF SUCCESSION ACT, CAP 160**

**submitted in part fulfillment of the requirement of the master of law degree of the
University of Nairobi**

BY

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G/P/62/8345/03

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DECLARATION

I, Mary A. Ang'awa, do hereby declare that this dissertation is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

m. ang'awa
M.A ANG'AWA

This dissertation has been submitted for examination with my approval as University supervisor.

K. KINDIKI

•
DEDICATION

To my mother, Mrs. Perez A. Ang'awa
on her 70th birthday

and

To the memory of my late father
Dr. James Ang'awa

ACKNOWLEDGEMENT

I wish to acknowledge all those who have been instrumental in
the successful completion of this document.

My special gratitude to Dr. K. Kindiki for the patience and guidance
that he gave in the supervision of this work.

Case law

1. Ali Ganyuma v. Ali Mohammed Volume xi 1927-1928 Law Reports of Kenya, 30.
2. Irene Njeri Macharia vs. Margaret Wairimu Njemo & Another CA 139/94,
3. In the matter of the estate of Reuben Nzioka Mutua
4. Re: Ruenjis Estate (1977) KLR 21
5. RE: -Ogola's Estate (1978) KLR 18
6. Okunda v Republic, 1970 EA 453
7. East African Community v Republic, 1970 EA 47
8. G.G.W vs. R.M.W Divorce case No. 72/02, Kubo J
9. Civil Liberty organization v Nigeria, Communication 1294/94 (dated 13.12.93)
10. In the matter of the Estate of Allan Ngugi Muchai(deceased)
11. Re Maangi 1968 E.A 637.
12. The matter of the Estate of Allan Ngugi Muchai Succession Cause No. 578/99;
Koome J.

Statute law

The Constitution of Kenya

The Draft Constitution of Kenya 2004

The Law of Succession Act cap 160 Laws of Kenya

Repealed Statutes

The Indian Succession Act 1865

The Probate and Administration Act 1881

The African Wills Act Cap 169

The Mohammedan Marriage, Divorce and Succession Act Cap 156

The Hindu Succession Act Cap 158

The Hindu Wills Act 1870 of India

English Statutes

The Administration of Estates Act 1925

The Inheritance (Family Provision) Act 1938

The Intestates' Estates Act 1952

ABBREVIATIONS

| | |
|-------------|---|
| ACHPR | African Charter on Human and People's Rights |
| ACHPR on WR | African Charter on Human and People's on Women's Rights |
| AU | African Union |
| CEDAW | Convention on the elimination of Discrimination against Women |
| CRC | Convention on the Rights of the Child |
| ICCPR | International Convention on Civil and Political Rights |
| ICESCR | International Convention on Economic Social and Cultural rights |
| OAU | Organization of African Unity |
| UNDHR | United Nations declaration on Human Rights |

CHAPTER ONE

INTRODUCTION

1.0 Background

Human rights have gained a significant foothold in many countries in recent years. More and more human rights norms are taking the forefront on aspect of good governance and democracy and accountability by states. Its importance emerged after the world war two when governments came together to affirm that disputes against nations would not be settled through war but by peaceful means. It was in 1948 when the Universal Declaration of Human Rights strongly emerged. This declaration recognized the

Inherent dignity and of the equal and inalienable rights of all members of the human family, thus making it the foundation of freedom, justice and peace in the world.¹

Human rights can therefore be said to be

That right which belongs to any individual as a consequence of being human, independent of any act of law” “every human being simply because he or she is a human being is entitled to something.²

Since 1948, human rights have been evolving. The internationally recognized human rights have now been identified as the three generations of human rights, namely:

- Civil and political rights
- Economic, social and cultural rights
- The “new” or “third generations” human rights (e.g. right to peace development or environment).³

¹ Universal Declaration of Human Rights. After the World War I the League of Nations made similar commitments that failed.

² Mark Piechshiak, “*What are Human Rights*”, “An Introduction to the Protection of Human Rights”, Edited by Raiji Hanski and Markku Suksi, published by Institute for Human Rights Abo Akademi University Turku/ Abo (2000) pg 3 (quoting Hersch 1986 p 132).

³ Allan Rosas and Martin Scheinin “*Categories and beneficiaries of Human rights*”, (n 2) pg 4.

“Rosa and Scheinin”⁴ describe this category for civil and political rights as first generation rights. These rights constitute the core of human rights which are individual rights that can be domestically enforced through courts of law or claim the rights against a state. The state is required to abstain from interfering with the life of the individual. (Negative obligation)

The second categories being the economic, cultural and social rights are second generation rights. These rights are objectives or “programmatic” rights⁵. Rights that requires positive action from the state (national policies and programmes). At times referred to as “collective rights” invoking images of collectivism⁶.

The third category is the third generation rights, these rights are collective rights based on notions of international solidarity and relating to global structural problems rather than individual cases.

These categories are mentioned because of the significance that the African Charter on Human and Peoples’ Rights has (herein referred to as the Charter). This is an instrument that “protects individual and collective human rights”. It sets up systems to promote the fundamental rights with particular emphasis on African tradition and the peoples’ rights to development.⁷

Within the charter, third generation rights are embodied from article 19 to article 24 which deal with the equality of the people. It ensures self determination in the fields of political status, economic and social development, the entitlement to peace, security and environmental rights which should be favorable to development.

⁴ Rosa and Scheinin (n 3 above) pg 49.

⁵ Rosa and Scheinin (n 3 above) pg 49.

⁶ Rosa and Scheinin (n 3 above) pg 49.

⁷ Flinterman and Henderson “*The African Charter on Human and Peoples’ Rights*” (n 2 above) 387.

It is this aspect of having all the three generations rights within the charter that makes it a most unique human right instrument⁸. Its adoption on the 27th June 1981 and coming into force five years later on the 21 October 1986 marked the start of commitment to human rights by African states.

Not only did the Charter recognize the rights of individuals and people but it recognized the duties by individuals to others. The Charter evolved at the Assembly of Heads of State and Government 16 ordinary session held in Monrovia, Liberia in July 1979.

The Charter provided establishment of bodies to protect and guard human rights. Its role was to eradicate all forms of colonialism from Africa, so that a better life from the people of Africa could be achieved to promote international co-operation by having regard to the charter of the United Nations and Declaration of Human Rights. It saw that the respect of peoples' rights should necessarily guarantee human rights and placed duties on the part of everyone.⁹

1.1 The problem

The law of Succession Act, Cap 160 laws of Kenya (herein referred to as the Succession Act) will now be briefly looked at.

It is an Act of Parliament to amend, define and consolidate the law relating to interstate¹⁰ and testamentary succession and the administration of estate of deceased persons.

This piece of legislation is unique in Kenya as it consolidates all the four laws governing the four various communities in Kenya on matters of succession law. Historically during the colonial error the peoples of Kenya were divided along racial or ethnic lines. The law

⁸ The American declaration on the rights and duties of man 1948 creates duties.

⁹ F. Ouguergouz, "The African Charter on Human and Peoples Rights", *"Rights of the Peoples': Old Concepts and new developments"* pg. 421.

¹⁰ The Law of Succession Act cap 160, Laws of Kenya, section 3 interpretation. A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect. Definition of intestate sec 34.

dealing with their personal lives was based upon the law recognizing succession law according to Statutory law, Customary law, Hindu law and Islamic law respectively.

The question arises as to whether there are aspects of the Succession Act that have clauses that are discriminatory or borders on discrimination on peoples and women's rights. The Jurisprudence of Equality Programme¹¹ looks into such interpretation of law having in mind human rights norms. The interpretation of the Succession Act and other related personal laws are important to judicial officers who should bear in mind international instruments in the interpretation of those laws. The constitution of Kenya does not preclude the application of international law and bill of rights which indeed are in agreement with the constitution¹². With the embodiment of the new generation rights, this paper will deal with specific questions that arise in the Jurisprudence of Equality programme on certain sections of the Succession Act, these being:-

1. The exclusion clause.
2. Termination of a life interest of a widow.
3. A deceased adult child.
4. Dependency.

1. 1.(a) The exclusion clause.

The exclusion clause excludes the following areas from the Act.

“a) Agricultural land and crops...

b) Livestock situated in such areas as the minister may specify”¹³

The areas gazetted¹⁴ later by the Minister being:-

- West Pokot
- Turkana
- Marsabit

¹¹ The Jurisprudence of Equality program, trains Judges and magistrates to identify discriminatory laws against women and see how to apply International instruments and to safeguard these rights.

¹² Section 3 Constitution of Kenya reads “if any other law is inconsistent with this constitution, this constitution shall prevail and the other law shall to the extent of its inconsistency, be void.” This means that if the laws are consistent, they are applicable. (see chapter 2 below).

¹³ Sec 32 (n 11 above).

¹⁴ Legal Notice 94 of 1981, J.K Kamere Attorney General.

- Samburu
- Isiolo
- Mandera
- Wajir
- Garissa
- Tana River
- Kajiado
- Narok

In the above areas,

The law applicable for the distribution of the estate is the law or custom applicable to the deceased's community or tribes as the case maybe.¹⁵

This means that the Succession Act would not apply to the properties specified in the given areas but the customary laws. The question that the study deals with is whether the exclusion clause protects the community or peoples' rights or is it discriminating by denying certain class of people their individual rights? Is there a conflict between individual rights and peoples' rights?

1.1.(b) Termination of a life interest of a widow¹⁶

Where a spouse has died intestate, the property to be inherited is given to the surviving spouse as a life interest but if she remarries, the interest terminates. The question to be asked here is whether the termination of a life interest discriminates against the widow?

1.1.(c) A deceased adult child¹⁷

An adult child may die leaving properties behind but has no wife or children. Only the parents survive him, the law provides that the father of that child inherits everything absolutely. If he is dead, then the mother inherits the properties. Should not there be the equal shares between parents as there is where there are no parents and the property is

¹⁵ Sec 32 (n 11 above).

¹⁶ (n 11 above) sec 35.

¹⁷ (n 11 above) sec 39.

shared equally between the brothers and sisters? The question to be asked is whether this law discriminates against the mother of the child?

1.1.(d) Dependency.¹⁸

The law recognizes a child who all along has been supported by the biological father (now deceased). That child is termed as a dependant and is entitled to the estate. The case law has extended this to include “the mother of that child, but mistress to the deceased” thereby compromising the widow’s rights. The question to be asked is whether this law is discriminatory against the widow in favour of the mistress?

In order to deal with these questions, a historic perspective will be outlined in chapter two giving the background and content of the law of Succession Act together with the African Charter on Human and Peoples’ Rights. Chapter three then comes in handy to analyze the extent to which human and Peoples’ rights have been secured under the Law of Succession Act. This will include an examination of the strength, and weakness of the Succession Act.

There has been not much writing or research done in the relationship between individual rights and peoples’ rights. The Charter talks of peoples’ rights but little is known of those rights in the place of Human Rights. The two major questions that are posed are: Can Human Rights and Peoples’ Rights co-exist? Is there a hierarchy as to whether one is more superior to the other?

1. 2 Objective of study

The study undertaken will look at a national legislation that touches on the personal laws of the people of Kenya and see whether it is in harmony with a regional instrument.

The law of Succession Act cap160 laws of Kenya has been specifically chosen for reason that it is the oldest and only¹⁹ national legislation that has attempted to consolidate the

¹⁸ (n 11 above) sec 29.

¹⁹ The criminal customary and religious laws were done away with and any useful laws included in the penal code. The other act touching on human rights that has since been consolidated is the children’s act.

various personal laws of the people with the sole purpose of uniting the people of Kenya through the law. It is an Act that advocates equality amongst the people of Kenya in gaining access to the court of law and an act that upholds human rights norms.

An attempt will be made to see whether the national law is in harmony with this regional instrument and whether such regional instrument is in harmony and applicable to the national laws.

This study will attempt to see whether there is a conflict between individual rights and the peoples' rights. Within these rights, the study will see whether there is a hierarchy of importance between the two types of rights or whether these rights are at par? The study will then look at whether elements of discrimination, if any, should be done away with.

Discrimination has been defined in the constitution of Kenya to mean:

Affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour and or sex whereby persons without one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or accorded privileges or advantages which are not extended to persons of another such description²⁰.

Discrimination has also been defined in article one of the 1965 Convention on the Elimination of all Forms of Racial Discrimination as:-

Any distinction, exclusion, restriction or preference based on race colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social cultural or any other field of public life.

This act has been domesticated from international instrument and a task formed on women and children that looked into the various laws headed by Owuor J.A (as she then was).

²⁰ Sec 82 the constitution of Kenya Revised Edition (1998) 1992, Government printers Nairobi.

This definition was also adopted in the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) but with slight modification from the above underlined emphasizes. Article 1 reads:

The terms discrimination against women shall mean any distinction exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status on a basis of equality of men and women on human rights and fundamental freedoms in the political economic, social, cultural civil or any other field.²¹

Discrimination can therefore be direct or indirect. Indirect discrimination is when the legal provisions affirms the principles of gender equality and equal treatment but when the conditions and criteria of qualification are different for men and women.²²

An example in Kenya of where the discrimination arose on the basis of race is found in the case of *Re maangi*²³. This case arose before the enactment of the current law of Succession Act. The brief facts being that the applicant, an African widow was married to a police officer who had died intestate. She applied to the High Court for grant of letters of administration but was not permitted to apply because section 9 of the Indian Probate and Administration Act precluded Africans from the Act and by implication from access to the High Court. Farrel J. upheld the submissions that this was contrary to the constitution and thereby discriminatory. The relevant law referred to by Farrel is the current constitution section 82 that deals with the fundamental rights of the individual contained in Part v that is identical to the Universal Declaration on Human Rights.

²¹ Emphasis to differentiate the two covenants

²² Merja Rentiainen "The problems of Discrimination and the 1979 UN Convention on the Elimination of all Forms of Discrimination against Women" in the book "new trends in discrimination law international perspective". Editors Lauri Nannikainen, eeva nykanen 1999 , Turku Law School VO3 No.1/1999

²³ 1968 E.A 637

1.3 Scope of the study

The scope of this study has been narrowed down to include the law of intestacy in succession with specific emphasis on section 32, 33, 39 and 29, that touches on the issue of peoples' rights and discrimination.

The study will not go at length to look into the law of testacy mainly because the law as it is has created checks and balances to protect the individual concerned and or affected by such testacy. The study will be restricted to the African Charter on Human and Peoples' Rights due to its emphasis on collective or peoples' rights.

1.4 Justification

Since the enactment of the Succession Act and the evolving of society to different life styles, values and morality, this study has become of importance as to whether, in the light of the third generation rights, the above sections of the law of the Succession Act have in themselves become discriminatory. Further, the study would focus on the extent to which human and peoples' rights have been secured under the law of Succession Act. The question as to whether there is a conflict between individual rights and peoples' rights and if so whether there is a hierarchy of importance between the two types of rights.

The importance of this study is that in Kenya, regional and international instruments do not become part of the national laws unless it is domesticated. To a judicial officer, making a decision on the interpretation of national laws that are negative towards human rights norms can be limiting. Such a judicial officer must bear in mind the regional and international instruments in interpreting the national laws. This study is to assist judicial officers in interpreting the instruments within the national laws that have not been domesticated.

1.5 Literature review

There has been little research done on the relationship between individual rights and peoples' rights. The Charter talks of Peoples' rights but little is known of those rights in the place of human rights.

Ougiergouz in his book 'The African Charter on Human and Peoples' Rights'²⁴ which has been of valuable use to this study, discusses at length the historical development of the Charter. Murray has written several articles and books on the African Charter. She looked into the progress and problems of the Charter since its inception in 1987 to the year 2000. Part of these progress was positive but the rest, such as the mechanism of the implementation of the act were negative²⁵. Flinterman and Henderson outline the importance and impact of the Charter to Africa and international community²⁶. They also look at the limitations of the act.

On the Succession Act, the main literature is found in the report of the commission on the law of succession and restatement of law: 2 on the Kenya law of Succession by Eugene Cotran. These literatures have been of valuable use in understanding the historical background and reasons why the law on succession was consolidated.

1.6 Methodology

The methodology of research used would be purely source of information, which will include case law emanating from the family division bench, as well as statute law being the law of the Succession Act and the African Charter on Human and Peoples' Rights.

Secondary evidence includes books of people on human rights, and a few journals. Internet sources especially on issues of peoples rights in Northern Kenya.

The research will be both analytical and descriptive.

²⁴ (n 9) above.

²⁵ R. Murray, The African Charter on Human and Peoples' Rights 1987-2000, An (Overview) of its progress and problems.

²⁶ Flinterman and Henderson, The African Charter on Human and Peoples' Rights, (n 2) above.

CHAPTER TWO

The African Charter on Human and Peoples' Rights and the Succession Act: A Historical Perspective

2.0 The history of the African Charter on Human and Peoples' rights.

2.0.1 Origins

Africa's concern has been economic development. After years of exploitation by former colonizers and later multinationals, Africa did not see human rights as an important agenda. This attitude was expressed well in 1998, by the Secretary-General of the United Nations Kofi Annan.

...some African still view the concern of human rights as a rich mans' luxury for which Africa is not ready, or even as a conspiracy imposed by the industrialized west...human rights ...are African rights, They are Asian rights; they are European rights; they are American rights; they belong to no government, they are limited to no continent, for they are fundamental to humankind itself. And they are the concern of all levels and sections of society.²⁷

2.0.2 The rule of law

Africa was first sensitized to human rights norms during the early 1960s'. The International Commission of Jurists (I.C.J) conference held in Lagos, Nigeria between the 3 to the 7 January 1961.²⁸ On the rule of law, one of the resolution adopted in the said meeting known as "the laws of Lagos" is:-

²⁷ Ouguergouz (n 6 above) quoting statement on the opening of the 54th commission on human rights in Geneva 16.3.98 introduction.

²⁸ Lord Denning's conference on the "future of the law in Africa had been held earlier for commonwealth countries between Dec. 1959 to January 1960. It indirectly dealt with issues that mostly touched on equality of the law. I.C.J had held a conference in Greece (1955) and New Delhi India (1959). The Lagos Nigeria conference was their third conference on the rule of law.

Para 4

in order to give full effect to the Universal Declaration of Human Rights of 1948, this conference invites the African government to study the possibility of adopting an African convention of Human Rights in such a manner that the conclusions of this conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse there to be made available for all persons under the jurisdiction of the signatory state.²⁹

The conference recognized that the rule of law advances the will of the people and political rights of individuals to establish social, economic, education and cultural conditions under which the individual may achieve his dignity and realize his legitimate aspirations in all courts.³⁰

They called on governments to adhere to the principles of democracy representation in their legislation. That the fundamental human rights should therefore, be written and entered in the constitution of all countries³¹.

The International Commission of Jurists, a non-governmental organization, is recognized for its role in bringing to the attention of the African states, the question of the rule of law and by implication, the human rights laws.

2.0.3 Human Rights and Africa

Africa's priority was not at the time to enact a regional African body for the protection of rights. Issue of having an international institution without identifying "the law applicable" was unacceptable.

Africa's' major concern, apart from its sovereignty was its problems of "economic under-development."³² Concerns of "self-determination, apartheid and racial discrimination" together with "economic development and issue of refugees" had always been in the fore

²⁹ I.C.J conference on the rule of law, 1961, Lagos Nigeria resolution Para 4.

³⁰ I.C.J (n 41 above).

³¹ I.C.J (n 41 above). During this period, many African countries were yet to gain their independence. The inclusion of the bill of rights in their new constitution became a reality.

³² Oguergouz (n 6 above). See Appendix A.

front agenda of the organization of Africa unity. This was hindered when human rights violation would occur but the aspect for sovereignty and non-interference in the internal affairs of a country would arise, restricting any development on human rights.

The international community made it a requirement that human rights standards must be adhered to in order to obtain economic aid and assistance. It was without a doubt that human rights violations by African states of their citizens was being committed e.g. Uganda, Idi Amin, Central Africa Jean Bedel Bokasa, Macias N'Gue'ma Equatorial Guinea.

2.1 General Overview and content

2.1.1 The African Charter of Human and Peoples' rights.

It was in Monrovia that the decision to adopt human and peoples' rights in Africa was made. The head of states called for experts to prepare preliminary draft of the African Charter of Human and Peoples' rights. It was the Mauritanian delegation who insisted that the expression "peoples' rights" be added to human rights³³.

A meeting four months later endowing of African heads of states was held in Dakar, 28 November to 8 December 1979. President Senghor gave an opening address in which twenty African experts were invited. He called on the experts to

Draw inspiration from African traditions, keeping in mind the values of civilization and the real needs of Africa."... "Development embraces the economic, social and cultural rights as well as civil and political rights. Development and the right of peoples', respect man and his freedom...a system of duties of the individual³⁴.

The draft Charter was ready within ten days. The document consisted of three parts together.

³³ Ouguergouz (n 6).

³⁴ Ouguergouz (n 6).

a) Part 1: Rights and duties

This section dealt with human and peoples' rights and their duties.

b) Part 11: Measures and safeguards

Chapter 1: The sections that established the African commission on Human and peoples' rights to be within the organization of the African unity to promote Human and peoples' rights. Chapter 11 to 1V: The mandate of such commission was provided, procedures and applicable principles.

c) Part 111: General provisions

It was in Banjul, Gambia from 9 to 15 June 1980 that the draft Charter was to be considered. It did not go far and was postponed. It was soon thereafter that the O.A.U chairman was assassinated. The issue of human rights reasserted the commitment of the African member state to promote and protect human rights. In 1981, in Banjul Gambia, a ministerial conference was held from 7 to 19 January 1981. The Charter was adopted in Nairobi (Kenya) on 27 June 1981. It came into force on the 21 October 1986.

The African Charter emphasizes these rights, when in article 2 it states:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language religion, political or any other opinion, national and social origin, fortune with or other status.³⁵

Every individual shall be equal before the law...Every individual shall be entitled to equal protection of the law.³⁶

2.1.2 Definition of Peoples' Rights

Peoples' right was never defined under the African Charter but clause 19 to 24 speaks of peoples' rights. This will be discussed further when dealing with peoples' and individual rights³⁷.

³⁵ Articles 2 and 3 of the African Charter on Human and Peoples' rights.

³⁶ (n 37 above) Article 3.

³⁷ See chapter 3 below.

2.1.3 Application of the African Charter on Human and Peoples Rights

Article 60 “ provides that the commission shall draw inspiration from International law on human and peoples rights, the Charter of the United Nations and the Charter for the Organization of African Unity, the Universal declaration of Human Rights” amongst other instruments..

Kenya by ratifying the Charter has committed itself to the values and ideals contained in the said charter.

The law in Kenya stipulates that the application of international and regional laws cannot be applicable to Kenya until such laws are domesticated and are part of the national or municipality law.

In the case of:-

- a) Okunda v Republic
1970 EA 453
- ii) East African Community v Republic
1970 EA 47

Where the court in Kenya/East African held that the regional law does not become part of the municipality law unless it is domesticated. Even if it is domesticated, any treaty or regional agreement, if in conflicts with the constitution, is void.

This law is indeed not good law in its interpretation. It makes Kenya as a country selective as to the international laws that should apply or not. A broader interpretation requires to be taken. For instance, the constitution of Kenya provides under section 3:-

The constitution is the constitution of the Republic of Kenya and shall have the force of law through out Kenya and, subject to S.47 of this constitution, if any other law is inconsistent with this constitution this constitution shall prevail and the other law shall, to the extent of the inconsistency be void.

Provisions, on the other hand, that is in agreement with the Kenya law can be applied.

In the Bangalore colloquium for judges held in India 1988³⁸, the resolution of the colloquium was that:-

Fundamental human rights and freedoms are inherent in all human kinds and find expression in constitutions and legal systems through out the world and in the International Human Rights instruments.

On the application of those international human rights, it recognized that most countries whose systems are based upon common law, international conventions are not directly enforceable in national courts “unless their provisions have been incorporated by legislation into domestic law.”³⁹

However, “the tendency by national courts to have regard to these international norms for the purpose of deciding law –whether constitutional, statute or common law – is uncertain or incomplete.”

This resolution continued to state that the tendency is “welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and group of person with the general interest of the country.”

The declaration went further to state that:-

It is within the proper nature of the judicial process and well established judicial functions of national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

However where national law is clear and inconsistent with the international obligations of the state concerned, in common law countries the national courts obliged to take effect to the national law. In such cases, the court should draw such inconsistency to the attention of the appropriate authorities since supremacy of national laws is no way

³⁸ Bangalore principle's on Domestic Application of International Human Rights Norms 1988.

³⁹ Domestication Process in Kenya: Human Rights treaties and their status in Kenya national law. By Reuben Kipng'eno Stalin. Chapter 8, I.C.J-Report on Judicial Reforms 2003-2004.

imitates a breach of an International obligation which is under taken by a country.

It was recommended that the judges and practicing lawyers be trained and sensitized on the international instruments.

The common law countries were therefore called to be aware of the Human Rights instruments.

In Kenya, the constitution provides that the fundamental rights of the individual to be safe guarded. This is contained in chapter V of the constitution. The wording of this chapter is similar to the universal declaration of Human rights and, as stated earlier, the aspects of fundamental rights embodied at the international and region and levels are enshrined in the constitution of Kenya.

It is further seen that once an instrument is domesticated in a countries law, it cannot be nullified.

In the case of:-

Civil Liberty organization v Nigeria

Communication 1294/94

(dated 13.12.93)

The military government of Nigeria “enacted various decrees in violation of the African Charter”.

It “dissolved the political parties” and “ousted the jurisdiction of the courts.”

The military government of Nigeria attempted to withdraw from the ratification of the African charter. The applicants filed reference to the African Commission on Human and Peoples’ Rights. It was held that the military government of Nigeria was not permitted to do so unless it followed the laid down procedure. It was bound by the Charter.

It is therefore important that a country should be guided by the principles enshrined in the fundamental rights to the people in various international and regional human rights charter. To realize a country's seriousness, the domestication of such laws into the national laws should be undertaken.

This Charter was followed by the African Charter on the Rights and Welfare of the Child (1992), the Protocol to the African Charter on Human and Peoples' rights on the Rights of Women in Africa in Maputo (2003), establishment of a regional African court on Human and Peoples' rights (June 1998) that was alongside the African Commission.

2.2 Origins of the Succession Act

In 1959, a conference was held in London chaired by Lord Denning on the "Future of the Law in Africa". This was a time when many African countries were in the process of gaining independence. Much of the customary laws were unwritten and attempts to have them written down were haphazard as seen in Kenya.

Eugene Cotran, a lecturer in African Law with the school of Oriental and African Studies, University of London was assigned to Kenya by the colonial government to investigate the customary law of Kenya. He did so and began with the criminal customary law. He then embarked on the personal laws under the customary laws touching on the laws of marriage, divorce and succession. He published, under a series of the restatement of African Law for Kenya, two volumes. The first being on marriage and divorce and the second being on the Law of Succession.⁴⁰ It was through his investigation that it was realized that in fact, Kenya had about four systems of laws that governed the law of succession⁴¹. This came about when during the colonial era the diverse people of Kenya had different laws applicable to them. The laws were therefore not uniform. The four systems of laws are:

⁴⁰ Cotran, 1969, "Restatement of African Law: 2 KENYA: 11 The Law of Succession", Published in London Sweet and Maxwell.

⁴¹ (n 17 above) 1.

1. The Succession law under statute law.
2. The succession law under customary law.
3. The succession law under Hindu law.
4. The succession law under Islamic law.⁴²

2.2(a) Statute Law

The succession law under statute law that was applicable was the Indian Succession Act of 1865. This Act was restricted only to Europeans, Goans and Parsees. It dealt with administration of estate both testate and intestate.

Another Indian Act was enacted known as the Probate and Administration of Estate Act of 1881 that dealt with the administration of estates but applied to other Asians. Both Acts,⁴³ did not apply to Africans⁴⁴. This aspect will be referred to later below.

2.2(b) Succession Law under Hindu Law

In 1870, the Hindu Wills Act was enacted to enable Hindus to make wills. This was applied together with the Probate and Administration Act of 1881. In 1946, the Hindu Succession Act (cap 158) was enacted to permit succession laws for Hindus' to be regulated by Hindu laws.⁴⁵

2.2(c) Succession Law under Islamic Law.

The Mohammed, Marriage Divorce and Succession Act (cap 156) applied solely to those people who professed the Islamic faith. Thus, where a male marries and dies having been a Muslim, then his property and law of succession applicable would be governed under the "principles of Mohammedan law" or the law of that particular sect of Mohammedans the deceased may belong.

⁴² Report of the Commission on the law of Succession-1968, Government printers.

⁴³ (n 23) above, Section 9 of the Indian Acts (Amendment) Act cap 2 1948.

⁴⁴ After independence, but before the enactment of the succession Act, the H.C in its ruling of *Re Maangi P* and a cause 161/65 (1968) E.A Pg. 637 had ruled that the statute was discriminating against Africans.

⁴⁵ Section 3 (1), (See n 20 above). Note 15.

2.2(d) The Succession Law under Customary Law

Under the customary law, it may be noted that the Kenya Colony Order in council of 1921 provided that in dealing with the African customary law:-

The High court and all subordinate courts shall be guided by African customary law in civil matters to which Africans are parties...

This meant that customary law only applied to Africans⁴⁶. The difficulty that arose, was that all customary law was oral. Some case law on customary law was recorded on appeal to the court of review⁴⁷. Any disputes that arose on customary law would see opinions given from elders or oral evidence would guide the proceedings. It was not until the restatement of African law on Kenya that customary law was finally documented⁴⁸. In 1961, the African Wills Act (cap 169) was enacted to enable the African write a will although it had its limitations⁴⁹. The procedure in implementing the will was left to that Africans' tribal laws. What then was wanting or lacking in the laws of succession in Kenya prior to independence?

2.3 Defects of various succession laws

The law of succession deals with the distribution of a deceased person's estate on his or her demise. The deceased person would have stated, before his death, how he wants his properties distributed amongst his heirs (testate) or he may not state anything⁵⁰ (intestate) but allow the traditional customary laws to distribute his estate or the religious⁵¹ laws to govern such distribution. In the two latter cases, no written instruction is given.

⁴⁶ See n 49 below

⁴⁷ Restatement of Africa law appendix A

⁴⁸ (n 2) above

⁴⁹ See 95 below.

⁵⁰ For example, an Asian would apply Hindu law where he professes such faith to govern his personal law. An African would apply customary law to his personal law. The law would not be applicable to the European Asian or Muslims. After independence, African customary law became applicable to persons who are not Africans but on condition that one party is an African through the Judicature Act cap 3 laws of Kenya.

⁵¹ E.g. Islamic law respectively.

The effect of this was to allow the various people to practice their respective values of life thus bringing about various different laws applicable. It ran on racial lines and excluded certain groups of peoples to the access of rights that may be beneficial to others.

2.3(a) Statutory law

The Indian Succession Act of 1865 that applied only to Europeans, Goans, Parsees provided for the making of ones' will and the procedure in which such property would be distributed. It also relates to intestacy where one dies without making a will.

This Act was amended⁵² in England on the aspect of intestacy but the Kenyan Act had not been amended. For instance, the 1865 Act gives unlimited freedom of power to a person to dispose, by will, his property to an outsider and thereby disinheriting completely, his or her dependants.

In England, they had in 1925 enacted the administration of Estates Act (1925) and the Inheritance (family Provisions) Act 1938, later amended by the Intestates Estate Act 1952. These amended Acts gave power to the English courts to vary, within defined limits, the will of a deceased person who may have in fact failed to make reasonable provision for the maintenance of their family. In Kenya, none of the amended acts were part of Kenyans (pre-independence) laws. The possibility of disinheriting a family was there and real.

2.3(b) The Hindu law

Under the Hindu law, the laws of succession applicable are those of “any school or such school of Hindu law” which is taken to mean the ancient Hindu laws.⁵³ To remove any doubt, ascertaining of the law under the Act was to be left to the courts to decide “as it thinks fit”, and on the “principles of justice, equity and good conscience”⁵⁴. The Hindus Succession Act 1956, had infact not kept up with any modern changes made in India.

⁵² (n 19 above) Para 40-44 page 10.

⁵³ (n 19 above) Para 45 page 11.

⁵⁴ Sec 5 Hindu Succession Act 1956.

2.3(c) Islamic law

The Islamic laws, administered through the Kadhis' courts saw the laws interwoven with marriage, divorce and succession laws. In essence, you are required to marry a Muslim who would then be eligible to inherit your estate. In practice, it was found that Muslim laws would be applied irrespective of the status of the marriage. There arose also the problem of non-Muslims not being permitted to inherit an estate of a Muslim as seen in the case law of Ali Ganyuma v. Ali Mohammed⁵⁵

The deceased was of the Wa- Digo tribe at the coast, Kenya. He converted into Islamic faith. Upon his death, a question arose as to which law should be applied? The Islamic law of inheritance or the wa-Digo customary law? The difference would be that under Islamic law of inheritance, the inheritance was patrilineal⁵⁶ whilst under the wa-Digo the inheritance was matrilineal.⁵⁷

In the above case, the native tribunal ruled that the estate should use the Wa-Digo customary law. On appeal to the court of appeal from the magistrates' court which upheld the native tribunals' findings, the court held otherwise and stated that the estate be governed by Mohammedan law and thus it descends' patrilineally. They relied on section 4 of the Mohammedan, Divorce and succession Ordinance of 1920⁵⁸.

This authority has far reaching effect in that, a man who converts to be a Muslim, upon his death all his heirs or beneficiary who are not converts to Islam are disinherited on the grounds that they do not profess the Islamic faith.

⁵⁵ Volume xi 1927-1928 Law Reports of Kenya, 30.

⁵⁶ Lineage through the male line i.e. father to son.

⁵⁷ Lineage through the mothers family i.e. nephew.

⁵⁸ Section 4 reads:-

“Where any person contracts a marriage or, being a male contracts a marriage, in accordance with Mohammedan law, where such marriage or marriages shall have been conducted either prior or subsequently to the commencement of this ordinance, and such person dies after the commencement of this ordinance, and make the issue of such marriage or marriages dies after the commencement of this ordinance, the law of succession applicable to the property both movable and immovable of any such person shall be in accordance with the principles of Mohammedan law ,any provision of any ordinance or rule of law to the contrary notwithstanding: Provided that where in any Act of Mohammedan to which the deceased belonged the law of succession differs from the ordinary law of succession in accordance with the ordinary principles of Mohammedan law then the law of succession applicable to such sect shall apply”.

2.3(d) Customary law

As to customary law, the biggest impediment was that the laws were unwritten. Where disputes arose and parties appear before a court of law, each party would always have to prove the facts and legality of the customary law to be applied. If customary law was written then the arbitrator or judicial officer merely required to read the provisions relating to a particular law.

The law of succession applied to the very many different communities living in Kenya being the Europeans, Asians and Muslims and also applied to the various African tribes. Despite this, it was noted that in principle, the procedure of succession laws were similar.

It clearly came out in the findings of the commission of inquiry that “the right of women whether wives or daughters, its share in the inheritance, are either very limited or non-existence.” Inheritance laws under customary laws were patrilineal. The benefit would be properties handed down from father to son with little participation from women. It was also noted by the commission that customary law catered for traditional property such as “land and cattle”. How then do you apply customary law to “houses, modern furniture, registered land, bank accounts, or motor vehicles?”

Finally, the waning of African customary traditions and practices had brought about little safeguards to the rights of the beneficiaries and or heirs. The commission discovered that the fibre strength of elders had lost its meaning, power and hold on the people. More people ignored the advice of the elders and the moral ability to strengthen traditions became of no consequence. A person who is named as an administrator of an estate would not, *per se*, follow traditions to safeguard the rights of the beneficiaries.

2.4 TASK OF COMMISSION

The commission was faced with a task of recommending⁵⁹ “a uniform code of succession law” which would apply to all persons in Kenya. They found themselves with three possibilities⁶⁰ :

- a. To recommend that each community should be subject to its own law of succession...
- b. to recommend one unified law of succession to apply to all persons in Kenya to the total exclusion of religious or customary law
- c. To recommend...a compromise...a uniform law of succession but allowing for the application of customary or religious law in certain circumstances and under certain conditions.

Where a person writes a will stating how he wishes his properties to be distributed, the procedure and administration of executing those wishes can easily be made uniform. The problem arises where a person has not written a will to state how his property should be distributed. If it is left to be laid down by customary laws this would mean that the status quo on distribution of estates remains. If a universal and unified application of succession law is recommended excluding religion and customary law, it would bring about a situation where some parts of the country would not be ready for this and would totally reject the new laws.

The commission came up with a compromise recommendation.⁶¹ Where a unified law of succession was recommended but with exceptions. The commission rejected that

⁵⁹ Terms of reference of the committee reads:-

“to consider the existing law on Succession to property on death, the making and proving of wills and the administration of estates; to make recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform code applicable to all persons in Kenya, which will replace the existing law on the subject comprising customary law, the Indian applied Acts and the relevant Acts of parliament including those governing Muslim and Hindu succession; to prepare a draft of the new law in accordance with the commissioners’ recommendations”.

The result was the succession bill and later the act.

⁶⁰ (n 19 above) Para 59, chapter 3 page 14.

⁶¹ (n19 above) Recommendation no. 1 page 18.

“We recommend that there be enacted a new code of succession law replacing the existing laws, merit should apply uniformly to all persons in Kenya as regards the safety of testate succession administration of estates. We recommend further that there should be a uniform law of intestacy and administration of

exceptions should include the Islamic faith or on grounds of religion as this could be catered for easily through the making of wills. It nonetheless recognized areas where Kenyans would not be ready for it. They recommended the areas to be excluded until the people were ready for the universal application of intestacy laws. These areas were left for the minister to decide but they actually suggested Turkana, Marsabit, North Eastern, East Pokot, Samburu and parts of Kajiado and Narok districts.

The effect that the commission wished to bring out was that

The universal law of intestacy would not apply to those types of property for which customary law of succession were demised.

The reason being the “the majority of inhabitants were unlikely to expect or even understand the new law of succession.” Yet what would you do with the businessman in a rural township who owned wealth that included modern property? A new law was required to govern such properties and to safeguard the interest of the beneficiaries.

2.4.1 Procedure where a person dies intestate or testate

Under the current succession act, in both testate and intestate situations, a legal representative would apply for a grant of letters of administration given to them and authorizing such persons to distribute the estate amongst the beneficiaries.

Where a will is written, it would name such person who is referred to as an executor (male) or executrix (female). Where no will has been written the person to apply for letters is referred to as the administrator⁶² (male) an administratrix (female). Such person is appointed by the court on application⁶³.

intestate estates that this should not apply to agricultural land of crops thereon and to livestock situated in areas of Kenya to be specified from time to time by ministerial order.

⁶² Jowitt's Dictionary of English Law, Earl Jowitt and Clifford Walsh, 2nd Ed. Vol. 1, London Sweet and Maxwell Ltd 1977. See also Black Law Dictionary, Eighth Ed., Bryan A. Garner, Thomson West.

⁶³ Legal Dictionary.

Where no legal representative comes forward to claim an estate, the public trustee (a department of the Kenya Government under the Attorney Generals Chambers) would take over the conduct of the said estate⁶⁴.

What procedures and rules should then apply is governed now by one act as opposed to several different laws applying to different groups of people⁶⁵. This aspect of the Act reflects the equality of all peoples in Kenya and is in line with the equal protection laws.

2.4.2 Bill of rights and equal protection law

The commissioners were nonetheless able to recognize that changes to uniformity of a universal law of succession would be realized in full. They must have been aware of the bill of rights and that the Kenyan laws ran along racial lines contrary to those rights.

The universal declaration of Human Rights and International law on Equal protection rights state:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”⁶⁶ ...Everyone is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind such as race, colour, sex, language, religion, political or other on social organ...⁶⁷

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prevent any discrimination and guarantee to all persons equal and effective protection.⁶⁸

The state parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present covenant.⁶⁹

⁶⁴ Public Trustee Act.

⁶⁵ The succession act contains standard forms to be filled out by applicants. The access to court is easier and applies to all persons having died or owning properties in Kenya.

⁶⁶ (n 1 above) UDHR Article 1.

⁶⁷ (n 1 above) UDHR Article 2.

⁶⁸ Article 26 of the International Convention on Civil and Political Rights.

⁶⁹ Article 3 of the International Covenant on Economic, Social and Cultural Rights.

By Kenya consolidating the personal laws, it was an attempt to bring about equality by ensuring equal protection of the law which is available to all.

2.5 The Strength and Weaknesses of the Succession Act.

After concluding that the law of Succession in principle upholds the ideals of international instruments of Human Rights; Human and Peoples' Rights, there still remains the critical appraisal of evaluating the strength and weaknesses of the Succession Act and identifying whether the Succession Act is progressive with the current principles of human and peoples' rights.

2.5.1 THE STRENGTH OF THE ACT

2.51(a) Uniformity

The purpose of the enactment of the succession Act as mentioned before was to establish a uniform code of succession law in Kenya which would apply to all persons in Kenya. The Succession Act has been able to achieve uniformity in two aspects.

Firstly, every person has a right to direct how his property is to be distributed when he dies or leaves it to the customs of ones' tribe. The Act provides for the right to make a will. Within the making of the will, a person is required to ensure that they provide for their immediate dependants. The law further allows a dependant to come and challenge the will where she or he has not been provided for. Africans are permitted to make an oral will on condition that such a person passes away within three months. This applies to military officers too. The oral will is at times referred to as a "death bed declaration."⁷⁰

Intestacy provisions under the Act have given all the diverse groups of the Kenya people a format in which properties are to be distributed in the event a person dies without writing a will.

⁷⁰ Succession Act Section 9.

“The African Charter contains the guarantees of the Right to property”⁷¹. That right should be safeguarded even upon ones demise. The succession act has ensured that protection and safeguard under the succession act of all persons are entitled to the property in which they are beneficiaries.

Secondly, the Succession Act provides a means by which the procedures to be used in accessing the courts is given. Thus, whether one comes by way of testamentary succession or intestacy succession, the procedure and format are the same. This procedure includes Muslims who have tried considerably to be excluded from the Act, on grounds that their religious system requires that they bequeath their properties according to their religious law. Their religious system ineffect is not interfered with but that the rules of procedure in accessing any estate in court is one for all peoples of Kenya.

The African Charter protects the right to due process of the law.⁷² Access to court is safeguarded in both the law of succession and the African Charter.

The procedure of obtaining a grant or letters of administration is now uniform. All the people of Kenya derive their authorities from this one Act. Previously only the Europeans and Asians had access to the High court. The Muslim had and still do have access to the Kadhi’s courts and the Africans would follow the customary laws but if there was any dispute, parties would then go to the African courts.

Every person is entitled to access of rights to court. Good democracy and governance requires that no man be above the law or be treated unequally. Today, all the parties would attend to one court for the administration of their succession cause. If there is any dispute and the matter is in the subordinate courts, the trial magistrate would refer the matter to the High court for determination but may deal with the uncontentious issues. If the matter is in the High court, the High court would proceed to determine the dispute.

⁷¹ Art. 14 ACHPR.

⁷² Art. 6 and 7 ACHPR.

The effect of the Act was to apply the equality of the law to all persons in Kenya. Where a party does not wish to have their property apportioned as per the intestacy provisions, they are free to make a will. In either case, the procedure of accessing the court is one and the same.

2.5.1(b) Equality

No one is above the law, no one is treated in a preferential way, and all are equal before the law (to some extent to be elaborated below).

The Universal Declaration of Human Rights, The Civil and Political Rights, Economic Social and Cultural Rights and the African Charter on Human and Peoples' Rights have clauses that deal with equality of the law.⁷³ The Charter has special protection designated for women, children, the aged and disabled⁷⁴. The peoples' rights and culture under the African Charter is taken into consideration, namely:

“The virtues of [the peoples] historical traditions and values of African civilization...It further recognizes the family as being a natural unit and the basis of society.”⁷⁵

Emphasis on the family has been made within the succession act.

2.5.1(c) The child

The Act has recognized the child and the welfare of that child as being paramount removing any elements of discrimination against the child on grounds that such child was born out of wedlock or is not the biological child and therefore does not belong⁷⁶. The attitude taken is that “it is not any of the child's faults” that a child finds himself or herself in that predicament. Therefore, provision for a child both male and female, that includes the biological child, the child born out of wedlock and most recently a social

⁷³ (n 33, 34, 35, 36, 37)art 19, A.C.H.P.R.

⁷⁴ Art 18 A.C.H.P.R.

⁷⁵ Art 18 (1), A.C.H.P.R.

⁷⁶ (n 19) above Para 155 pg 49 recommendation 44.

child.⁷⁷ Shares of the children are equal except in a polygamous situation is divided according to houses that includes both male and female⁷⁸.

There is a rule known as substitution or representation whereby a grandchild is permitted to take the place of a pre deceased child for purposes of inheritance. Where a father has an adult child but one dies before he does, in dividing the inheritance, the father should pass the properties to the son who died i.e. his grandchild instead of the living brothers⁷⁹.

2.5.1(d) The spouse

Both the spouses, with special emphasis to the woman are regarded equal partners when one of them passes away.⁸⁰

The wife is given priority to manage the estate of the deceased spouse. This responsibility no longer goes to the brother or elder son. Where there are minor children the widow or widower must manage the estate with at least one other person.

Regional and International law provides that everyone is entitled to the right to property.⁸¹ These rules are indeed found within the Succession Act.

⁷⁷ This is where the father assists a child but is not in any way related to the child. The court may describe such a child as a social child. See the matter of the Estate of Allan Ngugi Muchai Succession Cause No. 578/99 where M. Koome J. in determining who should be deemed as a child held:

“A child can either be the deceased biological child or the child that the deceased has adopted and assumed permanent responsibility. Although D.N.A profiles failed to establish paternity due to lack of appropriate technology, the court considered that the functions of social parentage cannot be disregarded and even if the children may not have been the biological children of the deceased, he had assumed their social responsibility. The children were awarded 50% of the deceased net estate”.

⁷⁸ (n 19 above)see recommendation No. 43 pg. 49 reads:

“We recommend that the recommendation No. 21 should be extended to cover applications by dependants in cases of total or partial intestacy, covering in cases of polygamous households, the whole net estate”.

⁷⁹ (n 19 above) recommendation 34 pg 43.

“We recommend that the rule of substitution of a grandchild for his or her parents, be applied in all cases of intestacy where the parent dies before the intestate”.

⁸⁰ The exception are in clause

35 (1) Life interest terminates on remarriage.

36 (1) Where a child passes away the lineage goes to the father first.

29 A wife or wives considered as dependants.

⁸¹ Art 14 ACHPR, art 15 (2) CEDAW, art 17 UDHR.

2.5.1(e) Brothers and sisters

Brothers and sisters are treated equally where it comes to the shares of a deceased whom they are entitled to inherit from. For instance, where both parents of the deceased have died and the deceased was not survived by a widow or children, his net estate evolves upon his brothers and sisters in equal shares.

2.5.2 THE WEAKNESSES OF THE ACT

2.5.2(a) Discrimination

There are still elements of discrimination within the Act that was discussed in chapter two of this paper.

The law treats the spouse differently on the re-marriage of the widower from the re-marriage of the widow⁸². The provision requiring the widow to lose her life interest on properties when she re-marries is discrimination against her⁸³. It is also discrimination when the widow is not made an equal partner for a child who dies without leaving an issue or wife⁸⁴. The property share should be equal. Lastly, is the description of a concubine being referred to as wife⁸⁵?

The African Charter calls for eradication of discrimination⁸⁶. It calls for the individual to have a duty towards his family and state⁸⁷ and other legally recognized communities and the international community. Duties to family means respect and to the community upholding “positive African cultural values”. Not the negative African cultural values.

2.5.2(b) Lack of Education

The disadvantage and weakness of the Act is lack of education on what it offers. The commission had recommended that there be a training of all the groups of people who are

⁸² (n 14 above) section 35.

⁸³ (n 14 above) section 35.

⁸⁴ (n 8, 71 above) 36 (1).

⁸⁵ (n 8, 71 above) 29.

⁸⁶ Art 28 ACHPR.

⁸⁷ Art 27 ACHPR.

to implement the Act and to the public in general. No formal education has taken place to date.

This applies to judicial officers and court clerks who were meant to attend the Kenya Institute of Administration. To date, an attempt by the Kenya Women Judges Association has been made to train judicial officers on the Act and its implementation⁸⁸.

The Succession Act was indeed ahead of its time. The compromise by the commission on certain aspects of the Act permitted customary law that is detrimental to the rights of both spouses is what may be described as discriminatory.

2.5.2(c) The Marriage Bill

The personal laws of marriage and divorce were meant to compliment the law of succession. Indeed the marriage bill provided for each wife, i.e. to obtain a marriage certificate whether the marriages are under monogamous system or polygamous system of marriage. It was to provide one certificate for all those who married. The position which persists today is the European marrying under the Marriage Act. A few Africans would marry under this Act if their marriage is registered. The Hindu and Muslim marry under their respective Acts, whilst the Africans who marry in church, marry under the African Christian Marriage and Divorce Act Cap. 152. The Africans who marry under customary law obtains no marriage certificate or proof of that marriage. The District Commissioners and District Officers would write a letter confirming the couple are married. This letter is not a legal document. It is a reflection of the hardship women undergoes to prove.

In the case of:

G.G.W vs. R.M.W Divorce case No. 72/02, Kubo J

A litigant who married under the Christian, Marriage and Divorce Act sued in the High Court instead of the subordinate courts. The Act provides that such a divorce should be

⁸⁸ This exercise was being funded by external powers donors but due to the new policy on fundings to government, the training exercise on the Succession Act has stopped temporarily. It is envisaged that it would resume soon.

heard in the subordinate courts. The applicant was able to successfully prove that the said statute was discriminatory and indeed shut out African Christians out of the High Court. The Succession Act is affected negatively where there is no complementary statute such as the Marriage Bill.

In dealing with “illegitimate Children”⁸⁹ they stated:-

We are happy to learn that the commission on marriage and divorce is recommending that where there has been a marriage ceremony, the child of such a marriage should be deemed legitimate even if such marriage was void or voidable.

The commission relied on the recommendation of the subsequent commission on the marriage bill to consider some of their findings. Without a marriage bill being enacted, courts normally spent considerable time proving who is a wife, a matter that would be overcome if the parties had been in possession of a marriage certificate.

2.5.2(d) Exclusion Clause

Exclusion clauses within certain areas mean that the customary laws are applicable to the law of succession. Distribution of the estate is according to ones' customary laws but these laws must be of a positive nature.

Excluding specific properties from the Act and in default excluding groups of people who are described as pastoralists amounts to some extent to discrimination. Whereas a people may wish to live in a community and uphold their cultural values, they do so voluntarily. They waive their individual rights and when they do this, they cannot say they are being discriminated upon.

In this instance, the purpose of the exclusion clause was to safe guard the said community but apply the current law when the minister and the people are of the view that they are ready for it.

⁸⁹ Explanation 155.

A person can waive their rights. This is said to be “different from decision not to exercise a fundamental right”.

“Waive” means in relationship to rights
When one undertakes to deal with the rights in the future⁹⁰.

The pastoralists in essence had not waived their rights in not wishing to have the Act apply to them. This was imposed on them to safe guard their rights till such a time as the exclusion would be removed.

2.5.2(e) Emphasis on Individual rights at the expense of the peoples’ Rights

The peoples’ rights under the Charter appear not to have been clearly envisaged and or defined save as to where their rights have been interfered with by culture and self perseverance.

The African Charter sees the peoples’ rights, *inter alia*, as declaring the domination of one people by another as being unjust in instances of colonization and oppression⁹¹. It has the peoples’ sovereignty over their wealth and natural resources and their entitlement to economic social and cultural development.

The peoples’ in Kenya who fall under the exclusion clause, as stated earlier, are nomadic pastoralists and persons living in armed conflict areas. They too have rights to development and to their culture. Their rights are not clearly defined making it difficult to enforce those rights⁹².

A person can inherit land individually but a group of people cannot inherit land as a group⁹³. The Kenyan land title deed allows a maximum of four people on a title and not an entire group⁹⁴.

⁹⁰ See text on New trend in discrimination law- international perspectives, edited by lauri hannikainen eeva nykanen, Publication of Turku’ Law School vol. 3 No. 1/1999.

⁹¹ Art 20 ACHPR.

⁹² For example, the rights to water, grazing areas for their animals when land is quickly being registered or alienated.

⁹³ Where a group of people wish to retain areas for their community e.g. Masaai, Somali, Turkana e.t.c.

⁹⁴ RLA section 5.

2.5.2(f) Exemption of the Muslim

It is not intended to discuss the Muslim issue in much depth in this paper but to bring out the effect the certain amendments made that the Act has.

The succession Act was amended in 1990 to define who a Muslim is⁹⁵, what the Muslim law is and what the role of Khadhi's court is⁹⁶. The amendments specifically allow an appeal from the Khadhi's court to the High Court and further to the Court of Appeal with powers given to the Chief Justice to make rules⁹⁷.

The effect of the amendment defines Muslims to be distinct from other people. Unity of the people has in fact herein been interfered with and differential treatment given weakening the act.

On the issue of appeals to the Court of Appeal, it is only the Muslim who can have the right to appeal on a point of law. What the act requires to do is to allow any person a right of appeal to the Court of Appeal. The Muslims by being treated as separate and distinct people because of their religion in the application of the succession law brings about inequality to access of justice.

The historical perspective of the African Charter will now be analyzed to understand how it came into being.

The intention of this chapter was to look at the historical origins of both the succession act and the African Charter on Human and Peoples' Rights, to evaluate the strength and weaknesses of the succession act and to give a general overview and content of the African Charter. This has laid a basis for chapter three. The four specific clauses mentioned in the succession act under the law of intestacy.

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⁹⁵ (n 8 above) section 2 (3) of the Act.

⁹⁶ (n 8 above) section 48 of the Act.

⁹⁷ (n 8 above) section 50 of the Act.

CHAPTER THREE

Human versus Peoples' Rights in the Succession Act

The four sections under the succession act that deal with the exclusion clause, termination of a life interest of a widow, a deceased adult child and dependency will now be discussed with emphasis on how the succession sections actually respond to human and peoples' rights.

3.0 Exclusion clause

A) Section 32

The provision of this part shall not apply to:-

- Agricultural land and crops thereon or
- Livestock

Situated in such areas as the Minister may by notice in the Kenya gazette specify.

Section 33

The Law applicable to the distribution on intestacy of the categories of property specified in section 32 shall be the law on custom applicable on the deceased's' community or tribe as the case may be.

The impression one would get from the above sections is that ownership of agricultural, land crops and livestock are precluded from the Succession Act. In order to understand this section the intention of the commission on the Law of Succession must be examined.

The intention of the commission⁹⁸ was to have a universal law of intestacy applicable to all Kenyans on the law of succession but, realizing that there are groups of people living in certain parts of Kenya "who should be excluded from the act, for the time being until such a time that they are able to comprehend the working of the Succession Act These

⁹⁸ (n 19 above) Para 73, 74. pg. 17.

peoples are those who practice customary law and live in remote areas of Kenya who may not “be willing to accept the new law and or ignore it.”

The exclusion was not total. Where it is envisaged, as stated earlier, that a business person in a township has acquired property customary law should not apply. The type of property should be unregistered land and cattle.

For example, Kenya had prior to independence begun with land consolidation; where land was registered under the Registered Lands Act Cap.300 laws of Kenya. The person who had their land registered under the act, prior to the enactment of the succession law. The registered land Act Cap.300 was used. Upon the death of an African, the administration officer would receive an application for succession. He would forward this to the Registrar of Lands who in turn would forward the same to the courts to ascertain the respective shares of each heir according to customary law. The court would issue a certificate to the Registrar who would then register the person appearing on the certificate as proprietor to land. The land would then be subdivided and portions given out as shares.

Where the land was not registered the land was distributed according to customary law. It was to this area of land that the Commission recommended they be excluded from the provision of the act.

They suggested that agricultural land, crops ‘thereon’ and livestock be excluded. They left the areas for the government to choose but they did suggest excluding Turkana, Marsabit, North Eastern, East Pokot, Samburu and part of Kajiado and Narok districts.

It was the commissions understanding that when the government felt or thought that those areas were ready for change, “the universal law of intestate could be applied to them.”

After 30 years since the report was made, a closer look at the mentioned areas would see little or no development amongst the group of people living in the suggested areas, which the Minister indeed gazetted fully in 1981,⁹⁹ the same year, as the adoption of the Africa Human and Peoples' Rights Charter in Nairobi, Kenya by the Organization of African Unity.

The areas consist of nomadic groups of people distinct and diverse from each other. They are mainly pastoral peoples, some professing the Islamic faith others, heathens and some Christians.

The Ogiek¹⁰⁰ a minority tribe that live in the Mau Summit forest, gatherers and hunters who now want their rights to be recognized as a people, were never included in this group nor did the Minister (The Attorney General) see it fit to include them later. They are to date agitating for their rights to recognition and to be permitted to use the forest.

The groups of nomadic mentioned to-day are those described as living in armed conflicts areas. There is the Elemi triangle that transcends Kenya, Sudan and Ethiopia which is occupied by the Turkana, Toposa, Dinka, Dongiro and Merille Communities. There are inter tribal cattle raids and animosity¹⁰¹ conflict in this region has been described as "most severe and frequent."

In the North Rift Region in Kenya communities, "largely, pastoralists arm themselves in a bid to protect their livestock from aggressions." A report by the Security Research and Information Centre called 'Profiling small arms and insecurity in north rift region'

⁹⁹ The Minister by gazette notice 49/81 dated the 23.6.81 application of part V of the act needs:-
"In exercise of the powers by section 32 of the Law of Succession Act, the Attorney-General declares that part V of the act shall not apply to:

- a) Agriculture land and crops thereon or
- b) Livestock

In various district set out in the schedule. West Pokot, Turkana, Marshabit Samburu, Isiolo, Mandera, Wajir, Garissa, Tana River, Lamu, Kajiado, Narok.
J.K. Kamere Attorney General. See note 32.

¹⁰⁰ <<http://www.Survival-international.org/ogiek.htm>>. (accessed November 2004)

¹⁰¹ Peace Building: August 2003, <http://www.itdg.org/d-region_east_African_peace_2> (accessed November 2004) peace building.

estimates that small arms has grown from 30,000 in 1990 to 127,519 to-day. Weapons have become a status symbol. An AK 47 is now said to be part of a bride price.

Here we see, instead of customary law improving the lives of the peoples so that, in peace and awareness of human rights, the succession laws would apply in intestacy, it seems far from reality, especially when people see the AK-47 as being bride price instead of cattle, the traditional property. (There is a lot that the government and the civil society require to do to address the issue of peace and insecurity in certain parts of Kenya).

The African charter states in article 23 (1).

All peoples shall have the right to national and international peace and security.

Without peace there cannot be the realization of one's enjoyment to property.

The commission's long term intention to section 32 and 33 was to do away with this section and apply the universal law of intestacy to the given areas.

Are the people rights, as opposed to the individual rights, in conflict on this understanding?

Peoples' rights are spoken of in clause 19 to 24 of the Charter and as mentioned earlier, was never defined.

Clause 19 – deals with the equality of the people. People have a right to existence. “All the peoples shall freely dispose of their wealth and natural resources”¹⁰². This right shall be exercised in the exclusive interest of the people. In no case shall the people be deprived of it. The charter envisaged spoilage and provided that in such cases, the disposed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

¹⁰² The African Charter on Human and Peoples' Rights clause 20.

Nomadic groups have a right to exist as a people. These rights are enshrined in the African Charter and are to be safeguarded. Article 22 of the Charter provides the right to cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

During the colonial era, reserves were set aside for groups of people. Other jurisdictions such as in the U.S.A – the red Indians have reserves where the common heritage is enjoyed. This type of existence is desirable in Africa. In Kenya, the rights of the peoples effected in the respective districts and named areas have had values change through education and acquisition of modern property and thus such persons are to be under the universal law of intestacy. The rights of peoples' and individual rights have to be balanced. There is a hierarchy between the two, in that individual rights take priority over peoples' rights.

With the understanding that the commission did not intend this clause to be discriminatory to certain peoples and or individuals it would be recommended that this clause be removed.

3.1 Termination of a life interest of a widow

“Section 35(1) subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to:-

a) The personal and household effects of the deceased absolutely and

b) A life interest in the whole residence of the net intestate estate:-

Provided that, if the surviving spouse is a widow, that interest shall determine upon her remarriage to any person

The intention of this clause by the commission is to consolidate the four laws on intestacy and the procedure to be undertaken.

The difference before was: -

- I: Statute Law – Indian Succession Act 1865, section 25 to 42
- i) Where the deceased leaves a widow all the property goes to the widow and vice versa to the widower.
 - ii) Where deceased leaves a widow or widower $\frac{1}{3}^{\text{rd}}$ of the property goes to the widow and $\frac{2}{3}^{\text{rd}}$ to the descendants equally among the children. If there are no children the $\frac{2}{3}^{\text{rds}}$ go to the grandchild of the parent who is demise.
 - iii) If there is no widow/property goes to the lineal descendents
 - iv) If there is a widow and kindred, each take one half¹⁰³.

2) Islamic Law

The shares are fixed as laid down in the Quran for each of the deceased relatives.

The widow - $\frac{1}{8}^{\text{th}}$

The widower - $\frac{1}{4}$

The father - $\frac{1}{6}$

The mother - $\frac{1}{6}$

For sisters - $\frac{1}{2}$

Sisters - $\frac{1}{2}$

Uterine brother and sisters $\frac{1}{6}$

Others schools give inclusive of the grandparents¹⁰⁴.

3) Hindu

i) Ancestral property where the property passes to survivorship to members of the joint family

ii) Self acquired property

The owner is free to dispose of it by will or by gift *inter vivos*. The widow gets the life estate where no will had been written. Married

¹⁰³ Where there is a will written, a person can will his property to whom he wishes. He or she can disinherit their family.

¹⁰⁴ Where a will is made by a Muslim, only $\frac{1}{3}$ of the net estate is permitted to go to outsiders. The other $\frac{2}{3}$ of the estate goes to the heirs according to the law of intestate.

daughters have no right whilst unmarried daughters only entitled to maintenance. All sons get equal share on division.

Females are entitled to their separate property which is not part of the estate¹⁰⁵.

4) Customary Law

On the death of a father, the eldest adult son takes over. If the son is minor, the brother to the deceased become head of the family. Apart from the Digo and Duruma the inheritance is patrilineal. In principle, distribution is done equally amongst the sons. Only sons inherit to the exclusion of wives and daughters. Distribution is per house¹⁰⁶.

There are no fixed shares under Hindu and customary laws but there is a fixed share under the European statutory laws and the Muslim faith laws.

The commission's recommendation No.32 states:

We recommend that on the death of husband, a widow should have a life interest in the whole of his free property. We recommend further that this interest should cease if the widow remarries...

The reasons for such recommendation came from women and women organizations that saw that

a wife should be the most important person as far as inheritance rights are concerned....It is through her effort that the husband accumulated his wealth ...and the widow is the one who needs the property most.¹⁰⁷

The act under section 35(1) went further to give both the husband and the wife a life interest to the estate. Therefore if either of the spouses dies, the surviving spouse would have a share of life interest to the estate. Where there are minor children, the

¹⁰⁵ Where a will is written this is limited by the Hindu act.

¹⁰⁶ Under the law of testate, will making was made orally during old age or by death declaration. Its main purpose is to nominate the successor of the head of the family. The Africans Wills Act on the other hand, was limited to the same concept as the Hindu act. This being:

i) The testator cannot bequeath property which he could not alienate "*inter vivos*".

ii) Deprive any person any right of maintenance.

iii) Affect any law of adoption or intestate succession.

¹⁰⁷ (n 19 above) Recommendation 32 Para 135 pg. 41.

administrator/administratrix must be two under section 58 of the act in order to create a resulting trust.

What is contentious to this recommendation and now proviso is the recommendation that the interest should cease if the widow remarries. This though does not apply to the widower if he remarries. An explanation of this is given under explanation No.148 and recommendation 40.

The commission recommends a life interest for the widower as the same for the widow. The reasons being; it is:-

- I: A safeguard for the children in cases where the father is likely to waste the property.
- II: To follow the wish of the wife, the husband would enjoy the property in his life time for the benefit of the children

The commission did not think that the “husband’s life interest should determine on remarriage” because of the ‘prevalence of polygamy’ “he may have other wives anyway”.

It is most certain that by applying different laws to the spouses it amounts to a distinct exclusion of those rights. This is indeed discrimination and the equal protection clause should be invoked to protect the widow under the African Charter i.e. African Charter on Human and Peoples’ Rights, Convention on Elimination of all forms of Discrimination against Women, Convention on Elimination of Racial Discrimination, and African Charter on Human and Peoples’ Rights on the Rights of Women.

The aspect of resulting trust under section 58 of the act should be maintained to safeguard the interest of the children.

3.2 A deceased adult child.

“39(1) where an intestate has left no surviving spouse or children, the net intestate estate shall dissolve upon the kindred of the intestate in the following priority:-

- a) Father, or if dead
- b) Mother, or if dead
- c) Brothers and sisters and any child or children of deceased brothers and sisters in equal share or if none
- d) Half – brothers and half sisters and any child or children of deceased half brother and half sisters in equal share or if none
- e) The relatives who are in the nearest degree of consanguinity up to and including the 6th degree in equal shares.”

The law prior to this was reflected in the statutory laws where the estate goes to the father if dead to the mother sisters, and brothers in equal shares.

The commissioners recommended that the property go to the father first or if dead, to the mother, or if dead to the brothers and sisters etc. Here again the father and mother to the child have equal rights. The shares should therefore be equal as seen in shares between brothers and sisters in his first instance.

The improvement seen by the Commission was to ensure that the mother is next in line to get the shares absolutely. The ideal situation is to have both parents get the shares equally. It would not be in the interest of the child if he knows that his father has married again, having left his mother and that his father gets all his estate absolutely, to the exclusion of his biological mother.

Equality before the law under the African Charter on Human and peoples' rights states that:

Every individual shall be equal before the law¹⁰⁸

It is clear that one spouse is discriminated against. The recommendation would be to allow both spouses to inherit equally the share of the deceased spouse.

3.3 Dependency

“Dependant” is defined in the Succession act section 29 to mean.

- a) The wife or wives, or former wife or views and the children of the deceased whether or not maintained by the deceased immediately prior to his death.
- b) Such of the deceased’s parents, step-parents grant parents, grand children step-children, children who the deceased had taken into his formerly as his own brother and sisters and half brothers and half sisters as were being maintained by the deceased immediately prior to his death and
- c) Where the deceased was a woman, her husband, if he was being maintained by her immediately prior to the date of her death.

Those classified as dependant include children born out of wedlock. The intention of the commissioners was to ensure that “a child should suffer as little as possible” as being born out of wedlock is no fault of his. Special emphasis was therefore taken by the commission for this child. The commission also provided for equal shares amongst brothers and sisters to remove the discrimination that has arisen for providing for male dependants children and not the female dependant.

It is generally agreed that a child is entitled to the estate. Whether born out of wedlock or adopted. There is today not much dispute on this. The problem arises on the dependency of a wife.

In the case law of: *the matter of the estate of Reuben Nzioka Mutua*¹⁰⁹. The deceased had died having been survived by a wife and children. He had also written his will on how his estate should be distributed. A mistress came to claim that she too was entitled to the

¹⁰⁸ Art. 3 (1).

¹⁰⁹ Probate and administration cause No. 843/86.

estate as she had two of the deceased's children. The court ruled (Aluoch J) that the mistress was not a wife and therefore not entitled to the deceased's estate. The Hon. Judge though, found that under section 29 of the succession act the two children are dependents and entitled to the estate, although their existence was not known by the widow to the deceased.

In dealing with the issue of really who is termed to be a wife, the court of appeal in the case of: *Irene Njeri Macharia vs. Margaret Wairimu Njemo & Another*,¹¹⁰ (Omollo, Tunoi .J JA, Bosire Ag J) discussed two earlier authorities of: *Re: Ruenjis Estate*¹¹¹ and *RE: -Ogola's Estate*¹¹² where it had been held that a deceased who had married a wife under the statutory law is not capable of having additional wives. Such additional 'wives' were not wives in law and could therefore not inherit. The court of appeal held this position was correct as the two decisions were decided prior to the succession act coming into force.

In 1981, they described that "the male –dominated" Parliament inserted a new sub clause to section 3 of the Succession Act which deals with the "interpretation" clause on the interpretation of dependant children.

Sub rule (5)

Notwithstanding the provisions of any other written law, a women married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman nevertheless a wife for the purpose of this act, in a particular section 29 and 4 thereof, and her children are accordingly children within the meaning of this act.

The effect of this clause is to bring a mistress (concubine who purports to be a wife) to be considered a dependent. The law clearly states that if you marry under the monogamous system of marriage, you are not permitted to contract any other systems of marriages unless you formerly dissolve the marriage. If you do, that marriage is termed null and void.

¹¹⁰ Nairobi C.A 139/94.

¹¹¹ Nairobi 1977 K.L.R 21.

¹¹² Nairobi 1978 K.L.R 18.

In the decision in question, the court of appeal had stated that for the purposes of interpretation, that mistress or concubine is indeed a dependant provided that a marriage (whether null or void) took place. The children in any event become the dependant and rightful dependants of the deceased. They did not agree with the Reuben Nzioka Mutua's¹¹³ decision declaring the other woman not a wife because the deceased had purported to marry the other woman. She was therefore a wife for the purposes of the act.

In the case in question; Irene Njeri Macharia¹¹⁴. they held that “the mistress” in fact could not prove that she was a wife and had undergone the marriage rites, but in the Mutua case¹¹⁵, the mistress went to great lengths to prove that she was married under Kamba customary law.

The court proceeded to award the minor child who was born out of wedlock, Kshs. 186, 086/= of the distributable estate and the widow Kshs. 10/=. They left out the mistress, the mother of the minor because she was unable to prove a formal marriage had taken place.

The issue of dependency of wives, ex-wives or former wives is understandable where there is proof of marriage. The law clearly says that a wife married under another subsequent system of law is not a wife. This clause enacted in 1981 would have been overcome if the marriage bill was enacted. The said marriage bill provides for two systems of marriages. Monogamous marriages and polygamous marriages. Because the bill had not been enacted, proof of marriage remains a contentious issue. This must be proved by that person who alleges it.

¹¹³ (n 58) above.

¹¹⁴ (n 59) above.

¹¹⁵ (n 58) above.

The African Charter¹¹⁶ permits the special protocols and agreements article 66 (d) whereby the African commission on Human and peoples rights elaborated a protocol on the Right of Woman in Africa. The said instrument provides that:-

States parties shall ensure that women and men enjoying equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislation to guarantee that:

- d) Every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally as recognized...

This right to afford the spouses a safe guard by ensuring their marriages are registered is not wholly available in Kenya. It is a clause with a reservation on. Kenya has therefore accepted the protocol with the given reservation that the issue of “a marriage certificate being available to all women” should not be made a requirement under the protocol.

The enactment of Act No.10 of 1981¹¹⁷ contradicts the laid down law on the capacity to marry and mitigates against the sanctity of marriage and the family. For the removal of doubt the marriage bill should be enacted to be in line with the regional instrument

On the other hand, there are situations where a man would have no intention of getting married to the woman who bears his child. Kenya used to have an Affiliation Act to cater for such women. The man would be required to pay maintenance for the child. This act was repealed due to abuse but the clause has now been brought back through the Children’s Act¹¹⁸. However, under the new act, both the mother and father of the child are required to pay maintenance for that child. Customary law recognized pregnancy compensation to be paid by the man. These awards are still being made by the subordinate courts.

¹¹⁶ The protocol to the African charter on Human and Peoples rights on the rights of women in African article 6 marriage.

¹¹⁷ Section 3 rule 5 Law of Succession Act.

¹¹⁸ The Children’s Act 2001, sec 90 (e)

In this chapter, we have seen how human rights have been recognized under the succession act but with the four exceptions in the categories under the exclusion clause, termination of a life interest of a widow, the adult child and dependency.

The exclusion clause basically targets nomadic people without actually stating so. It is at times noted that such people are in a group and their rights are treated by them as group and collective rights. They too have a right under the universal law of intestacy but that this focus more on the individual right of the immediate family as a unit as opposed to the extended clan or tribes. Individual human rights is guaranteed by the law.

Human rights is seen in the section on spouses and their rights. These rights have been safeguarded, except on clauses where there are clawbacks touching on the woman alone. It therefore amounts to discrimination in providing preferential treatment to one spouse from the other.

The family as a unit requires to be safeguarded. Under dependency, the clauses allowing a mistress to intrude in the family without there being a formal divorce is unacceptable and the law protecting the individual right of a wife is to be upheld.

The national or regional laws say more or less the same principle in that in order to have a safeguarded society, the family unit and the individual rights have to be safely protected. That the peoples' rights and their welfare are to be promoted through the same means of protecting individual rights.

CHAPTER FOUR

Conclusion and recommendations.

4.0 Conclusions

The study has established that the purpose of consolidating the personal laws of Kenya on succession was to bring in line the equality of the law for all. This act in many aspects is procedural and informs all individuals on how they can access the court and be heard under the one law. Instead of various different methods which amounted to giving different treatments and rights to only certain peoples' of Kenya.

The historical perspective of the act was ventured into and established the desire of having a uniform and equitable legislation¹¹⁹. The succession act, it was seen, was unique in character as it upheld human rights norms and equality between the peoples, sexes, and creed. This national legislation was indeed before its time when it was enacted. It was because of this that it was chosen to test whether it complies with the regional instrument of the African Charter on Human and Peoples' Rights.

This Charter is also unique in its own way, combined the principles enshrined in the civil and political rights, economic social and cultural rights and the third generations rights of human rights. Criticism have been termed that the African Charter is too ambitious and cannot be effectively implemented but this study was concerned with the principles within the Charter. The right of individuals and peoples are paramount and in effect should be safeguarded.

At the time the succession act was being prepared, Kenya had just gained independence with very many other African countries also becoming independent. The whole of African customary laws were being studied to see their place in the new independent country. One thing was clear that the equality of the law was lacking.

¹¹⁹ chapter 2.

By the time the Act had been passed and commenced, the O.A.U had just passed the African Charter that recognized the importance of these rights. The African Charter was seen to uphold equality¹²⁰ of the people, the peoples' right to culture,¹²¹ and the special protection designed for women, children, the aged and disabled¹²². The rights to property¹²³ and the duty to dispose of and the protection of the process of law¹²⁴.

These rights under the succession laws have been enshrined in this domestic and national legislation. It is an act that brings about uniformity of the law, equality and protection of the spouses, the child and the family.

These rights therefore are entailed in four sections under the law of succession or intestacy to which this study restricts itself to.

- i. The exclusion clause found in section 32 of the succession act, saw certain areas excluded from the act and by extension groups of people from these particular areas who are nomadic. Their perspectives at times being restricted to livestock and communal agricultural land. The time has come to permit them to be under the universal law of intestacy that applies to the rest of Kenya to safeguard their peoples' rights.
- ii. The life interest of a spouse that terminates when she remarries. Section 35 infringes on the equality of that widow. This means that the said clause is a clawback. It further established that it is discriminating against the widow.
- iii. The adult child in section 39. This means that the share of the estate of an adult child should not devolve alone to the father only but equally to the father and mother.
- iv. On the issue of dependency, the family's sanctity require to be protected in order to have a moral fabric of society

¹²⁰ Art 19 A.C.H.P.R..

¹²¹ Preamble Art 18(1) A.C.H.P.R.

¹²² Art 18 A.C.H.P.R.

¹²³ Art 14 A.C.H.P.R.

¹²⁴ Art 6 & 7 A.C.H.P.R.

4.1 Whether there is a conflict between individual rights and peoples' rights.

The succession act has emphasized individual rights with special preference to the family; whether that family practices monogamous or polygamous form of marriage. Such individuals are protected under the act.

The peoples' rights are implied. Where such categories of properties that may touch on the peoples' rights, an exemption clause was put within the act. The purpose as was found in the study is to give an opportunity of such people to gradually apply the act when they have understood it and especially when the people have acquired modern properties not subject to customary law¹²⁵.

4.2 Whether there is a hierarchy of importance between the two types of rights or whether these rights are at par.

The hierarchy of importance within the succession act is based on the individuals. The peoples' rights are important. The succession act in exempting the properties in the respective areas applies customary law. At times, customary law is negative. The African Charter advocates positive customary law and culture and therefore, by implication, negative customary laws are not part of human rights norms.

An individual can waive¹²⁶ their human rights deliberately and agree to be subject to a law he or she wishes that may be negative to their rights. The rights are not at par as the peoples' rights, which are collective rights may override the rights of an individual.

4.3 Whether elements of discrimination still exist within the succession act.

There are elements of discrimination¹²⁷ against women that still exist within the act. These elements were intended to advocate customary law norms. With the educated

¹²⁵ Chapter 2 pg 26 &27.

¹²⁶ Chap 2 pg. 50.

woman who now acquires her own properties, the sections that advocate negative customary law norms should be repealed.

4.4 Application of regional and international instruments by judicial officers.

Although the laws at regional and international level have to first be domesticated in Kenya before it becomes law, there is nothing stopping a judicial officer from applying the regional and international instruments in their decisions where such instruments are not in conflict with the national laws. This was recommended in a commonwealth judicial colloquium held in Bangalore India in 1988.

National law can be given more life when human rights norms are applicable and not in conflict. It was also noted that once the African Charter has been ratified and domesticated, a country is not permitted to repeal it from the laws without following laid down “proceedings”.¹²⁸

The succession act has to be alive and realistic. More and more Kenyans want a secure future for themselves and their families. Human rights norm is to be used to protect those rights. The draft constitution (2004) has embodied the same idea in part II concerning the fundamental rights and freedoms, the protection of the right to property (section 58) and access to court (section 72). It goes further to speak of community land (section 80) and differentiates the property rights of spouses.

The draft constitution recognizes both the rights of individuals and the people. These rights as stated previously have to be enhanced in such a way that can allow the realization of the peoples’ and individual rights. Where there is a conflict in the two rights, the individual rights should prevail.

Although incorporation of human rights into [the] legal system is a significant step towards their exercise, it can nevertheless remain empty or

¹²⁷ Chap 2 pg. 25.

¹²⁸ Chap 2 pg 42. See also civil liberty organization v. Nigeria case.

formal unless the whole social, economic and political order is transformed so as to allow everyone equal enjoyment of all human rights[regulation].

The above statement is correct in that the Succession Act, which has incorporated aspects of human rights norms, if not wholly transformed into the lives and enjoyment of the people become meaningless. The commission on the succession act saw the succession act as one that would mold itself into the ever changing society.

This also applies to the African Charter which can easily become of little significance if it too does not allow the individual and people to enjoy those rights¹²⁹. The protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa which was adopted in the second ordinary session of the assembly in Maputo (2003); in which it recommended that the full enjoyment of the Charter be realized by removing the discriminating clauses against people and individuals.

The different treatment of individuals is discriminative only when it infringes human rights...¹³⁰

4.5 Recommendations

4.5.1 Discriminatory clause

It is recommended that the following discriminating sections and clauses within the law of succession act of Kenya be removed and repealed:-

4.5.1(a). Exclusion Clause

Section 32 and 33 that excludes people from the application of the act.

That a new section be included to cater for the group of people.

4.5.1(b). Proviso to section 35 (1) that is on the termination of the life interest of a widow on her remarriage. That the life interest of a widow should not terminate on her remarriage.

¹²⁹ Drzewick (n 2 above).

¹³⁰ Piechshiak (n 2 above).

4.5.1(c). The amendment to section 36 (1) be effected to give equal shares of property to both parents on the demise of an adult single child who dies leaving no wife or issue.

4.5.1(d). The repeal of legal notice No. 10 of 1981

This is the legal notice that gives a concubine the same status as a wife.

4.5.1 (e). The Marriage Bill

It is recommended that the Marriage Bill be enacted to remove ambiguity as to who is a lawful wife that still exist. It would give each couple a certificate of marriage to prove that a marriage took place.

4.5.1 (f) The re-enactment of the affiliation Act

4.6 Recommendation on domestication of regional and international instruments

Kenya requires domesticating the regional and international human rights conventions. It also requires going further and ensuring that these rights are transformed into the social and economic life of the peoples.

4.7 Awareness

The implication of the act to bring the said statute to life is important. To do this, there requires to be public awareness through the media of the rights under the Act.

The commission on the succession law had recommended that there be training of judicial officers undertaken at the Kenya Institute of Administration. It is therefore recommended that such training do continue not only for judicial officers but for the clerks in the registry who initially handle the said documents.

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APPENDIX A

Chapter 2 Para 2: Historical perspective on the African Charter on Human and Peoples Rights

March 1967 saw Nigeria “take a draft resolution to the United Nations Commission on Human Rights requesting for a creation of a regional commission for the protection of Human Rights.” An ad hoc committee was set up to study the draft resolution. Its members differed and a report to the United Nations Secretary General was forwarded to be remitted to member states.”

Africa failed to make a report on its human rights activities in 1968, at the Tehran conference that was then celebrating 20 years of the Universal Declaration of Human Rights.

In 1969, the following year, Egypt hosted a conference between 2 and 15 September 1969. It is here that the African Commission on Human Rights appointed the establishment of an African commission on Human Rights limited to “education, information, research, study projects, advisory services and holding seminars and awarding fellowships.” The issue of sovereignty and investigating complaints on human rights violation was not accepted fully.

On the basis of the ad hoc study group and the Paris seminar a conference was held in Ethiopia on “African legal process and the individual”. It adopted the resolution of there being African Human Rights Commission to further collect and evaluate information on Human rights and establishment of an advisory body to interpret the convention.

A subsequent seminar was held in Dar-es-salaam (Tanzania). It aimed towards achieving a sub-regional co-operation between states before a human rights commission could be established.

Fourteen years later, the United Nations accepted recommendation to facilitate a regional seminar on the establishment of the regional commission on Human rights for Africa.

Monrovia, (Liberia) held the conference from 10 to 21 September 1979¹³¹. The conference seminar came up with a proposal on African commission on Human Rights. This commission would study violation of Human rights that are alleged and their causes, then report to the Organization of African Unity (O.A.U). This was to allow the O.A.U to have settlements at the discretion of the O.A.U first.

The effect was to give the continent international human rights legislation. (The Monrovia conference was concerned with the structure and mechanism of the protection of human rights).

¹³¹ Ouguergouz (n 6) summarizes this history having participated himself in the Monrovia conference, The following historical events is extracted in summary from his book.