THE INTERFACE BETWEEN CUSTOMARY LAWS OF SUCCESSION IN THE TRADITIONAL JUSTICE SYSTEM AND THE FORMAL JUSTICE SYSTEM IN KENYA

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ABSTRACT

Traditional justice systems (TJS), which apply African customary law (ACL), play a significant role in the regulation of various cultural, social, and economic spheres of individual lives in society. It is estimated that 90% of African countries use TJS in dispute resolution. Succession matters form one of the areas in which TJS are applied. In Kenya, it is estimated that the majority of succession matters are addressed through TJS given that only 36% of cases are taken to the formal justice system (FJS) for determination. This indicates the presence of legal pluralism where formal law co-exists with African customary law. However, the application of customary succession laws and their enforcement by the FJS encounter impediments which curtail the integration of ACL within the FJS. Therefore, the purpose of this study is to determine the interface between African customary laws of succession in the TJS and the FJS. In order to achieve this objective the study applies the Historical School of Jurisprudence as its theoretical framework and applies document analysis as the research methodology. The major findings of the study indicated that though progressive recognition, application and enforcement of ACL in Kenya has been realised, there are several impediments to the integration and enforcement of customary succession decisions within the FJS. These include non-complimentary legal provisions, lack of in-depth knowledge on ACL by the FJS, and more importantly, lack of a policy guideline on the integration of ACL within the FJS. Based on these findings, this study finds it necessary to develop a guideline that will enhance the integration and enforcement of customary succession decisions by the FJS.

KEYWORDS

Customary Law

Decisions

Development

Disputes

Enforcement

Enhancement

Formal Justice Systems

Informal Justice Systems

Interface

Integration

Recognition

Reform

Succession

Traditional Justice Systems

LIST OF ACRONYMS AND ABBREVIATIONS

ACL	African customary law
ACRWC	African Charter on the Rights and Welfare of the Child
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
FIDA	International Federation of Women Lawyers
FJS	Formal justice system
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IJS	Informal justice systems
IPRC	Isiolo Peace and Reconciliation Committee
JTI	Judicial Training Institute
JTF	Judicial Transformation Framework
KLRC	Kenya Law Reform Commission
LSA	Law of Succession Act
SJT	Sustaining Judiciary Transformation
TCRMs	Traditional conflict resolution mechanisms
TDRMs	Traditional dispute resolution mechanisms
TJS	Traditional justice systems
UDHR	Universal Declaration of Human Rights
UNCRC	United Nations Convention on the Rights of the Child
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGA	United Nations General Assembly
WPDC	Wajir Peace and Development Committee

DECLARATION

I, **Angela N. Mutema**, declare that **'The interface between customary laws of succession in the Traditional Justice System and the Formal Justice System in Kenya'** is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed: _____ Angela N. Mutema

June 2019

Signed: _____ Prof. Lea Mwambene

June 2019

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DEDICATION

To Dad, Mum and Kitinda.

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND AND PROBLEM STATEMENT

Traditional justice systems (TJS)[1] or traditional dispute resolution mechanisms (TDRMs)[2] are the oldest source of justice amongst the indigenous African people. Most TJS are presided over and regulated by elders. In this regard, Kariuki F observes that the institution of elders is one of the crucial institutions for conflict resolution in most African societies. He asserts that the institution of elders has remained resilient and continues to exist outside the spheres of state influence, even in countries with no formal state recognition of the institution of elders. Accordingly, this lends credence to the longevity of TJS which apply TDRMs in dispute resolution and which are presided over by elders in the community.[3] TJS apply African

[1] There is no universal or cross-cutting definition of TJS as they tend to be culturally specific. Hence concepts like community justice system (CJS), traditional, non-formal, informal, customary, indigenous and non-state justice systems are used interchangeably in different contexts to refer to localised approaches by communities to attain justice. A study by FIDA-Kenya refers to TJS as all those people-based and local approaches that communities innovate and utilise in resolving localised disputes, to attain safety and access to justice by all. See Traditional Justice Systems in Kenya: A Study of Communities in Coast Province, Kenya. FIDA-KENYA http://www.fidakenya.org/dr7/sites/default/files/Traditional-Justicefinal.pdf. (accessed 23 April 2018). TJS is also defined as 'encompassing the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not a part of the judiciary as established by law and/or whose substantive procedural or structural foundation is not primarily based on statutory law.' See UN study on Informal Justice Systems: Charting a Course for Human-Rights Based Engagement by the Danish Institute of Human Rights, UNDP, UNICEF and UN Women, available at http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Informal-Justice-Systems-Summary.pdf (accessed 23 April, 2018). Further, for an in-depth analysis on the use of the term in Kenya, see Kariuki F Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology available at http://land.igad.int/index.php/documents-1/countries/kenya/conflict-3/535-community-customary-and-traditional-justice-systems-in-kenya-reflecting-on-and-exploring-the-appropriate-terminology/file (accessed 23 April 2018).

[2] These mechanisms include conciliation, meditation, negotiation and arbitration.

[3] See Kariuki F, 'Conflict resolution by Elders in Africa: Successes, Challenges and Opportunities,' 1, available at https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/francis-kariuki.pdf?sfvrsn=0 (accessed 22 April, 2018).

customary law (ACL),[4] which is a deep-rooted source of law and one of the primary sources of legal knowledge in Africa.[5] In most African states including Kenya, TJS are applied alongside statutory law. This presents the existence of legal pluralism,[6] which is observed as the most significant feature of law in Africa.[7] In this context, the state system and the non-state legal systems co-exist.[8] This co-existence is observed to result from the struggle of ACL not to be submerged by other European legal systems that came with the colonisation of

[4] African customary law is also known as consuetudinary or unofficial law (*consuetudo juris*), native law, folk law and/or informal law, as it is not provided for under a statute and in most cases applied informally by informal tribunals. It has been defined as 'rules of traditional customs which are discoverable by judicial inquiry and which are enforceable because they are acceptable as conforming to what ought to be the current values in society.' See generally definitions by Ogwurike C 'The Source and Authority of African Customary Law' (1966) 3 *Univ. Ghana LJ* 17 and Oba AA 'The Future of Customary Law in Africa' in Fenrich J, Galizzi P & Higgins TE (eds) *The Future of African Customary Law* (2011) 59-60. It can be divided into 'official' and 'living' customary laws. Official customary law 'has been recognized in anthropological studies, court judgments, restatements, and in legal codes,' while living customary law is 'the practices and customs of the people in their day-to-day lives.' For another distinction between official and living customary law, see Himonga (2011), who asserts that 'the concept of living customary law is now readily accepted by courts, scholars, and legislation dealing with customary law and that recognition of this concept signifies the status of living customary law and its future as a part of African legal systems.' Himonga C 'The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa' in Fenrich J, Galizzi P & Higgins TE (eds) *The Future of African Customary Law* (2011) 37.

[5] Further, ACL is diverse but has some common features in terms of content that makes it identifiable as a distinct family of laws. First, it is unwritten, secondly, it is expressed communally, thirdly it depends on acceptance by society and lastly, it is flexible as it adapts to changing times and circumstances. See Oba AA 'The Future of Customary Law in Africa' in Fenrich J, Galizzi P & Higgins TE (eds) *The Future of African Customary Law* (2011) 59-60.

[6] This is supported by the observation that legal pluralism is dominant in most African countries which were colonised, and forms a defining factor for the legal systems of the various states in which it is present. In trying to demystify the phenomenon that is legal pluralism, a myriad of definitions have been advanced. For instance, Forsyth M notes that legal pluralism is characterised by various legal systems operating independently or semi-independently from the state; with the most common legal orders existent in a legally pluralistic state being the state system and the non-state legal systems. The author also notes that there are some legal orders which have religious-based systems in addition to the non-state legal systems. She gives the example of Nigeria's *shari'ah* courts in this regard. She also identifies an emerging legal system namely the "trans- national legal system". See Forsyth M 'A Typology of Relationships between State and Non-State Justice Systems' (2007) 39 (56) *The Journal of Legal Pluralism and Unofficial Law*, 67-112,67-8.

[7] See Oba AA (2011) 61.

[8] The recognition of the existence of legal pluralism, is now entirely beyond dispute among scholars as noted by Scuppert GF (2015) 'From Normative Pluralism to a Pluralism of Norm Enforcement Regimes: A Governance Research Perspective' in Kötter M, Röder TJ, Schuppert GF & Wolfrum R (eds) *Non-State Justice Institutions and the Law Decision-Making at the Interface of Tradition, Religion, and the State* (2015) 188.

Africa.[9] Accordingly, legal pluralism applies in Kenya which can be described as having a bifurcated system of law, where several legal systems are applied either in parallel or in union.[10] The United Nations estimates that in some African states,[11] TJS handle between 80 to 90 per cent of the total caseload, thereby serving the function of resolving disputes.[12] Further, it has been noted that in many developing countries, customary systems (TJS) operating outside the state regime are often the dominant form of regulation and dispute resolution, covering up to 90% of the population in Africa.[13] As a result, TJS have an enduring cultural legacy as many communities look to them as the primary source of dispute resolution;[14] as they are within the communities' reach.[15] In this regard, it is widely observed that TJS offer a sense of ownership to the people they apply as they are within people's proximity, are readily available, accessible, flexible and accommodating, affordable, effective and timely in their decision-making.[16]

[9] See Oba AA (2011) 61.

[10] The different legal systems that apply in Kenya include the English common law, African customary law and Islamic law.

[11] Examples of states that apply TJS include: Kenya, Malawi, Mozambique, Uganda, Tanzania, Sierra-Leone, Namibia, Niger, Nigeria, Rwanda, South Africa and Zambia.

[12] See Human Rights and Traditional Justice Systems in Africa http://www.keepeek.com/Digital-Asset-Management/oecd/international-law-and-justice/human-rights-and-traditional-justice-systems-in-africa_7d32f3a1-en#.WPvDOlN97Vo#page17 (accessed 23 April 2018).

[13] See Chirayath L, Sage C and Woolcock M 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems' (2005) 2. They cite the example of Sierra Leone where approximately 85% of the population is governed by customary law.

[14] Human Rights and Traditional Justice Systems in Africa http://www.keepeek.com/Digital-Asset-Management/oecd/international-law-and-justice/human-rights-and-traditional-justice-systems-in-africa_7d32f3a1-en#.WPvDOlN97Vo#page7 (accessed 23 April 2018).

[15] This could be attributed to the fact that customary justice systems ((CJS) or TJS operate within the community. According to Kariuki M & Kariuki F, this brings justice closer to the people and makes the quest for justice more affordable. This supports the fact that access to justice is a basic and inviolable right guaranteed in international human right instruments and national constitutions, as seen in art. 48 of the Constitution of Kenya 2010, which guarantees the right of access to justice for all. See Kariuki M & Kariuki F 'ADR, Access to Justice and Development in Kenya,' 8, available at https://profiles.uonbi.ac.ke/kariuki_muigua/files/adr_access_to_justice_and_development_in_kenya__strathmore_conference_presentation.pdf (accessed 22 April 2018).

[16] See observations by Kane M, Oloka-Onyango J and Tejan-Cole A (2005) "Reassessing Customary Law Systems as a Vehicle for Providing Equitable Justice to the Poor" paper presented at the Arusha Conference, New

Further that TJS have an emphasis on reconciliation, compromise and group responsibility, and use informal enforcement procedures,[17] which lead to their decisions being complied with due to familiarity of the customs.[18] In addition, it is observed that by fostering reconciliation, TJS maintain social order.[19]

In the context of Kenya which has 44 ethnic communities,[20] TJS are accessed by various community groupings,[21] comprising of the *Njuri Ncheke* of the Meru;[22] *Kokwet* of the Kipsigis;

Frontiers of Social policy, December 12-15 https://bit.ly/38GOwbV (accessed 22 April 2018) 1-34, 9-11. See also similar observations by Rautenbach C, 'Traditional Courts as Alternative Dispute Resolution (ADR)-Mechanisms in South Africa' in Diedrich F (ed) *The Staus Quo of Mediation in Europe and Overseas: Options for Countries in Transition* (2014) 288- 329, available at https://bit.ly/2wRMEzS (accessed 24 April 2018).

[17] See Elegido JM *Jurisprudence* (1994) 128-130 in Oba AA (2011) 60.

[18] This compliance is attributed to the fact that ACL is widely applied in most matters and that most people have knowledge of its workings as ACL 'springs from the practices of a particular community.' See observation as espoused by Ubink J 'The Quest for Customary Law in African State Courts' in Fenrich J, Galizzi P and Higgins TE (eds) *The Future of African Customary Law* (2011) 99.

[19] These are viewed as important goals of TJS due to community development, according to the UN in *Human Rights and Traditional Justice Systems in Africa* (2016) 27 available at http://www.keepeek.com/Digital-Asset-Management/oecd/international-law-and-justice/human-rights-and-traditional-justice-systems-in-africa_7d32f3a1-en#.WPvDOlN97Vo#page27 (accessed 23 April 2018).

[20] Rautenbach C highlights other advantages of TJS by stating that customary justice systems are flexible and accommodating. For more see Rautenbach C, 'Traditional Courts as Alternative Dispute Resolution (ADR) — Mechanisms in South Africa' in Diedrich F (ed) *The Staus Quo of Mediation in Europe and Overseas: Options for Countries in Transition* (2014) 288- 329, available at https://www.researchgate.net/publication/262937933_Traditional_Courts_as_Alternative_Dispute_Resolution_ADR_-_Mechanisms (accessed 24 April 2018).

[21] These will further be discussed in Chapter Three. Of worthy note is that TJS are used in regulation of personal matters and disputes, not only in similar ethnic settings but also in multi-ethnic settings. For instance, the Wajir Peace and Development Committee (WPDC) and Isiolo Peace and Reconciliation Committee (IPRC), involve local approaches crafted by several ethnic communities on how to resolve different types of conflicts. See Traditional Justice Systems in Kenya: A Study of Communities in Coast Province, Kenya. FIDA-KENYA http://www.fidakenya.org/dr7/sites/default/files/Traditional-Justicefinal.pdf, 4. (accessed 23 April 2018). The study also notes that TJS are not only accessed by ruralites but also are accessed by urban informal dwellers in resolving their disputes; indicating that traditional or non-formal approaches are extensively used by both urban and rural populations in resolving disputes. Further that, lack of access to justice is not only a rural people's problem but is also experienced by poor urban people. Examples of informal settlements in Kenya include Kibera and Mukuru slums in Nairobi. Kibera, being one of the largest slums in the world; housing approximately 250,00 of the 2.5 million slum dwellers in the city. See http://worldpopulationreview.com/countries/kenya-population/ (accessed 23 April 2018).

[22] The Meru community forms 4% of the total population as per the last Kenya Census conducted in 2009, available at http://www.kenya-information-guide.com/kenya-population.html (accessed 2 May 2018).

Athuri Aitora of the Kikuyu;[23] Kaya of the Digo;[24] *Kokwo* of the Pokot;[25] *Ngaisikou Ekitoe* of the Turkana;[26] *Oo-olpaiyan* of the Samburu,[27] and *Piny* of the Luo.[28] The application of TJS in these communities, is mostly recognised in matters of personal law, including adoption, marriage, divorce, burial and succession,[29] the focus of this study. Accordingly, TJS are of interest in Kenya, which has a high degree of legal pluralism wherein state law (FJS) constantly

[23] The Kikuyu community forms 17% of the total Kenyan population, available at http://www.kenya-information-guide.com/kenya-population.html (accessed 2 May 2018).

[24] The Digo are a Bantu tribe which is grouped together with eight other tribes to form the 'Mijikenda' or "nine towns". The Digo form 5% of the total Kenyan population. Available at http://www.kenya-information-guide.com/kenya-population.html (accessed 2 May 2018).

[25] The Pokot community is a sub-tribe of the larger Kalenjin tribe which consists of other communities such as the Marakwet, Tugen, Kipsigis, Keiyo and Nandi. The Kalenjin form 13% of the total population in Kenya. See http://www.kenya-information-guide.com/kenya-population.html (accessed 2 May 2018).

[26] The Turkana community constitutes 2.5% of the total population according to the last census carried out in 2009. Available at http://www.kenya-information-guide.com/kenya-population.html (accessed 2 May 2018).

[27] The Samburu are a nilotic, maa-speaking group, akin of the Maasai tribe. The Maasai constitute 2.1% of the total population as compiled in the 2009 national census. http://www.kenya-information-guide.com/kenya-population.html (accessed 2 May 2018). For the list of communities applying TJS as cited above, see Traditional Justice Systems in Kenya: A Study of Communities in Coast Province, Kenya. FIDA-KENYA http://www.fidakenya.org/dr7/sites/default/files/Traditional-Justicefinal.pdf, 4. (accessed 23 April 2018).

[28] The *Njuri-Ncheke* of the Meru and *Kokwet* of the Kipsigis will be discussed in detail in Chapter Three. For a reading on the Pokot, Turkana, Samburu and Marakwet TJS, see Karimi M, Rabar B, Pkalya R, Adan M & Masinde I, Indigenous Democracy: Traditional Conflict Resolution Mechanisms ITDG-EA (2004) 11-86.

[29] See Ochich GO 'The Withering Province of Customary Law in Kenya: A Case of Design or Indifference?' in Fenrich J, Galizzi P and Higgins TE (eds) *The Future of African Customary Law* (2011) 104. The application of TJS in these matters is by virtue of s 3(2) of the Judicature Act of 1967, which limits application of ACL to civil matters in which either party is affected by or subject to it. This provision implies that the entire body of African customary criminal law has no application in Kenya. See Ambani OJ & Ahaya O 'The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era' (2015) 1 *Strathmore Law Journal* 53. However, emerging jurisprudence from the Kenyan courts post-2010 has changed this as customary law is applied to criminal cases as well. See *R v Mohamed Abdow Mohamed* [2013] eKLR and *R v Lenaas Lenchura* Criminal Case No.19 of 2011. This follows after the promulgation of the new Constitution, 2010 whose art. 159 (2) *(c)* provides that courts are to be guided by the principles of traditional dispute resolution mechanisms. Kariuki F 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems,' 9-11, available at *http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/TDRM%20and%20Jurisprudence.pdf* (accessed 20 April 2018). However, the growth of recognition of customary law in criminal matters is doubtful as the Constitution stipulates that no one shall be tried for a criminal offence unless it amounts to an offence under the laws of the State or under international law under art. 50 (2) *(n).* This provision has the effect of rendering the entire African customary criminal law invalid as African customs are hardly written and only recognised formal legislative structures such as Parliament are allowed to enact criminal law. This implies that the entire corpus of African customary offences is dead except for those traditional crimes that have secured legislative articulation. See Ambani OJ & Ahaya O (2015) 49-50.

competes with various non-formal sets of norms (customary law) and non-state institutions (TJS) at local and ethnic levels.[30] This can be attributed to the fact that in some parts of the country, state presence is very weak and judiciary largely absent, necessitating people to turn to traditional institutions of dispute settlement.[31] In this context, TJS address several challenges encountered by local communities in accessing the formal justice system (FJS), such as long delays, cumbersome procedures and technicality of legal proceedings, financial constraints and legal illiteracy.[32] This illustrates that TJS are still very strong and relevant in the lives of many Kenyans, therefore, ACL as applied in TJS, should not be subordinated.[33] This view is supported by Ambani OJ and Ahaya O (2015), who state that non-recognition or subordination of customary law limits the people's enjoyment of their indigenous customs, and renders customary freedom unachievable by a significant portion of the mostly rural populations of Kenya.[34] They further note that this is despite both international law and the Constitution 2010 providing for the right to culture and cultural experience.[35]

[30] See Helbling J, Kalin W and Nobirabo P 'Access to justice, impunity and legal pluralism in Kenya' (2015) *The Journal of Legal Pluralism and Unofficial Law*, 47(2) 347-367, 348.

[31] Helbling J, Kalin W and Nobirabo P (2015) 348.

[32] According to Scharf W (1998) 'Non-State Justice Systems in Southern Africa: How Should Governments Respond?' Institute of Criminology, University of Cape Town in Traditional Justice Systems in Kenya: A Study of Communities in Coast Province, Kenya FIDA- KENYA available at http://www.fidakenya.org/dr7/sites/default/files/Traditional-Justicefinal.pdf, 4 (accessed 23 April 2018).

[33] Further discussions in Chapter Three and Five will highlight that TJS have progressively developed from the pre-colonial period to present day.

[34] See Ambani OJ & Ahaya O (2015) 57.

[35] See Ambani OJ & Ahaya O (2015) 57. International law instruments that support the right to culture, with particular reference to the application of ACL in succession matters in Kenya, will be discussed in detail in Chapter Five.

From the foregoing, it is worthy of note that ACL is recognised as a source of law in Kenya,[36] and accordingly TJS are recognised.[37] At the helm of this recognition is the Kenya Constitution, 2010 under art. 159(2)*(c)* as read with art. 259,[38] which recognises TJS as follows:

> In exercising judicial authority, the courts and tribunals shall be guided by the following principles —
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3) which provides that traditional dispute resolution mechanisms shall not be used in a way that — (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law.

The constitutional recognition of TJS means that decisions are binding as long as they do not contravene the Bill of Rights.[39] More importantly, the Constitution 2010 recognises that justice delayed is justice denied.[40] Therefore, the use of TJS can facilitate this constitutional aspiration.

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[36] This is by virtue of s 3(1) (a)-(c) of the Judicature Act, Chapter 8 Laws of Kenya. The section however, ranks ACL as the lowest in the hierarchy of the sources of law. The first is the Constitution, secondly the English common law, thirdly are the doctrines of equity and the statutes of general application in England and lastly is ACL. This hierarchical order will be discussed in detail in Chapter Three section 3.3.3.

[37] See Kariuki F 'African Traditional Justice Systems' 1-16, 8, available at http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf (accessed 20 November 2018).

[38] Art. 259 (1) *(a)* and *(c)* requires the Constitution to be interpreted in a manner that is purposive and leads to the development of the law.

[39] See also similar interpretations by Ambani OJ & Ahaya O (2015), Ochich GO (2011) 123 and Onyango P *African Customary Law System: An Introduction* (2013) 42-3.

[40] Art. 159 (2) states that 'In exercising judicial authority, the courts and tribunals shall be guided by the following principles - (*a*) justice shall be done to all, irrespective of status; (*b*) justice authority shall not be delayed; …'. In this context, Helbling J, Kalin W and Nobirabo P '(2015) 347, note that this provision reflects a widespread dissatisfaction with Kenya's judicial system under the previous independence Constitution. They note findings of a report by ILAC (2010) "*Restoring Integrity: An Assessment of the Needs of the Justice System in the Republic of Kenya*" 7-8 which found that, public confidence in the judicial system has virtually collapsed. Partiality and a lack of independence in the judiciary, judicial corruption and unethical behaviour, inefficiency and delays in court processes, a lack of awareness of court procedures and operations, and the financial cost associated with accession

This view is supported by the fact that the Constitution recognises that even an effective and efficient state judiciary will not have the capacity to properly handle all conflicts and be accessible to all.[41] Moreover, in line with this constitutional recognition, the Kenyan Government has taken various steps to recognise TJS in Kenya, which have progressively developed from the pre-colonial period to present day.[42]

First, the judiciary seeks to re-affirm the fundamental place of ACL in its legal system,[43] by encouraging the use of TJS,[44] and the recognition of indigenous jurisprudence.[45] In this regard,

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the court system have, amongst other factors, all served to perpetuate a widely held belief among ordinary Kenyans that formal justice is available to only a wealthy and influential few.

[41] Helbling J, Kalin W and Nobirabo P (2015) 348. Further, it has been observed that the Constitution does not limit the application of TJS to any area of law, which denotes a wide approval of TJS by the State. See Kariuki F 'African Traditional Justice Systems' 1-16, 9 available at . http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf (accessed 20 November 2018).

[42] In this context, the historical recognition and development of ACL as applied in the TJS in Kenya will be discussed in Chapter Three.

[43] See Kenya Judiciary Strategic Development Plan 2014-2018, which provides that the judiciary's mission is 'To administer justice in a fair, timely, accountable and accessible manner, uphold the rule of law, *advance indigenous jurisprudence* and protect the Constitution. Available at http://www.judiciary.go.ke/portal/assets/filemanager_uploads/Downloads/Corporate%20Strategic%20Plan%20%202014%20%202018-min.pdf (accessed 2 March 2018). See also the current vision of the FJS on its service delivery agenda in 'Sustaining Judiciary Transformation (2017-2021), launched by the current Chief Justice David Maraga.

[44] See, for instance *Lubaru M'Imanyara v Daniel Murungi* [2013] eKLR and *Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others* [2012] eKLR, where the FJS referred land marital disputes to *Njuri Ncheke* (The highest ranking TJS in the Meru community), for resolution based on art. 259 of the Constitution. Article 259 (1) *(a)* and *(c)* requires the Constitution to be interpreted in a manner that is purposive and leads to the development of the law. Courts are therefore urged to promote and encourage the use of TJS to enhance access to justice and in recognition of the culture and cultural expressions of the people. This is because in some parts of Kenya, there are no formal courts and TJS are the only means to access justice. See Kariuki F 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems' 11 available at *http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/TDRM%20and%20Jurisprudence.pdf* (accessed 20 April 2018).

[45] This is evident in recent cases such as *R v. Lenaas Lenchura* Criminal Case No. 19 of 2011, where Emukule J sentenced the accused using customary laws on conviction of manslaughter and ordered the accused to pay compensation of one female camel according to the customs of the deceased. The case illustrates an emerging jurisprudence from the courts where compensation is awarded for offences based on customary law and application of customary law principles and TJS in criminal law. Consequently, future jurisprudence will likely consider the principles of TJS. Kariuki F 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems,' 9-11, available at *http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/TDRM%20and%20Jurisprudence.pdf* (accessed 20 April 2018). Further, with regard to the application of ACL to criminal cases, it is observed that there is need to determine when, how and under what circumstances

various Commissions and Taskforces have been appointed by the State and FJS to consider ways on how efficiently and appropriately TJS can be integrated within the FJS.[46] Key among them and relevant to this study is the Taskforce on Traditional, Informal and Other Mechanisms used to access justice in Kenya (Alternative Justice Systems Taskforce).[47] One of the Taskforce's mandates is to *develop a policy to mainstream into the FJS informal and other mechanisms used to access justice in Kenya, in order to reduce case backlog*.[48] To achieve this, a further mandate of the Taskforce was to convene stakeholders and practitioners in Alternative Justice Systems (AJS) to map out and understand the prevalence of the use of AJS, its intersection with the FJS and the progress made in infusing it with National and constitutional values.[49] Further, the function of the Alternative Justice Systems Taskforce is supported by the Judiciary Transformation Framework (JTF) 2012-2016,[50] which constitutes

TJS can apply in criminal cases. This follows from the fact that the Constitution 2010 seems to extend the application of TJS to criminal matters, as it does not proscribe the use of TJS in such matters. See Kariuki F ' African Traditional Justice Systems' 1-16, 10 available at http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf (accessed 20 November 2018).

[46] See for instance the Commission on the Law of Marriage and Divorce and the Law of Succession, appointed on March 1 1967 by the independence Government. See Notes and News 'Commissions on the Laws of Marriage and Succession in Kenya' (1967) Journal of African Law 11(1) 1-4,1. Of worthy note in these Commissions is the member and secretary, one Eugene Cotran, who was instrumental in developing the Restatements of African Law, which guide the FJS in Kenya to date. This will be shown and discussed in detail in Chapter Five.

[47] This Taskforce was established by the former Chief Justice, Dr. Willy Mutunga and its 19 members gazetted on 4 March 2016. The members were drawn from various sectors to ensure participation of key stakeholders in the exercise.

[48] See http://www.judiciary.go.ke/portal/blog/post/taskforce-on-informal-justice-systems-gazetted (accessed 10 May 2018) [own emphasis].

[49] Other responsibilities of the Taskforce include to: Undertake a situational analysis of any existing reports, manuals, guidelines, practice notes, legal provisions on mainstreaming AJS; consolidate best practices from selected TJS of selected communities; highlight challenges and effects of inter-linkage between TJS and the FJS; consult with key stakeholders and recommend a linkage between traditional and informal justice systems and the FJS; and develop a National Model for Court-Annexed Traditional Justice Resolution Mechanisms for possible adoption. For more see Kenya: Justice Sector Reforms to Enhance Access to Justice - IDLO Quarterly Report January-March 2017, 31 May 2017 available at https://aidstream.org/files/documents/01_KEN---Justice-Sector-Reforms---The-Netherlands---Progress-Report-and-Summary-of-Results-2017-QTR-I-20170531020537.pdf (accessed 10 May 2018).

[50] Developed under the leadership of the Supreme Court of Kenya.

four pillars of reform, key among them being 'People-Focused Delivery of Justice'.[51] This pillar engages various measures to be adopted in improving access to justice in Kenya. One of them and key to this study is identified as *the promotion and facilitation of alternative forms of dispute resolution*.[52] In this context, it is worthy of note that the JTF has been successful in meeting its objectives such as service delivery and reduction in case backlog.[53] As a result of these developments, the FJS has presented the next stage of its transformation through a service delivery agenda for 2017-2021, themed Sustaining Judiciary Transformation (SJT) for Service Delivery.[54]

Secondly, the use of TJS is given statutory force by various national laws. In this regard, the State has enacted Acts of Parliament which embody certain aspects of ACL, in order to ensure harmonisation between the TJS and FJS in providing justice.[55] For example, the Community Land Act,[56] explicitly recognises customary tenure and requires the use of TJS to resolve

[51] The other three pillars of reform are titled: 'Transformative Leadership, Organizational Culture and Professional and Motivated Staff', 'Adequate Financial Resources and Physical Infrastructure' and 'Harnessing Technology as an Enabler of Justice'. For a detailed summary of the Framework see http://kenyalaw.org/kl/fileadmin/pdfdownloads/JudiciaryTransformationFramework.pdf (accessed 24 August 2018).

[52] [own emphasis]. The other measures include: reduction of backlogs and the acceleration of case management; the introduction of simplified procedures to reduce costs; the establishment of new courts in under-serviced areas and mobile courts in remote locations; and the expansion of legal aid schemes. See discussion on the same in Helbling J, Kalin W and Nobirabo P (2015) 347-8.

[53] See as noted in foreword by Hon David K. Maraga, Chief Justice of Kenya in Sustaining Judiciary Transformation (SJT), A Service Delivery Agenda 2017-2021, 1-70, 3.

[54] The SJT focuses on interventions that will enhance access to justice; clearance of case backlog; enhancement of transparency, accountability and integrity within the judiciary; implementation of the new Judicial Digital Strategy; and on leadership and governance. These key aspects form the main six chapters of the SJT.

[55] The consideration of ACL as part of formal legislation is commended by this study based on the observation that it is 'untenable to assert that only formal legislation is true law.' For a detailed discussion see Woodman GR, 'A Survey of Customary Laws in Africa in Search of Lessons for the Future' in Fenrich J, Galizzi P and Higgins TE (eds) *The Future of African Customary Law* (2011) 11-2.

[56] No. 27 of 2016, Laws of Kenya.

customary land disputes.[57] Further, the Marriage Act 2014,[58] encourages the use of conciliation before parties seek divorce in the FJS,[59] while the Law of Succession Act (LSA)[60] includes provisions that prescribe the application of ACL in certain circumstances, which provisions are considered by the FJS in determining succession matters.[61] In addition, the Magistrates' Courts Act[62] provides that magistrates' courts have jurisdiction over certain matters governed by ACL.[63] Furthermore, the Judicature Act[64] recognises that the FJS can be guided by ACL in civil cases in which one or more of the parties is subject to or affected by it.[65] As noted earlier, the Judicature Act spells out the sources of law in Kenya, with ACL being one of them.[66]

The foregoing statutory recognition of ACL, denotes state normative recognition of ACL which occurs when norms of customary law are assimilated into the corpus of state law or more commonly, recognised and enforced by state organs such as courts.[67] It is admirable that Kenya

[57] Section 39 (1) provides: 'A registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land.'

[58] No. 4 of 2014, Laws of Kenya.

[59] See s 68(1). As noted earlier, conciliation is one of the TDRMs employed in TJS. In this context, it is observed that customary law principles that require conciliation of conflicts, and those that require household or family disputes not be taken outside those circles, tend to influence communities to elude recourse to state courts. See Woodman GR (2011) 25.

[60] Chapter 160, Laws of Kenya.

[61] A detailed discussion on the LSA and its provisions will be done in Chapters Four and Five.

[62] No. 26 of 2015, Laws of Kenya.

[63] See s 7 (3) of the Magistrates' Courts Act.

[64] Chapter 8, Laws of Kenya.

[65] However, with a rider that the applicable ACL is not repugnant to justice and morality or inconsistent with any written law. See s 3 (2) of the Act.

[66] See s 3(1)(a)-(c), noted earlier.

[67] There also exists institutional recognition of ACL, which occurs when institutions of customary law are incorporated into the state legal system. This occurs for instance, when decisions of traditional authorities are

recognises ACL in this way, as it is observed that normative recognition of customary laws will continue to be a feature of state laws, due to the recognition by policy makers that the observance of customary laws cannot be suppressed, even if it was desired.[68]

However, despite TJS being widely used in Kenya,[69] recognised by the Constitution, the judiciary, and given statutory force, their decisions seem not to be recognised or enforced by FJS.[70] This is despite the estimation that only 1 in 10 persons in Kenya take their disputes to formal courts of justice.[71] In relation to this study, the focus of which is succession, it is estimated that only 36% of probate and administration cases are taken before the High Court.[72] Further, if a party is dissatisfied with the suggested settlement in the TJS, the decision made can be rejected and the case re-litigated in the FJS.[73] The process of relitigation requires that

considered to be valid under state law. However, it is observed that such recognition has ceased in some countries, and its scope declined in others. See Woodman GR (2011) 21, 28.

[68] See Woodman GR (2011) 28. Further see Levy JT 'Three Modes of Incorporating Indigenous Law' in Kymlicka W and Norman W (eds) *Citizenship in Diverse Societies* (2000) 297-325, who advances three distinct modes in which indigenous law can be incorporated by States. The modes are identified as first, by incorporation as customary law; secondly by incorporation as common law; and lastly, by self-government.

[69] It is estimated that 96% of Kenyans seek justice outside of formal courts. See Kenya: Justice Sector Reforms to Enhance Access to Justice IDLO Quarterly Report January-March 2017. 1-11,8.

[70] A detailed discussion pertaining the non-recognition of TJS decisions will be provided in Chapters Three, Four and Five. The discussion will also highlight the reasons for non-recognition by the FJS, which include the application of the repugnancy clause, the prohibition of application of ACL by statute and divergent positions on the upholding of ACL by the FJS.

[71] See Speech (Unpublished) by the Chief Justice of Kenya Dr. Willy Mutunga at the Induction Retreat for Cohesion and Integration Goodwill Ambassadors, Crowne Plaza Hotel, Nairobi on 29 August, 2010, as cited by Tobiko K, Director of Public Prosecutions, Kenya in a paper *The Relationship between Formal Rule of Law and Local Traditional Justice Mechanisms* presented at the 18th IAP Annual Conference and General Meeting in Moscow, Russia, 8-12 September, 2013, available at http://www.iap-association.org/Conferences/Annual-Conferences/18th-Annual-Conference-and-General-Meeting-Provisi/18AC_WS2B_speech_Keriato_Tobiko.aspx (accessed 23 April 2018).

[72] See Kenya: Justice Sector Reforms to Enhance Access to Justice IDLO Quarterly Report January-March 2017, 10.

[73] In this regard, Karimi M, Rabar B, Pkalya R, Adan M & Masinde I (2004) note that the respondents in their study wanted the judiciary (FJS) to help enforce the rulings and verdicts of the traditional courts by linking TDRMs to the FJS. To achieve this, it was noted that TJS should work with the FJS to develop a legal framework

the case be heard anew. The problem with relitigation is that decisions from the TJS seem to have no legal force;[74] yet it has been observed that 'even in societies with the most developed legal systems, only about 5% of legal disputes end up in court.'[75] Relitigation also renders ACL applied in the TJS inferior to common law rules applied in the FJS.[76] This is compounded by the fact that formal courts are not easily accessible, leading to delay in the delivery of justice.[77] This lack of recognition inevitably leads to case backlog in the FJS,[78] which raises deep

which would legitimise the TJS and its TDRM structure. See Karimi M, Rabar B, Pkalya R, Adan M & Masinde I (2004) 90.

[74] This can lead to some people not placing much value in customary awards or decisions. Some authors have observed various reasons for this. Oba AA (2011), for example, writes that this could be attributed to various factors such as: (i) Many of African elite tend to think that customary law applies mainly to the poor and that it is a drawback to development and thus view customary law as a liability which should be replaced with statute law. These new class of African elites reject the African way of life and are very critical of African customary law. (However, not all educated African elites are like this. Some are proud of their African heritage and want to give expression to its positive aspects.) (ii) Legal education at university and law schools in most African countries ignores customary law. This situation creates an aversion to customary law as it is viewed as primitive and backward. Therefore, an urgent need to integrate the study of customary law into the mainstream of legal education in African countries is called for, which will result in Africanisation of laws and legal systems in Africa. Oba AA (2011) 67, 71-2 and 80. For further discussions see also Ochich GO (2011) 119-120.

[75] See Chirayath L, Sage C and Woolcock M (2005) 2.

[76] In this context, ACL has undergone a lot of changes since the colonial era in most African countries for it to be subordinated. It is observed that the colonial authorities did not consider ACL as a viable legal system, and thought that it would eventually wither away or be integrated into the laws brought by colonialism. This is according to Ochich GO (2011) 119-120, who further notes that ACL has been relegated to inferiority in Kenya since independence. He states that there is a misplaced perception that ACL should be viewed differently, a perception which owes its origin to the colonial administration in which colonial judges were on a mission to relegate customary law to an inferior status, if not into extinction. Another author, Oba, AA also states that due to colonialism, customary law lost and never regained its status as a full-fledged legal system in modern African nation states. See Oba AA (2011) 61.

[77] In many African countries, access to judicial mechanisms to address parties' complaints in an effective and efficient manner remains a challenge, as people and communities feel that their legitimate grievances are not addressed. This is as observed by Helbling J, Kalin W and Nobirabo P (2015) 347.

[78] Other than case backlog, it is observed that Kenya's legal system faces other substantial challenges in the area of dispute resolution. Some include, delays in adjudication of matters; unpreparedness of lawyers, police and probation officers; the judiciary being under staffed; high costs of litigation and alien juridical languages and convoluted procedures. These impediments drag resolution of legal disputes and as a solution, the authors thus call for promotion of TJS as spelt out in art. 159 (2) of the Constitution, which prescribes for prompt dispensation of justice; the promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms; and the administration of justice without undue regard to procedural technicalities; among others, as viable solutions. See Ambani OJ & Ahaya O (2015) 57.

concern.[79] Further, there is lack of policy guidelines and implementation strategies to recognise and enforce TJS decisions by the FJS, which has continued to hinder the effectiveness of these systems.[80] In succession disputes, which is the focus of this study, the lack of recognition and enforcement of TJS decisions, can delay access to the deceased's intestate estate leading to severe hardship to the beneficiaries.[81] In this regard, there is need to identify factors which impede the harmonisation of TJS and the FJS, since TJS provide a more holistic approach to conflict resolution than the formal courts.[82] This is in view of the fact that TJS serve the

[79] Due to this concern, it was noted earlier that the Alternative Justice Systems Taskforce was formed with the mandate to develop a policy to mainstream into the FJS informal and other mechanisms used to access justice in Kenya, in order to *reduce case backlog*. [own emphasis]. In this regard, it was noted that the FJS has managed to reduce case backlog since the inception of the Judiciary Transformation Framework (JTF) 2012-2016 , as there was available data on the status of case backlog in the judiciary, which made it easier to address through various interventions. See Chapter Two of Sustaining Judiciary Transformation 2017-2021, which discusses case backlog in the judiciary.

[80] It is submitted that the development of such a policy or formulation of strategies would be commendable. In this regard, Ambani OJ & Ahaya O, state that legislative reforms are tenable and base their argument on Cotran's Restatement (Cotran E *The Law of Marriage and Divorce* Vol. 1 (1968), who suggested way back in 1989 that Parliament should make up its mind on what aspects of customary law should apply. In effect, this would do away with repugnancy clauses and other criteria demeaning to African customary law. See Ambani OJ & Ahaya O (2015) 58. Further, according to Ochich GO, failure to promulgate any comprehensive rules on ACL has led to a stagnation in the development of ACL [*and as a result decisions of the TJS*]. In this respect, Ambani OJ & Ahaya O (2015) assert that as a result, ACL has received more limitations than are necessary in a free and democratic society. They state that 'each coming day witnesses the crucification of African customs in preference of novel values mostly originating from western traditions and value systems. Indigenous practices whether religious, moral or customary have to contend with the fact that there are official restrictions both express and tacit. See Ambani OJ & Ahaya O (2015) 57. This in turn, pose considerable challenges to the competitiveness of ACL, according to Ochich GO (2011) 127.

[81] See, for example, *Re Estate of Mbiyu Koinange* (Deceased) [2015] eKLR, which took 36 years before its determination by the FJS. It was reported that the protracted case has been handled by 25 judges of the High Court's family division since it was filed in 1981 after Mr Koinange's death. The deceased was a former Minister, and died intestate, leaving behind six wives and 34 children. See Karanja F 'Family fights over inheritance of Mbiu Koinange multi-billion estates' *The Daily Nation* 15 April 2018. See also the reported case by Mungai A 'Land feud that has dragged on for decades' The Standard Digital 25 October 2018, in which a succession case has been in the FJS for 47 years. The son to the deceased, one Karago Ndirangu, said that his father died testate but a dispute arose involving his four wives and siblings. In the time the matter has been in court, his mother and some of the original parties in the suit have died and their descendants have taken over from where they left off, indicating the inordinate delay occasioned by the FJS by those seeking its services. These two cases are just a mere example of the numerous succession cases that tell the tale of the extremely long wait by heirs and beneficiaries, before their determination by the FJS.

[82] In this regard, a study conducted by FIDA- Kenya indicates that TJS provide a more holistic approach to conflict management than that of the formal courts as TJS are involved in social issues in the community such as boundary demarcations, environmental management and in some cases spiritual matters. This indicates that TJS are all-encompassing, readily acceptable by the people and therefore, the study recommends that 'decisions of TJS be enforceable in a similar manner as court decisions.' See as cited earlier, Traditional Justice Systems in Kenya: A

function of resolving disputes, foster reconciliation and maintain social order, are easily accessible by the communities, their decisions likely to be complied with due to familiarity of the customs, and are constitutionally recognised.

Consequently, this thesis embarks on evaluating the interaction between customary laws of succession in the TJS and FJS in Kenya. This is based on the position that while various customary rules of succession inform the administration of estates in the TJS of various communities in Kenya, the application of ACL in the FJS is limited to or founded on aspects that the FJS recognises.[83] The problem that is presented lies in the extent to which ACL is limited in its application in succession matters, which is solely dependent on the recognition that the FJS accords it. This position has continued to hinder the effectiveness of TJS amidst a citizenry that still embraces ACL to a great extent.[84] Accordingly, this position questions the relevance and applicability of succession decisions of TJS in the FJS, and the subsequent need for their enforcement by the FJS.[85] In this regard, there are several impediments that hinder the application and enforcement of ACL by the FJS. These include: inadequate knowledge on both

Study of Communities in Coast Province, Kenya. FIDA-KENYA http://www.fidakenya.org/dr7/sites/default/files/Traditional-Justicefinal.pdf, 16-7. (accessed 23 April 2018).

[83] For instance, this is through provisions in the Law of Succession Act, Chapter 160 Laws of Kenya and reported customary laws in Restatements. These will be discussed in detail in Chapters Four and Five.

[84] Ochich GO (2011) 128.

[85] This is in view of the fact that there has been a shift in the perception of ACL since the enactment of the Kenya Constitution 2010, as noted in section 1.1 of this Chapter. This is as opposed to the previous period in which ACL was relegated as an inferior source of law and government policy was inclined to the more liberal and western-styled law which posed considerable challenges to the competitiveness of ACL. See observations by Ochich GO (2011) 122, 127.

official and living ACL;[86] gaps in Restatements of ACL;[87] and inconsistency in applying and enforcing TJS decisions by the FJS.[88] In turn, these impediments question whether there is harmonised interaction between the TJS and FJS.

In order to address these impediments, analysis of literature and courts' jurisprudence indicates that the executive, legislature, judiciary (FJS) and communities in Kenya,[89] have taken various initiatives to harmonise the application and enforcement of ACL within the FJS.[90] However, these initiatives have not realised the complete integration of TJS within the FJS in providing justice, as there still lacks policy guidelines and implementation strategies on the enforcement of TJS decisions.[91] In this context, this study submits that there is an urgent need to address this problem, so as to ensure enforcement of TJS decisions particularly in succession matters.

[86] This is in consideration of the fact that some aspects of ACL have developed along prevailing socio-economic contexts. For example, the reform of ACL to recognise the right of the woman/girl child in inheritance. This will be shown in Chapter Five. Further, Onyango P, observes that there exists diverse customary laws in Kenya, which regulate the lives of many people especially the pastoralist communities in some parts of Kenya. Due to this, he argues that *the legal profession requires a wider knowledge of customary law as it is unwise to sideline the legal traditions and moral values that have kept families united and progressive until today*. For a further discussion see Onyango P (2013) 8-9 [own emphasis].

[87] This will be discussed in Chapter Five.

[88] This will be discussed in Chapter Five.

[89] Communities in Kenya address the challenge of recognition of TJS decisions through the reform or development of ACL. This will be shown in Chapter Five.

[90] Refer to the discussion in section 1.1 of this Chapter.

[91] This is supported by the earlier noted observations of the study conducted of the Pokot, Turkana, Samburu and Marakwet communities of Kenya, wherein the respondents called for the FJS to help enforce the rulings and verdicts of the traditional courts by linking TDRMs to the judiciary. It was noted that this was achievable by the TJS working with the FJS to develop a legal framework which would legitimise the TJS and its TDRM structure. See Karimi M, Rabar B, Pkalya R, Adan M & Masinde I (2004), 90.

1.2 RESEARCH QUESTION

The main research question that this study seeks to examine is: What is the interface between customary laws of succession in the TJS and FJS in Kenya?

This question seeks to evaluate the interface between TJS and the contemporary FJS, with a view to offer insights on how ACL can be developed and how the FJS can enhance the interaction between the two systems toward addressing the challenges outlined in the problem statement above.[92] This evaluation is grounded on the fact that there has been a shift in the perception of ACL since the promulgation of the Kenya Constitution 2010, which has resulted in a higher appreciation of its being and the reciprocate advancement of the use of TJS.[93] Consequently, this has impacted positively on the application of ACL and in its utility in the dispensation of justice in Kenya.[94] In addition, the various Kenyan communities continue to apply ACL in addressing various matters in their lives.[95] Accordingly, this study is in line with various policy directions and initiatives being undertaken and envisaged by the State and judiciary, as well as reforms of ACL by the various communities.[96]

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[92] It is worthy of note that the FJS plays a supervisory role on TJS succession decisions by imposing the limit on the application of some aspects of ACL such as those which are manifestly gender discriminatory. An example is the denial of women to inherit upon the demise of a husband or father. Such rules violate the right to equality and freedom from discrimination, but their application is abated through the intervention of the FJS while playing its supervisory role for matters presented before the courts. This will be discussed in detail in Chapter Five.

[93] As noted earlier, this is further evident through the FJS which calls for the application of ACL in dispute resolution before recourse is had to the courts; as well as provisions in several statutory legislations. Refer to the discussion in section 1.1 of this Chapter.

[94] It is submitted that this denotes a recognition of the resilience of ACL and its relevance in the lives of many Kenyans, as many of its aspects have remained authoritative to date.(This will be shown in Chapters Four and Five). See similar observations by Oba AA (2011) 59.

[95] The application of ACL is recognised on matters of criminal law, and personal law, including adoption, marriage, divorce, burial and devolution of property upon death. In support of this see observations of Oba AA (2011) 79 and Onyango P (2013) 8.

[96] As noted earlier, this will be shown in Chapter Five.

The study therefore, seeks to answer the main research question by addressing the following sub-questions:

(i) What are the customary rules of succession that inform TJS in various selected communities in Kenya?

(ii) What is the legal position of TJS in the Kenyan legal system?

(iii) What is the relevance and applicability of succession decisions of TJS in the FJS?

(iv) What factors enhance or impede the recognition and enforcement of TJS decisions by the FJS?

(v) What approach can be applied to enhance the interface between TJS and the FJS in Kenya?

1.3 RESEARCH METHODOLOGY

This study applies analytical research design focusing on the review of literature pertaining to concepts, principles and theories on information relating to the research questions. The study also reviewes relevant case law in the focus area of the study. This methodology entails desktop research and the information is derived from primary and secondary sources. The primary sources utilised in the study include reported cases, domestic and international laws and legal documents. Secondary sources include peer-reviewed journal articles and textbooks.

1.4 LITERATURE REVIEW

The available literature indicates that TJS or informal justice systems (IJS) in Kenya are recognised by various communities in decision-making. For example, a study conducted by FIDA-Kenya on TJS of communities in the coastal province of Kenya, sheds light on how TJS

in Kenya are applied as well as their advantages and shortcomings.[97] The study generally highlights the structure, composition and jurisdiction of TJS, lack of women's participation in the TJS and the conflicting community's perception of TJS. It also brings to light the lack of interaction between TJS and the FJS . The study therefore, makes various recommendations, key of which is the need for a nexus between the formal courts and the TJS.

Another study on the Pokot, Turkana, Samburu and Marakwet communities by Karimi M, Rabar B and Pkalya R *et al*.,[98] highlights the use of traditional conflict resolution mechanisms (TCRMs) in attaining indigenous democracy. This was a study of the four communities' understanding of conflict, and the prevention and management of both internal and inter-ethnic conflicts. The study features the strengths and weaknesses of mechanisms applied and makes a summary of recommendations on how efficacy of the traditional mechanisms of conflict resolution can be enhanced, such as documentation and wide dissemination of decisions of TCRMs.

In addition, a study by Kiplangat[99] on the Kipsigis community in Kenya, focused on the use of informal justice systems (IJS) in land disputes. His findings were that without access to justice, which the IJS provide in a similar manner as the FJS, the realisation of social justice as envisaged in the Constitution cannot be realised. He therefore emphasises the need to strengthen the application of IJS in Kenya. He also advocates for independence of the

[97] See Traditional Justice Systems in Kenya: A Study of Communities in Coast Province, Kenya. FIDA-KENYA http://www.fidakenya.org/dr7/sites/default/files/Traditional-Justicefinal.pdf. (accessed 23 April 2018).

[98] Karimi M, Rabar B, Pkalya R, Adan M & Masinde I Indigenous Democracy: Traditional Conflict Resolution Mechanisms ITDG-EA (2004) 11-86.

[99] See Kiplangat JS 'Strengthening the Application of Informal Justice Systems in Land Disputes: A Case Study of the Kipsigis Community' (2016) 4 (1) *Africa Nazarene University Law Journal*, 152-176.

traditional institutions and that the courts should play a supervisory and facilitative role in the development of customary law and TJS. He further accentuates on the need of documenting proceedings in the IJS so as to assist the FJS in assessing the decisions of TJS.

Kariuki F[100] also highlights the need for promotion of traditional dispute resolution mechanisms (TDRMs) in delivery of justice, as he asserts that customary law is still regarded as inferior to statutory laws. He comes to this conclusion by analysing the application of customary law by the courts from the colonial era, through independence and following the promulgation of the current Kenyan Constitution in 2010. He argues that there 'needs to be a change of mindset and perceptions amongst judges, lawyers and the wider citizenry towards customary law if traditional justice systems are to contribute to enhanced justice for communities in Kenya.'

The UN in its book Human Rights and Traditional Justice Systems in Africa (2016)[101] addresses key aspects of TJS such as their nature and characteristics, community involvement and focuses primarily on restorative justice. The publication further addresses programmatic strategies for engagement such as state recognition and reform.

Musyoka's writing[102] is an overview of the law of succession in Kenya for both testate and intestate succession. He also presents a general overview of succession law as pertains under

[100] See Kariuki F 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems,' 1-13, available at http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/TDRM%20and%20Jurisprudence.pdf (accessed 23 April 2018).

[101] See Human Rights and Traditional Justice Systems in Africa http://www.keepeek.com/Digital-Asset-Management/oecd/international-law-and-justice/human-rights-and-traditional-justice-systems-in-africa_7d32f3a1-en#.WPvDOlN97Vo#page17 (accessed 23 April 2018).

[102] See Musyoka WM *Law of Succession* (2006).

common law and presents various cases to illustrate the application of various succession rules or principles. The presented cases also highlight the application of statutory provisions as contained in the Law of Succession Act,[103] that call for application of customary law in succession matters.

The foregoing literature review indicates the importance of TJS not only in Kenya's legal system but also in other legal systems, and the need to incorporate them into the FJS. The literature also exemplifies how the application of ACL can be elevated in the formal court system. However, no study has addressed in specific terms the recognition of decisions emanating from TJS in the FJS. This thesis therefore, addresses the shortcomings of the above literature by widening the sources of information. In addition, the thesis gives a particular focus only to the extent to which recognition of succession decisions by the TJS are recognised in the FJS.

1.5 SIGNIFICANCE OF THE STUDY

From the above literature review, the interaction between TJS and the FJS in resolving disputes forms a major area of study in most legally pluralistic states, including Kenya.[104] This is indicated by the resilient nature of ACL as many of its aspects have remained authoritative.[105] In this regard, this study seeks to fill the gap in the existing literature by specifically considering how succession decisions stemming from the TJS are recognised and enforced by the FJS in

[103] Chap 160, Laws of Kenya.

[104] In this regard, it is observed that in the last decade, ACL has been identified as a major area of study in order to determine its relevance and applicability in various African legal systems. See Onyango P (2013) 4.

[105] As noted earlier. This is further illustrated by efforts of various legally pluralistic states to incorporate ACL into the corpus of formal law. For example, see the Recognition of Customary Marriages Act (RCMA) 120 of 1998 of South Africa and the Malawi Marriage Act of 2015, which govern customary marriages in addition to other types of formally recognised marriages.

Kenya.[106] Furthermore, the findings of this study will generate new knowledge and serve as a guide in the identification of an approach to address the impediments that hinder the interaction between the TJS and the FJS, in matters to which ACL is applicable. These findings are applied in formulating a guideline that can be used in the application of ACL by the FJS, thereby offering a solution to the existing gap on the enforcement of customary law judgments in Kenya.[107] Further, the proposed guideline can be considered in improving the existing laws or enacting new laws, which can enhance the interaction between the TJS and the FJS.[108] Accordingly, the research is of interest to legislators and policymakers not only in Kenya, but also in other legally pluralistic states grappling with the interface between the two systems. In addition, it is envisaged that academics, students and NGOs researching within the discipline, will be able to use this information to further their research.[109]

1.6 CONCEPTUAL CLARITY

The study embraces the term ACL, an acronym for African Customary Law. This is a wider concept that embraces various aspects of African customary law in terms of its norms, its mode of application and/or governance and the decisions that are handed down by a recognised person or forum in a given community.[110] The TJS on the other hand, is contextualised as a

[106] This is attributed to the fact that there is no legitimate authority enforcing ACL decisions stemming from the TJS. This is supported by observations of an earlier noted study. See Karimi M, Rabar B, Pkalya R, Adan M & Masinde I (2004) 90.

[107] It is envisaged that the application of this approach will reduce case backlog in the FJS and also facilitate the resolution of disputes in a faster and cost effective manner.

[108] This study noted earlier that lack of policy guidelines and implementation strategies to recognise and subsequently enforce decisions of TJS hinders their effectiveness, amidst a citizenry that still embraces ACL to a great extent.

[109] Therefore, this study offers both theoretical and practical significance.

[110] See Woodman GR (2011) 10, who notes that a customary law can be defined as a normative order which is a body of interrelated norms observed by a population.

component within ACL, which provides a framework for the settlement of civil and criminal disputes.[111] The TJS is formed from the lowest unit in the society, that is the family, to the larger forum of the community that may include a team of elders.[112] This is relevant as it informs the wider TJS composition and further that succession decisions are made starting from the family unit cropping up to the higher fora. The FJS on the other hand, refers to the contemporary justice system (judiciary) informed by the applicable laws such as the Constitution 2010, the Law of Succession Act, the Judicature Act and the Restatements of African Law on Kenya.[113] The link between the FJS and the TJS for purposes of this study, lies in the manner the FJS regulates the application of ACL and which of its rules or principles are to upheld.

1.7 LIMITATIONS OF THE STUDY

This study examines and analyses the relationship between the interaction of the FJS and the TJS with regard to succession. In this regard, it is delimited to succession matters and other related aspects such as marriage, and is limited to analysis of primary and secondary sources of information pertaining to the relevant research areas.

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[111] See earlier noted characteristics of TJS such as their use in decision making, as observed by Kane M, Oloka-Onyango J and Tejan-Cole a (2005). See also Chirayath L, Sage C and Woolcock M (2005) 2, who observe that in many developing countries, TJS operating outside the state regime are often the dominant form of dispute resolution, covering up to 90% of the population in Africa.

[112] In support of this see Osei-Hwedie K & Rankopo MJ 'Indigenous Conflict Resolution in Africa: The case of Ghana and Botswana' in Osei-Hwedie BZ, Galvin T & Shinoda H (eds) *Indigenous Methods of Peacebuilding* (1970) 33-51,43, who observe that dispute resolution starts at the household level (*lolwapa*) level, then taken to the extended family level (*Kgotlana*), if it cannot be resolved at the household level. At the *Kgotlana*, elders from the extended family sit and listen to the matter. As noted and cited in Kariuki F ' African Traditional Justice Systems' 1-16, 10 http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf (accessed 20 November 2018).

[113] This is by virtue of normative recognition of ACL as earlier noted in this Chapter, which occurs when norms of customary law are assimilated into the corpus of state law or more commonly, recognised and enforced by state organs such as courts.

Further, while the study evaluates the pre-colonial, the colonial and the post-colonial period, the emphasis is on the effects of the three periods on the post 2010 period. This is due to the various developments from the pre-colonial periods that informed the need for the study in the post-2010 constitutional dispensation.

1.8 CHAPTER OUTLINES

In addition to this introductory Chapter which presents the background and problem statement, research question, research methodology, significance of the study, literature review, and chapter outline, this study consists of a further six chapters as follows:

Chapter Two presents the theoretical framework for the study. Its aim is to support why customary decisions should be enforced by the FJS, by highlighting aspects of the theory that underpin the interaction between ACL and the FJS in Kenya.

Chapter Three provides a historical overview on the recognition, development and application of ACL in Kenya from the colonial era to present day. The purpose of this chapter is to show how the State and the FJS perceive ACL in decision making in relation to formal law. This will ultimately highlight the interaction between the TJS and the FJS in Kenya.

Chapter Four discusses the legal and customary framework on marriage and succession laws in Kenya. It also addresses some of the peculiar features of customary laws of marriage and succession as observed among the various communities in Kenya. The aim is to highlight the general rules and principles applied in the regulation of succession matters and how they inform the interaction of TJS and the FJS.

Chapter Five is the heart of the research. It examines decisions of the FJS in succession matters based on the application of both ACL and formal legislation. In doing so, it aims to analyse the extent to which the FJS upholds decisions by the TJS. It further considers factors that enhance or impede the recognition of such decisions of the TJS by the FJS.

Chapter Six based on the findings in Chapters Three, Four and Five, proposes an approach that can be applied by the FJS to further enhance the integration and enforcement of TJS decisions.

Chapter Seven concludes this study by presenting summaries and observations from the study. It also offers recommendations which can be feasible solutions to the study problem.

CHAPTER TWO

THEORETICAL FRAMEWORK UNDERPINNING THE INTERFACE BETWEEN AFRICAN CUSTOMARY LAW AND THE FORMAL JUSTICE SYSTEM

2.1 INTRODUCTION

This chapter presents the theoretical framework for the study. As noted in the preceding chapter, its aim is to lend support to why customary succession decisions should be enforced by the FJS. To achieve this purpose, the chapter will highlight various aspects of the chosen theory for the study, which support the interaction between ACL and the FJS in Kenya. This interaction is based on the earlier noted correlation between ACL and formal law within Kenya's legally pluralistic setting.[1] In this context, to understand the laws that exist in any given society, jurisprudence presents itself as a reference point in demystifying this existence.[2] Jurisprudence may simply be defined as the science or philosophy of law,[3] and is divided into

[1] This was noted to arise through normative recognition of ACL, which occurs when norms of customary law are assimilated into the corpus of state law or more commonly, recognised and enforced by state organs such as courts.

[2] Jurisprudence is principally, an examination of the nature of law from a philosophical perspective. Simmonds N, *Law as a Moral Idea* (2007) 1, describes jurisprudence as first, 'a tradition of philosophical inquiry that is centrally concerned with the nature of law and justice,' and secondly, it is still 'part of developed legal systems, shaping the forms of doctrinal reasoning that characterize such systems and articulating the presuppositions on which those forms of reasoning rest.' Other authors regard jurisprudence as part of legal theory, noting that legal theory encompasses both the philosophy of law and jurisprudence, and hence avoids the attendant disputes in defining jurisprudence solely. For a detailed discussion see Solum LB, 'Legal Theory Lexicon: Legal Theory, Jurisprudence, and the Philosophy of Law' (2011)1 *Journal of Law* 417-421, 421. Others such as Freeman M, provide that 'Jurisprudence involves the study of general theoretical questions about the nature of laws and legal systems, about the relationship of law to justice and morality and about the social nature of law' and that 'A proper discussion of questions such as these involves understanding and use of philosophical and sociological theories and findings in their application to law.' See Freeman M *Lloyd's Introduction to Jurisprudence* 9 ed (2014) 2.

[3] Although some authors have argued that not all philosophy of law amounts to jurisprudence. See Omony JP *Key Issues in Jurisprudence; An in-depth discourse on Jurisprudence Problems* (2014) 1. Others such as Penner J, Schiff D & Nobles R (eds) *Jurisprudence & Legal Theory: Commentary and Materials* (2002) 3 note that:

> Jurisprudence is 'Law' with a capital 'L'. It is not the law of any particular subject area (contract, crime, property etc) or even, apparently, the law of any country. It attempts to analyse law at its most general level, to identify what is important and significant rather than what is mundane and inessential. Those who give answers to jurisprudence do not give answers to questions about what particular laws, or laws on particular subjects, are. Rather, they explore what it might mean to say that a particular rule is the law

two groups, namely: theories of law and theories about law.[4] "Theories of law" are concerned with what establishes validity or legitimacy within laws in order to be regarded as legal norms,[5] while "Theories about law" are concerned with effectiveness of the law.[6] The two types of theories constitute a necessary discussion of this study and will be analysed in this Chapter and their relevance and applicability shown in Chapters Three, Four and Five of this study.

Generally, jurisprudence confronts the moral, ethical, political and linguistic aspects of law, and, therefore, aids in demystifying law's existence.[7] In doing so, however, it adds speculation to the numerous approaches adopted in determining the emergence and development of law.[8] In this regard, the nature of law ultimately becomes controversial and debatable in the sense that different thoughts on why law exists emerge, and several accounts of law are offered;

> of this or that particular legal system, …or they might try to explain what it is to have legal rights or duties or, … might specify what sort of reasoning judges and lawyers in any legal system engage in when they decide cases or advise clients.

[4] On this note, some authors argue that 'jurisprudence is an imprecise term as sometimes, it refers to a body of substantive legal rule, doctrines, interpretations and explanations that make up the law of a country…it may also refer to the interpretations of law given by a court therefore, signifying juristic approaches and doctrines associated with particular courts…and it also consists of scientific and philosophical investigations of the social phenomenon of law and justice generally.' See Ratnapala S *Jurisprudence* (2009) 3.

[5] These include, for example, positivism and natural law theory, as will be discussed in this Chapter.

[6] This for example, includes its implementation and its interaction, with other societal factors such as morality, politics, and the economy.

[7] See Freeman M, as earlier cited, who notes that '[j]urisprudence involves the study of general theoretical questions about the nature of laws and legal systems, about the relationship of law to justice and morality and about the social nature of law'. Freeman M (2014) 2.

[8] D'Amato A in Simmonds N *Law as a Moral Idea* (2007) 1, accurately points out to the central concerns of jurisprudence and legal theory by stating the following:

> Legal scholars have traditionally concerned themselves with discovering "the" meaning of law and the necessary preconditions for its "validity." Classically this endeavor has led to the construction of grandiose logical theories to which empirical instances of laws had to conform at the expense of otherwise being declared invalid by the theorist. To John Austin, for example, law is a command backed by sanction; without these elements, an alleged rule of law is not "really" law…To St. Thomas, law is the reflection of right reason; all laws which do not conform, even if they happen to be commands backed by sanction, are presumably invalid. Professor H.L.A. Hart today would argue that if there is no "rule of recognition" enabling us to distinguish laws from other standards of social conduct, there is no "law."

which form 'an integral part of broader moral and political philosophies…'[9] The latter part is critical in understanding why certain laws are rejected, and in this study's context, why succession decisions from the TJS seem not to be recognised by the FJS.[10]

From the foregoing analysis, there exists an inevitable inclination for one to question assumptions that are prevalent in law development and also on the wider understanding of the nature and working of law.[11] In this connection, Freeman M highlights this enquiry as a necessity, as 'questions of theory constantly spring up in legal practice, though they may not be given very sophisticated answers.'[12] In this regard, jurisprudence attempts to answer these questions by providing different theories on and of law development to suit different ideologies or beliefs of individuals.[13] This presumption is based on the fact that disagreements abound when it comes to choosing a philosophical approach to law.[14] In this context, it has been recognised that 'agreeing to disagree' in jurisprudence is inevitable and often times, one has to take a side on what theory they prescribe to and give good reasons for doing so.[15] It is in this

[9] Simmonds N (2007) 2.

[10] Reasons vary from failure to adhere to Constitutional provisions, for example, on non-discrimination, to customary rules being repugnant to notions of justice and morality. This will be shown in Chapter Five.

[11] To reiterate Freeman M, who states that: 'A study of jurisprudence should encourage the student to question assumptions and to develop a wider understanding of the nature and working of law. Questions of theory constantly spring up in legal practice, though they may not be given very sophisticated answers.' See Freeman M *Lloyd's Introduction to Jurisprudence* (2014) 2.

[12] Freeman M (2014) 2.

[13] There are those who align themselves with theories based on personal beliefs or political inclinations. For example, one who strongly believes in the State as the superior and maker of laws, would associate with the positivist theory, while an individual who believes law to be derived from God would be inclined to the natural law theory.

[14] Freeman M points out that 'every jurist has his own notion of the subject-matter and proper limits of jurisprudence, but his approach is governed by his allegiances, or those of his society, by his ideology.' See Freeman M (2014) 1.

[15] As highlighted in the preceding discussion.

regard that this study embarks on a brief discussion of some jurisprudential theories that seek to inform the development of law and ultimately select a theory that supports the arguments of the study. Due to the amalgam of theories existent in elucidating the existence of law, this study will limit itself to a discussion of few selected theories, namely: Natural Law, Positivism and the Historical School.

As stated earlier, there exists several theories of and about law, that strive to show how law developed and ultimately show the validity of law within a given society.[16] In this context, theories of law seek to answer what makes some rules valid as law within a legal system while others are deemed as invalid. These theories include the Historical School of jurisprudence, Natural Law, Marxism, Positivism and Legal Realism.[17] These theories are concerned with the effectiveness of law within the society, or the interplay of law with other societal factors such as politics, economics and culture, and further, the extent to which law helps achieve fundamental societal values such as justice.[18] In this context, the second section of this chapter will discuss the various theories of law that can be applied in understanding existing laws in a given legal system. The discussion will aim to draw a comparison among them, and ultimately show why one theory is chosen as the theoretical framework for the study, namely the Historical School. The third section seeks to discuss in detail the Historical School theory focusing on its tenets. It also explores criticisms levelled against the Historical School, with

[16] Legal anthropologists tend to choose one theory over the other based on circumstances, empirical facts and at times, simply one's belief or conviction.

[17] The Realist theory is based on the perception that it is judges that make law. It is divided into American and Scandinavian realists and it (Realism) posited that 'judges' decisions were often based (consciously or unconsciously) on personal or political biases and constructed from hunches…' See Bix B *Jurisprudence: Theory and Context* (2009) 190.

[18] These aspects of jurisprudential thought can be categorised as sociological schools, as they are concerned with the sociology of law.

the aim of highlighting the inherent limitations attendant to the theory. Section four seeks to establish the utility of the Historical School in Kenya's legal system by contending that the theory should not be bereft of its practicality due to its limitations. Accordingly, the argument offers a basis for the advancement of ACL by the State, and in turn, establishes a foundation for which customary law's contribution to Kenya's legal system can be assessed. Section five forms the conclusion.

2.2 NATURAL LAW THEORY

The natural law theory propounds that true law is right reason in agreement with nature.[19] It submits that law is universal, eternal and unchanging and that God is the only source and enforcer of this law.[20] This theory is divided into traditional natural law and modern natural law.[21] St Thomas Aquinas[22] and John Locke[23] are the proponents of traditional natural law, while Lon L Fuller,[24] HLA Hart[25] and John Finnis advocate for modern natural law.[26]

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[19] In this context, Wacks R notes that '[t]he best description of natural law…is that it provides a name for the point of intersection between law and morals.' See Wacks R *Understanding Jurisprudence: An Introduction to Legal Theory* (2005) 15.

[20] Cicero (106 -43 BC), one of the natural law scholars, perceived law as a command from God.

[21] See Omony JP (2014) 17.

[22] St. Thomas Acquinas (1225-1274). He is associated with the Ancient or Classical Natural law theory. In his book S*umma Theologica* (1266), Aquinas espouses the main principles of his idea of natural law. Two key principles are that first, he opines that God is the highest good from which all things develop; and secondly that law flows from divine reason and are promulgated for the common good. He also classified law into four namely; *lex devina* (divine law), *lex naturalis* (natural law), *lex humana* (humanly posited law) and *lex aeterna* (eternal law). For a detailed discussion see Wacks R (2005) 18. See also Freeman M (2014) 75-78.

[23] John Locke (1632-1704).

[24] Lon L. Fuller (1902-1978).

[25] HLA Hart (1907-1992).

[26] See Freeman M (2014) 75-124 for a general discussion.

Despite there being two divisions of natural law, both share common ideologies, which in summary, 'seeks universality and commonality in human law, values and institutions across the globe.'[27] For purposes of this discussion, natural law has a principle that resonates well to the argument of this study, in that, it believes that law is habitual and continuous. This is characteristic of ACL which is dynamic and flexible.[28] In addition, natural law argues that law should be geared towards the common good of the people and if it fails to do so, it is unjust.[29] The justification for this assertion is based on the argument that the FJS in Kenya needs to recognise TJS decisions since the majority of communities in Kenya use TJS in regulating various aspects of their lives.[30] By recognising and enforcing such decisions, Kenya can harmoniously integrate both ACL and statutory laws in its inherently legally pluralistic setting.[31] This in turn can result in just decisions being made by the FJS as the will (customs) of the people are also considered alongside formal law.[32]

[27] Omony JP summarises these similarities as follows: First, that there are absolute values against which the validity of law should be tested, secondly that which is good is in accordance with nature and that which is evil is contrary to nature; thirdly that a law which lacks moral validity is wrong and unjust; fourthly that if man observes nature and understands it correctly, he can become aware of the universal, eternal and comprehensible values; and lastly that there exists an order which is rational and which can be known by man. See Omony JP (2014) 17.

[28] This is one of the characteristics noted of ACL as well as TJS, as highlighted in Chapter One.

[29] This argument is good but is watered down by the fact that naturalists such as John Locke (1632-1704), who believe that laws stem from god and that man can choose to obey or disobey such laws. The fact that there is room for disobedience, alludes to the fact that even laws from a higher deity can be unjust, and as such, absolute obedience fails or becomes impossible.

[30]This was noted in Chapter One which highlighted that Kenyans apply ACL in regulating matters such as marriage, succession, burial and land disputes.

[31] Through the proposed approach advanced by this study, chapter six will discuss how Kenya can best achieve such harmonious integration between ACL and the FJS.

[32] This will be discussed in detail in Chapters Five and Six. Chapter Five will highlight the consideration of ACL by the FJS in making decisions with regard to succession matters, while chapter six will propose an approach that can be applied by the FJs to ensure customary succession decisions are recognised and enforced.

However, there are several criticisms levelled against the natural law theory which aim to discredit its principles on law development.[33] These criticisms serve to further discredit reliance on the natural law theory by this study for the following reasons. First, naturalists consider law as a dictate of reason and credit its emergence to a higher deity or god.[34] In this regard, naturalists believe that there is a 'higher knowledge which man cannot understand,' making them idealists.[35] This postulation disqualifies the theory from being relied on in this study, whose central focus and belief is that law emanates from a people or their culture and/or traditional history.[36] In addition, the theory creates a hierarchy of laws,[37] which pits human law as the lowest in the hierarchy.[38] It is for this reason that this theory does not support this study's objective, which is to suggest ways in which ACL (human law) can stop being relegated and hence be given a higher recognition in a pluralistic legal system such as Kenya.[39] Further, this

[33] Criticisms are not only peculiar to the natural law theory but also exist regarding other theories about and of law. For example, the Historical School theory is criticised for failing to support codification of laws, arguing that codification ossifies the law. This will be discussed in section 2.4.2 of this Chapter.

[34] Savigny, one of the proponents of the Historical School, did not attempt to establish a direct religious legitimation of law despite being 'personally religious in a Christian-ecumenical sense'. As noted in Dilcher G *The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization* (2016) 30.

[35] This belief further leads them to conclude that law "ought" to be in a particular way as opposed to viewing law as "is", which is adopted by the positivists.

[36] This is as posited by the Historical School which advances that true law stems from the customs of a people. This will be discussed later in the Chapter under section 2.4.

[37] The hierarchy of laws under natural law are first, divine law, then natural law and lastly human law. This hierarchy was advanced by Aquinas as earlier noted, where human law represents that posited by humans.

[38] Naturalists sub-ordinate man-made laws to other laws. This is contrary to the positivists, who do not offer any classification of law.

[39] This scenario will present itself in the discussion in Chapters Three, Four and Five, which will show the position ACL is given in Kenya's legal system. This will lead to unfolding why decisions emanating from TJS seem not to be recognised and enforced by the FJS. The main aim here being to show that the position allocated to ACL in the hierarchy of laws, affects the recognition of such decisions and other rules stemming from the TJS. Although as noted in Chapter One, the recognition and promotion of the application of TDRMs and by extension TJS by the Kenya Constitution 2010, seems to elevate ACL in Kenya.

theory advances that obedience of laws is only achieved by the presence of a social contract.[40] This is not necessarily true in instances where ACL regulates the social order of a people, as obedience to the customary rules does not stem from a social contract as so argued by the naturalists, but rather, out of an innate individual responsibility to the laws that govern people since time immemorial.[41] In sum, the above discussed facets negate the reliance upon natural law theory by this study.[42]

2.3 POSITIVISM

Positivism is a system of philosophy based on things that can be seen or proved.[43] The main proponents of this theory are Hans Kelsen, Jeremy Bentham, John Austin and Herbert Lionel

[40] This is not entirely accurate in relation to customary rules, which were adhered to in primitive societies despite the lack of a contract among individuals. This is in line with the first stage of development as advanced by Sir Henry Maine, which advances that initially an individual was concerned with his relationship with family and community based on status. See discussion under section 2.4.2 of this Chapter.

[41] View as posited by this study and supported by the views advanced by Sir Henry Maine in his stages of law development, as discussed in section 2.4.2 of this Chapter.

[42] Other principles espoused by the natural law theory that this study deems not to be in tandem with it, is the fact that naturalists emphasise that law conform to a "natural order" and to principles of justice and morality. The question here arises as to what is the standard to be held for a "natural order" or morality of laws. This requirement is a qualification that customary law has been subjected to in most African countries, in an aim to discredit its application. (See for example, s 3(2) Judicature Act Chap 8 Laws of Kenya which will be discussed in detail in Chapter Three). Yet, there can be no universal agreement as to what is moral, since moral values are different for the various peoples of Africa and differ from place to place. This is illustrated by the dissimilar positions taken by different African countries on practices such as homosexuality. Uganda, for example, comes out strongly against homosexuality to the extent of criminalising it, yet South Africa embraces the practice and allows same-sex marriages (see Civil Union Act of 2006). This stated, natural law theory has some relevance in Africa, in the sense that it articulates equality of all people, which idea is resonated in the Bill of Rights or Constitutions of most African countries that prohibit various forms of discrimination. See Omony JP (2014) 31-2 for a further discussion.

[43] This contrasts with naturalism which is idealist.

Adolfus Hart.[44] Positivists credit the sovereign as being the source of law.[45] This view immediately fails to augur well with the idea advanced and cultivated by this study that law emanates from the people or their customs. Further, positivists believe that laws enacted by the sovereign must be backed by sanctions for them to be valid.[46] This ideology further renders positivism incompatible with the arguments advanced by this study. The notion that it is a sovereign who makes laws and punishes for their non-adherence, questions the role of the people in law making.[47] It signifies non-participation of the people to whom these laws will apply. As a result, the laws may not be understood and may only be followed for the sake of avoiding the sanctions laid down by the sovereign or superior. This is in total contrast with customary law which emanates from the people, and is adhered to, not because of fear of punishment, but majorly because people understand it.[48]

Another glaring incompatibility of the positivist theory for this study, is the fact that positivists articulate the separation of laws and morals, in the sense that they do not require a law to

[44] There is also Bruno Simma, a former judge of the International Court of Justice (2003-2012), who has been recognised as one of the leading proponents of enlightened positivism, which 'denounces some of the traditional and classical conservative views about law (especially international law) and postulates a flexible version of positivism that takes into account the realities of international law - that international law is not only made by states, but that civil society organisations are increasingly becoming important participants, and that the law of nations is not strictly based on the concept of state consent.

[45] Positivists argue that law is a command of a sovereign backed with sanctions, and as such, the sovereign has the power to punish those who do not adhere to the laws.

[46] View posited by John Austin (1790-1859) who argued against any correlation between law and morality, and Jeremy Bentham (1748-1832), largely known for his principle on utilitarianism which evaluates actions based on their consequences.

[47] This study acknowledges that there is a danger in allowing the will of the people to determine applicable laws in any given society. The will (spirit of the people) should be limited, but their ideas heard and considered as ultimately, the laws enacted will govern them. This is discussed in detail in this Chapter in the section on the Historical School.

[48] This said, it is important to note that customary rules are not without sanctions. As with the role of any laws applied in a society, customary rules also seek to maintain order and a deviation from these rules would amount to punishment as prescribed by the relevant customary rules. This will be shown in Chapter Three in relation to ACL as applied in Kenya.

conform to morals as long as it is effective.[49] In as much as this study questions the standard of what should constitute 'moral', particularly when it comes to customary rules, it is akin to the fact that some customary practices are frowned upon in modern society (and rightly so).[50] It is in this recognition that the study highlights the fact that customary rules [just like formal rules/laws] impose penalties for what they consider an offence.[51]

From the foregoing discussion, it is evident that although the naturalist and positivist schools seem to be diametrically opposed, similarities exist between them.[52] One similarity is that both schools postulate the idea of a supreme law, but the source of this law is different. To the naturalists, it is god and for the positivists it is the sovereign. It is these sources of laws that do not conform with the proposition of this study, which considers custom as the source of law, particularly that which regulates the private life of individuals.[53] As noted earlier, other tenets advanced by the two schools do not entirely acquiesce with this study. For those reasons, the natural and positivist law theories are not satisfactory to support this study.

[49] In this regard, the immoral character of law is irrelevant.

[50] For example, in Kenya, such customary practice is that of female genital mutilation (FGM) among the Cushitic group, Kisii and Maasai community. This practice is deemed repugnant and various attempts are being made to phase it out. To this end, the Prohibition of Female Genital Mutilation Act No. 32 of 2011 was passed in Kenya all in a bid to protect women from repugnant customs. In support of this, the FJS (High Court) in *Katet Nchoe and Nalangu Sekut v R* criminal appeal number 115 of 2010 consolidated with criminal appeal number 117 of 2010, held that the Maasai custom of circumcising females was repugnant to justice and morality. Further, the Constitution, 2010 in the Bill of Rights, art 55*(d)* requires that the youth be 'protected from harmful cultural practices,' and FGM would fall under this ambit.

[51] Some of these offences and attendant punishments will be highlighted in Chapter Three in the discussion on selected TJS of various selected communities in Kenya. An example is the prescribed fine of 12 goats, 1 bull, 20 heifers and 1 cow for the offence of homicide among the Meru community. See discussion under section 3.3.

[52] As observed by Omony JP (2014) 35.

[53] However, a positive tenet of these two schools, is that they recognise customary law if it is written in statutes or recognised by courts. See Omony JP (2014) 35.

2.4 HISTORICAL SCHOOL

The Historical School looks to communities for principles of jurisprudence and not to abstract first principles or arbitrary sovereigns.[54] It is also concerned with the relationship of law, history and society.[55] Further, it has its origins in the French Humanist school of jurisprudence, which emerged from secularisation of thought that emerged following the Renaissance and the Protestant Revolt against orthodoxy, in which French humanists encouraged use of native law.[56] In this context, the Historical School advances the idea that 'a legal system develops in an evolutionary manner, reflective of the customs and traditions of a particular people.'[57] Historical jurists, therefore, aim to elaborate the relationship between law and community, with the intention of establishing how laws emerge from cultural rules (culture) of a people.[58] Its main proponents are Gustav Ritter Von Hugo,[59] Friedrich Karl von Savigny[60] and Sir Henry Maine.[61]

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[54] Young SB 'Beyond Bok: Historical Jurisprudence in Replacement of the Enlightenment Project' (1985) 353 *Journal of Legal Education* 333-351, 351. This is unlike the natural law and positive law schools.

[55] As noted in Abraham G 'Historical Jurisprudence' (2004) 118-9 in Roederer C & Moellendorf D 'Jurisprudence' (2004) 20 *South African Journal on Human Rights* 684-694.

[56] This approach of encouraging the use of native law was also adopted in England through the works of Richard Hooker (1554-1600) in his work *Of The Laws of Ecclesiastical Polity* (1597), as cited in Abraham G (2004) 118-9.

[57] See Abraham G (2004) 123.

[58] The Historical School is at times associated with legal anthropology, whose main exponent was Sir Henry Maine (1822-1888).

[59] (1764-1844), known as the 'patriach' of the Historical School.

[60] (1779-1861). Savingy was the pioneer of the Historical School of jurisprudence, see Pillai PSA *Jurisprudence and Legal Theory* (2005) 6, and one of the law Professors in the University of Berlin in the late eighteenth and nineteenth century. He was the 'most conspicuous of a group of German scholars preoccupied with a mystical sense of organic growth of particular human societies' who elevated the idea of history and tradition as requisites in adopting laws by any society. See Abraham G (2004) 122-3.

[61] Sir Maine was the main exponent of the anthropological school, which relied on anthropological studies to determine the development of law, as advanced by Savigny and other proponents of the Historical School of Jurisprudence. Maine's findings are captured in his book *Ancient Law* (1908).

Early Historical School proponents advanced the notion that political authority is rooted in the consent of a particular people and as a result, the laws laid down by the political authorities of the past continue to bind the people of the present because such laws reflect the consent of a particular people.[62] The proponents claim that both the moral and political validity of law stems from its historical character.[63] Historical School proponents elevated the idea of history and tradition as requisites in adopting laws by any society.[64] Sir Edmund Coke embraced the idea of 'evolutionary progress of a legal system' and was of the view that, 'while law changes over time, it is organic in the sense that, in changing, it must remain faithful to its root stock'.[65]

Following the above notion by Sir Edmund Coke, this study calls for enhanced recognition and enforcement of succession decisions emanating from the TJS by the FJS in Kenya. This submission is made on the basis that despite customary succession rules being deemed 'regressive',[66] they regulated the conduct of communities in Kenya even before the statehood

[62] This line of thought was advanced through the works of Richard Hooker (1554-1600) of England, in his work *Of The Laws of Ecclesiastical Polity* (1597), in Abraham G (2004) 118-9.

[63] This position dominated the seventeenth century jurisprudence of England's common law, and shown in the works of Sir Edmund Coke (1552-1634) who 'provided historical jurisprudence with one of its foundational building blocks- the principle that a nation's laws are to be understood within the context of its national history. More strongly that the past does, and ought to, exert a normative influence on present and future legal development.'; John Selden (1584-1654) who had a contrary opinion to Coke. 'His principle contribution was to stress that the relative quality of a legal system might best be measured when judged by the extent to which it 'fits' the wants and needs of the people to whom it is intended to serve.'; and Sir Matthew Hale (1609-1676), who compiled Coke's and Selden's ideas in his work *History of the Common Law* (1713), which was the first history ever written on the English Law. Works and early proponents as cited and discussed in Abraham G (2004) 119. See same for a detailed discussion.

[64] Breunig C *The Age of Revolution and Reaction*, 1789-1850 (1977) 183 in Abraham G (2004) 122-3.

[65] As per Sir Edmund Coke (1552-1634), discussed in Abraham G (2004) 119.

[66] This will be shown in Chapter Five through the analysis of courts' jurisprudence which will highlight some factors that lead the FJS not to recognise customary rules of succession, such as those that are gender discriminatory. The Chapter will subsequently highlight the reform of ACL in line with constitutional values of equality.

of Kenya was established.[67] On this note, one can contend that these customary rules are the basis of the current legal norms applied, as they informed their drafting, hence making them the foundation on which existing legislation came to be developed.[68] It is argued that consideration of customary rules in drafting legislation is necessary for various reasons. First, customary rules change to accommodate the circumstances in which they operate.[69] Secondly, due to their adaptability to circumstances around them, they can govern communities for continuous periods. This view is supported by the Historical School, which believes that communities go through predictable stages and that a community's laws reflect the community's stage of development.[70]

As noted, the Historical School proponents were of the view that history and tradition should be embraced in law making, as law stemmed from the natives.[71] This view was further supported by Baron de la Brede et de Montesquieu (1689-1755).[72] He argued that 'the

[67] This will be shown in the discussion on TJS of various selected communities in the following Chapter, which will highlight the procedures in the TJS as well as matters to which TJS are applied.

[68] In particular, the Law of Succession Act, Chap 160, Laws of Kenya, which recognises ACL rules and practices in its provisions. For example, s 3(5) which recognises subsequent wives in customary marriages (often polygamous unions), for purposes of succession; s 9 which recognises customary oral wills; and s 26 which recognises all sired children of a deceased as his dependants, thus doing away with testamentary freedom as applicable under English law. These will be discussed further in Chapter Four.

[69] For instance, this will be highlighted in Chapter Five where customary rules of succession will be shown to have reformed to recognise the right of women to inherit. This change is due to the adaptability of customary laws to conform with current requirements such as those on gender equality, as enshrined in Constitutional provisions and various international instruments.

[70] See stages of law development as advanced by Sir Henry Maine.

[71] Elevation of history and tradition dominated in the late eighteenth and nineteenth century, and one of the central tenets that was espoused by the German Historical School was that the organic culture (*Volkskultur*) resided in the spirit of the people (*Volksgeist)*. Discussed in detail in Savingy's book *Of the Vocation of our Age for Legislation and Jurisprudence*, which is recognised as the basic charter of the Historical School. See Reimann M 'The Historical School against Codification: Savigny, Carter, and the Defeat of the NewYork Civil Code' (1989) 37 (1) *American Journal of Comparative Law* 95-119, 98.

[72] In his work *L'Esprit des Lois* (1748), as discussed in Young SB 'Beyond Bok: Historical Jurisprudence in Replacement of the Enlightenment Project' (1985) 353 *Journal of Legal Education* 333-351. These same sentiments were espoused by Edmund Burke (1729-1797), when he rejected the notion of the envisaged French Constitution that "appealed to 'natural rights' based on abstract reason", and instead advocated for the unwritten

legislature should follow the spirit of the nation, when it is not contrary to the principles of government; for we do nothing so well as when we act with freedom, and follow the bent of our natural genius.'[73] It is in this idea, that this study argues for the legislature to consider customary rules that govern succession under the TJS in decision-making, as long as they adhere to constitutional provisions and principles of humanity. In this context, this study refers to principles of humanity to signify the awareness of the role such principles have played in elevating African jurisprudence. One such principle is that of *Ubuntu*, which signifies that where humanity is key, most conflicts and violence can be avoided through TJS methods such as negotiation and reconciliation.[74] Therefore, the argument for ACL to be considered by the legislature in law-making is advanced on the basis that TJS decisions endeavour for reconciliation over retribution, thus they should be upheld by the FJS as far as they embrace values of humanity and comply with Constitutional provisions. Further that, TJS rules spring from the customs / spirit of the people and as a result, they will be adhered to.[75] This argument

English constitution which had evolved over the century with the evolution of the English people. As cited in Abraham G (2004) 117.

[73] See Young SB (1985) 353.

[74] See generally Bennett TW, Munro AR & Jacobs PJ (eds) *Ubuntu An African Jurisprudence* (2018). See also Bilchitz D, Metz T, & Oyowe O *Jurisprudence in an African Context* (2017) for a general discussion.

[75] On this aspect, anthropological studies have been done, and one of the scholars, Malinowski B in his work *Crime and Custom in Savage Society* (1932) concluded thus:

> The rules of law stand out from the rest in that they are felt and regarded as the obligations of one person and the rightful claims of another. They are sanctioned not by a mere psychological motive, but by a definite social machinery of binding force based as we know, upon mutual dependence, and realised in the equivalent arrangement of reciprocal services. As cited in Abraham G (2004) 131.

From the above quote, it is submitted that although the sentiments were espoused regarding the peoples of the Trobriand Islands, the same conclusion can be drawn for most societies as all customary laws operated within the primitive societies and had the role of maintaining order.

is also supported by the view articulated by Hugo, who expressed the idea that 'just as people adhere to their language and customs, so too, should they adhere to their law as it emerged.'[76]

Modern scholars further buttress the foregoing view of Hugo by maintaining that the law of a people grows out of their common conscience,[77] and as a result, adherence will not be forced or done out of fear of sanctions imposed by a superior,[78] but will stem from their conscience.[79] In support of this argument, Savigny, stated:

> In the general consciousness of a people lives positive law and hence we have to call it people's law (*Volksrecht*). It is by no means to be thought that it was the particular members of the people by whose arbitrary will, law was brought forth; in that case the will of the individuals might perhaps have selected the same law, perhaps however and more probably very varied laws. Rather it is the spirit of a people living and working in common in all the individuals, which gives birth to positive law, which therefore is to the consciousness of each individual not accidentally but necessarily one and the same.[80]

A key aspect to note is that despite enhancing the idea that law emanated from the spirit of people, the Historical School proponents were alive to the fact that the law that stemmed from

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[76] He argued that 'there was no reason for the overturning of the tradition.' See Abraham G (2014) 123. However, due to emerging societal changes, some TJS rules may be 'invalidated' for not adhering to certain human rights precepts, for example, FGM in Kenya as noted earlier.

[77] See views of Abraham G (2014) 123.

[78] As advanced by positivism earlier discussed in section 2.3 of this chapter, which credits the sovereign as the source of law.

[79] Johann Gottfried von Herder (1744-1803), a Protestant pastor and theologian, was of the view that people sharing common culture and language, possessed a unique *Geist* ('spirit' or 'genius') which developed differently for different peoples. He expressed the view that '[a]n authentic national culture drew its inspiration from the *Geist* of the people'. This view is fundamental in historical jurisprudence as Herder 'saw the need for identification of a Geist as being a prerequisite for all national development, not simply that of the German people'. See Breunig C (1977) 183 in Abraham G (2014) 122-3.

[80] Savigny F (1840) in *System des heutigen Römischen Rechts* (System of Modern Roman Law) in Abraham G (2014) 117.

the traditions varied from people to people.[81] It is in being alive to this fact, that they expressed that law should be suited to each society's circumstances.[82] On this notion, Montesquieu held that: '...the government most comfortable to nature is that which best agrees with the humour and disposition of the people in whose favour it is established'.[83] Following this line of thought, this study submits that the Historical School supports the idea advanced of adoption of an approach by the Kenyan judiciary or legislature, which should consider the variance of customs of the various communities in Kenya. Accordingly, this will avoid imposition of uniform laws that would have the effect of subjecting members of a certain community to traditions of another.[84] In this context, caution on the aspect of codification of laws is critical, as such practice was indicated by the Historical School proponents, to have the effect of obviating customary rules from growth, by reinforcing obsolete customs;[85] yet one of the main characteristics of customary laws is their flexibility.[86] For example, the codification done

[81] As shown in section 2.4 of this Chapter, where it was noted that the Historical School believes that communities go through predictable stages as advanced by Sir Henry Maine, and that a community's laws reflect the community's stage of development.

[82] Onyango P highlights on this by stating that there is eminent need for research in customary law in order to provide suitable legal knowledge for best practice, constitutionalism and the rule of law, in correspondence to current socio-economic changes and new challenges facing the modern judicial systems. See Onyango P (2013) 1. Similar observations are made by Elias TO who states that 'a system of law can only be realistic if it keeps a breast with the economic, social and cultural development and requirements of the people,' as cited in Onyango P (2013) 6.

[83] Montesquieu, as cited in Young SB (1985) 353, further considered that societies should implement laws

> …[i]n relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherd: they should have relation to the degree of liberty which the constitution will bear, to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs.

[84] This in consideration of the fact that customary laws are different as they are linked to the biological heritage of a people; according to Savingny.

[85] 'The historical school was, by the very essence of its axioms, biased against legislation.' See Reimann M (1989) 114.

[86] To avoid the criticism of codification, some countries, for example, Kenya and Malawi, created restatements of customary law, which serve as guides rather than authoritative statements of customary law. See Cotran E *Restatement of African Law*: Kenya I: *The Law of Marriage and Divorce*, in 1 RESTATEMENT OF AFRICAN LAW (Allot AN (ed) (1968) and Malawi – Ibik JO, Malawi I: *The Law of Marriage and Divorce*, in 3

earlier in Kenya,[87] had the effect of a static representation of the customary rules applicable in Kenya, thereby impeding the development of customary law, yet the customary rules of the various communities are always developing, signifying an evolution of culture.[88] Savingny rejected codification and argued that 'fixing in immutable principle legal ideas which express culture, and which should be allowed to develop over time, was destined to fail.'[89] According to Savigny, there exists a natural process of change within all social rules, which weaken when the state seeks to fix legal doctrine in a comprehensive contextual system.[90] However, it is important to note that Savigny was not entirely opposed to codification as will be discussed later in the Chapter.

RESTATEMENT OF AFRICAN LAW (Allott AN (ed) (1970). The restatements and activities of the courts increasingly transformed customary law into formal law. See Oba AA (2011) 63.

[87] See Cotran E, *Restatement of African Law*: Kenya I: *The Law of Marriage and Divorce*, in 1 RESTATEMENT OF AFRICAN LAW Allot AN (ed) (1968).

[88] This will be shown in Chapter Five in the discussion on the FJS reliance on Restatements in ascertaining the customary rules and practices applicable in Kenya. However, despite the disadvantages noted, codification had its advantages such as: made it known the customs of a particular people, helped in deciding cases where the parties were natives, particularly where English judges presided over the courts. The utility of Restatements in these ways, is still seen in modern contemporary Kenya as will be shown in Chapter Five through the analysis of courts' jurisprudence. Further, the racial bias in the FJS during colonial and post-colonial periods in Kenya, will be discussed in Chapter Three.

[89] This retaliation was out of the intention to codify German law; which would signify universal features of a people which was unorthodox in their thinking. See Abraham G (2014) 124. The reasons for Savigny's objection to codification, are well captured in Reimann M (1989) 97-8. The author states that: 'Savigny's principal argument against codification was that his own age lacked the ability necessary to do it properly. In his view, a proper code had to be an organic system based on the true fundamental principles of the law as they had developed over time. A thorough understanding of these principles was an indispensible prerequisite to codification. Savigny found such mastery of principles lacking among his contemporaries and feared that a codification in his time would therefore do more harm than good by perpetuating misunderstandings. Thus, he urged his contemporaries to study the historical evolution of the basic principles first and to turn to codification later if they deemed it necessary.

[90] This expression by Savigny led to a delay in the codification of German law for nearly a century. German law was ultimately codified as the *Bürgerliches Gesetzbuch* (*BGB*) and entered into force in 1 January 1900. See Cotterrell R *The Sociology of Law* (1984) 23 in Abraham G (2014) 124,7. Codification of all the major areas of German law, had been passionately advocated for by Anton Friedrich Justus Thibaut, a Professor of Roman law, who 'lamented that German law was not only geographically disunited but also ridden with the complexities of Roman law, which led to delays and uncertainty. He believed that a uniform code could remedy these problems, and that such a code could be completed within two to four years'. See Reimann M (1989) 4.

2.4.1 Tenets of the Historical School

The Historical School contends that one can only explain or understand a legal concept or institution in terms of its social context.[91] This context is based in the concept of communities.[92] This approach of looking at communities or societies by the Historical School is commendable, as they 'interpret the changes in the growth of law and explain the forces which have brought them about.'[93] By employing this approach, laws enacted express the culture of a people or society. In this regard, Abraham G asserts that law emanating from a people is as it is, because it is a product of the peculiar culture and traditions of the people.[94] He states that:

> [w]e know and understand legal concepts, which we choose to obey, not because they constitute distilled essential truths, nor because they are imposed from on-high by an omnipotent legislature, but rather, because they are part of the very essence of what it means to be a human being living within a particular community.[95]

The above quote is instructive to the view advanced by this study, that any approach employed by Kenya in the interaction of the FJS and TJS will be observed, as law (ACL) emanates from the people. In this context, Savigny maintained that *it is only they (people), who can elevate rules into law through their customs and culture*.[96] This is because the rules that inform TJS decisions, arise from deeply held or rooted beliefs of a culture and therein lies a reciprocate

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[91] Abraham G (2014) 117.

[92] '…[c]ommunities of the dead, the living, and the unborn, the temporal continuity of cultural traditions, and of the reasons such traditions advance for giving life its meaning.' See Young SB (1985) 351.

[93] See Pillai PSA (2005) 6. This approach agrees with this study, which delves in establishing how and/or why the laws that regulate marriage and succession in Kenya came to be, as will be discussed in detail in Chapter Four.

[94] Abraham G (2014) 117.

[95] Abraham G (2014) 117.

[96] [own emphasis]. See Omony JP (2014) 98.

responsibility upon an individual to adhere to these rules.[97] As a result, the rules that have regulated the various Kenyan communities since time immemorial are formalised.[98] This brings in the facet of considering history of a society in understanding the rules that govern it, as advanced by the Historical School jurists.[99] A further justification for this view held by this study, is that Historical School jurists contend that customary law 'is enforced by the sovereign because it is already law; it does not become law because of enforcement by the sovereign.'[100] Although this view of law being deemed independent of political authority and enforcement is one of the criticisms of the Historical School,[101] it nevertheless plays an important role in signifying that at times, some legislation in society (Kenya), is informed by customs that regulate communities within it.[102]

2.4.2 Criticisms of the Historical School

There are various criticisms that are associated with the Historical School. Some of these are discussed as follows. The first criticism of the Historical School is that it relies on speculative theories that draw strongly on principles of social evolution which attach their reliance on the 'spirit of the people' as advanced by Savingny.[103] The latter aspect has been criticised as

[97] This is supported by current scholars, who maintain that the law of a people grows out of their common conscience. For example, see views of Abraham G (2014) 123.

[98] An example is the earlier cited s 3(5) of the Law of Succession Act, Chap 160, which recognises the rights of subsequent wives in customary marriages, which are by their very nature polygamous unions.

[99] The relevance of history will be illustrated in Chapter Three, which discusses the TJS of selected communities in Kenya as well as in Chapter Four which analyses the customary rules that govern marriage and succession in Kenya.

[100] See Subbarao GCV *Jurisprudence and Legal Theory* (2012) 10.

[101] As will be discussed in the following section.

[102] See for example the Prohibition of Female Genital Mutilation Act No. 32 of 2011 and the Community Land Act No. 27 of 2016.

[103] Abraham G (2014) 118. On this note, Reimann M notes that there are two aspects of Savigny's theory that expose it to such criticisms. First, that law [custom] is, an expression of the "common consciousness of the

problematic due to the impossibility to accurately analyse and as such, making it too abstract a concept, as it does not rely on 'empirically ascertainable historical facts'.[104] The idea of the 'spirit of the people' would be most problematic at law development stage, as lawmakers would have to decide which 'spirit' or 'conscience' to recognise. For instance, in Kenya, this problem is conceivable due to the diverse communities, with equally diverse customary laws.[105]

Another conceivable difficulty with developing laws stemming from the 'spirit of the people', is that there exists the danger of privileging the will of the people in law making, yet some of their beliefs run counter to morality and/or equality.[106] In Kenya, one can aptly state that this concern has been averted by various checks and balances. First, through the Constitution 2010, in its Article 2(4), which provides that any law, including *customary law*, which is inconsistent with its constitutional provisions, is invalid.[107] Secondly, and in similar manner, through the repugnancy and inconsistency clauses in the Judicature Act.[108] These clauses are to the effect

people"' and secondly that custom grows over time, driven by "internal, silently operating powers", making it an evolutionary phenomenon, subject to constant change. For more detail see Reimann M (1989) 98.

[104] As argued by Hugo (Savigny's contemporary), See Robinson OF, Fergus TD & Gordon WM *An Introduction to European Legal History* (1985) 471 in Abraham G (2014) 127.

[105] However, there are identifiable similarities in the diverse customary rules. For instance, this will be shown in Chapter Four in relation to marriage and succession rules.

[106] This is evident in some customary methods of adjudication which are problematic in some respects and customary laws which are not free from gender prejudices. See Oba AA (2011), 80. For example, in Kenya, while following customs of the Maasai people, elders ordered the payment of 49 cows to the family of a 44-year-old widow and mother of 4, 'Christina', who was raped by 9 men and murdered. In this case, the customary laws were repugnant and an ultimate injustice to the bereaved family. Such customs when imposed have the effect of oppressing the minor and weaker members of a certain community. Watsup Africa News 'Family Seeks Justice for Christina who was raped, then murdered by 9 men in Nderekesi Village' available at *http://watsupafrica.com/news/family-seeks-justice-for-christina-who-was-raped-then-murdered-by-9-men-in-nderekesi-village/* (accessed 23 June 2016).

[107] Note the explicit reference to customary law by the drafters of the 2010 Constitution and the glaring absence of any mention of other laws such as equity, common law or statutory legislation.

[108] Chapter 8, Laws of Kenya.

that to be enforceable ACL should not be repugnant to justice and morality, and that ACL in Kenya can only be applied if it is not inconsistent with any written law, respectively.[109]

The second criticism levelled against the Historical School is the fact that it does not support codification of laws.[110] In a subtle rebuttable of this criticism, Savigny was quick to acknowledge that law making changes ownership and does not rely on the conscience of the people but belongs to jurists, who possess legal knowledge required in law-making.[111] This recognition by Savigny, to some extent, waters down the influence the people were perceived to have, and illuminates the fact that the Historical School acknowledged that legal experts were needed in the law process, which could not necessarily be found in the basic knowledge of the people.[112] This argument supports the idea of identification of an approach that can be used to further the integration and enforcement of ACL within the FJS. This is despite its provisions drawing some bearing from customary rules of the various communities in Kenya.[113] To give further support to this argument is the view espoused by Reimann M: 'There is no logical reason why legislation, particularly if enacted by a popularly elected body, should

[109] See s 3(2) Judicature Act, Chap 8 Laws of Kenya. The inconsistency and repugnancy clauses will be discussed in detail in Chapter Three section 3.3.3.

[110] As noted earlier in the Chapter and advanced by Savigny.

[111] See Reimann M (1989) 98.

[112] Savigny's insistence of law as a science led him to conclude that it can only be appropriately administered by scientists. His sentiments are captured in Reimann M (1989) 110-111 as follows:

> With the progress of civilization… what otherwise would have remained common, becomes appropriated to particular classes; the jurists now become more and more a distinct class of the kind; law perfects its language, takes a scientific direction, and, as formerly it existed in the consciousness of the community, it now devolves upon the jurists…" Law is no longer the law of the people (*Volksrecht*) but the law of the lawyers (*Juristenrecht*).

[113] Further, this situation indicates why this study calls for integration and a harmonised collaboration between the TJS and the FJS along with other key stakeholders in the legal system such as the legislature, law commissions, traditional leaders/elders and civil society organisations. This will be discussed further in Chapter Six.

not be at least as appropriate an expression of legal custom as are court decisions or scholarly writings.'[114] This view reinforces the idea by Savigny, who although opposed to codification, vouched for it but a later stage noting that if it was to be implemented, 'law must see itself as a trustee of the people interpreting and reflecting their wishes and consciousness'.[115] Accordingly, if the approach adopted by this study on recognition and enforcement of TJS decisions is adopted and developed by the legislature in Kenya, the same must uphold the consciousness of the people.[116]

The third criticism levelled against the Historical School is that it supposes cultures are unitary phenomena.[117] This criticism is well summed by Cotterrell R who comments:

> Any large, complex society, with its multiplicity of social backgrounds and individual experiences, contains varying mores and attitudes within itself. On any given piece of legislation there will not just be supporters and enemies, rather there will be many points of view, ranging from unconditional support, through indifference, to unmitigated opposition.[118]

It is on the basis of the above quote, that this study does not call for the 'blanket application' of customary rules in the proposed approach or guideline that will be advanced in Chapter Six of this study, but proposes that customary rules be considered according to a community's practices.[119] In this regard, it is argued for instance, that the drafters of the Marriage Act

[114] See Reimann M (1989) 114.

[115] Omony JP (2014) 98. It is worthy of note that Sir Henry Maine was also not opposed to codification, as he held that the common law of the English peoples was a form of written law. See Abraham G (2014) 130.

[116] The adopted approach must be pegged on customary rules that regulate succession matters in the TJS and FJS.

[117] Abraham G (2014) 127.

[118] Cotterrell R *The Sociology of Law* (1984) 25.

[119] This is in recognition of the attendant dangers of imposing customary laws of one community to another, considering the diverse communities in Kenya. One danger of customary law imposition on another community,

2014,[120] when developing the legislation, applied principles espoused by the Historical School which posit that laws should reflect the social attitudes, behaviour, usages and customs of a people (*such as customary marriages*).[121] This is reflected by s 43(1) of the Marriage Act 2014, which recognises customary marriages in Kenya and provides that such marriages are to be 'celebrated in accordance to the customs of the communities of both or one of the parties to the intended marriage.'[122]

Lastly, the Historical School has further been criticised for relying on stages of law development, as advanced by Sir Henry Maine.[123] In summary, these stages are as follows. The first stage advances that there existed a shift from status to contract in an individual's dealing with society. Initially, an individual was concerned with his relationship with family and community(status) but with the progression of society, which created a social order in which all relations, rights and duties arose from the free agreement between individuals, the necessity for contacts in regulating such relations arose. This led to the second stage, which aimed at law making and ultimately showed the development of law. On this stage, Maine discovered that early primitive life was governed by rituals which were a social affair and individuals had their

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is the result of non-adherence by the communities to which such laws do not apply. This was the case in Tanzania where uniform customary laws were imposed through codification. For more see Twining W 'The Restatement of African Customary Law: A Comment' (1963) 1(2) Journal of Modern African Studies 221-228, 225.

[120] No. 4 of 2014, Laws of Kenya.

[121] [own emphasis]. Further, according to Savingny, the state is the "embodiment of a spiritual community of people, and constitutes its foundation as an invisible entity of nature, so that in the state the people find its true personality. (Savigny, System I, pp. 21 f., 23) in Dilcher G *The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization* (2016) 30.

[122] Further see the Marriage (Customary Marriage) Rules 2017, which require a declaration that a customary marriage was conducted in accordance with the customary law of a particular community, in support of registration of such customary marriage by the Registrar of Marriages in Kenya. See First Schedule, Form CM1, Part 2: Parties' Declaration.

[123] See Maine H *Ancient Law* (1908) 39. See also discussion in Abraham G (2014) 128-130.

various roles to play in such rituals, for example, circumcision. From these rituals, customary rules and commands evolved which were to be obeyed and by this way, law was created. The third stage in law development occurs where customs are codified and the fourth stage entails modification of fundamental customs and traditions.[124] Against this background, one of the concerns of critics of these stage schema such as Hoebel EA,[125] lies in the fact that in the primitive stage, 'all primitive societies relegate women to a level socially inferior to that of men and that marital rights were relatively exclusive.'[126] This criticism is instructive as this study highlights the relegation of women in Kenya's TJS (as is common in most African TJS).[127] Further, in relation to the evolutionary process, it is generally submitted by the Historical School that societies develop in accordance with a particular pattern.[128] However, scholars agree that this idea need not necessarily mean that the Historical School proponents alleged that societies always develop in the particular way they advanced.[129]

Despite the above-noted criticisms, the principles upon which the Historical School is based, still offer valuable insights worth considering, particularly in law-making, where customary law plays a significant role. Accordingly, it would be biased to deprive the School of merit due

[124] See Omony JP (2014) 103.

[125] Hoebel is a scholar of the twentieth century who undertook anthropological research in the way of life of primitive communities. His works include Hoebel EA *The Law of Primitive Man* (1954) and Llewellyn KN & Hoebel EA *The Cheyenne Way; Conflict and Case Law in Primitive Jurisprudence* (1941) as cited in Abraham G (2014) 130.

[126] Observations of Hoebel EA as cited in Abraham G (2014) 130-1.

[127] See observations by Woodman GR (2011) 12. The relegation of women in TJS will be shown in Chapter Three and further discussed in Chapter Five.

[128] See the stages of law development advanced by Sir Henry Maine, as noted earlier.

[129] Of important note, is that Maine believed societies need not go through all the stages of law development.

to its inherent limitations. It is therefore submitted that the School still has some worthy tenets that can be relied on, as discussed in the following section.[130]

2.4.3 Relevance of the Historical School's Propositions in Kenya's Legal System

There are many tenets of the Historical School that are relevant to the Kenyan legal system. First, the Historical School recognises similarities and differences in various legal systems and provides insights on how the law operates and how it may be changed for the better.[131] This situation applies in Kenya's legally pluralistic system. Therefore, if an approach is to be adopted to enhance the integration of ACL within the FJS, it should 'fit' both legally and socially in Kenya's legal system, as 'not all good law is everywhere the same'.[132]

Secondly, the other tenet of the Historical School is that it believes that any laws should embody the story of a nation and as such, cannot be distinct from a society's customs. On this basis, the Historical School is relevant in Kenya's legal system, as any approach adopted to be applied as proposed by this study, will entail a comparison of other stages of legal development in different societies, based on the stages of their social development.[133] This assessment is

[130] Recognition of this fact allows this study make room for the assumption that the Historical School is not the only theory that can be applied by different persons to the problem question at hand. Different views as to which theory is best applicable will be presented. For instance, this study notes that the semi-autonomous theory as advanced by Sally Moore, can be applicable in the analysis of the interaction of ACL and FJS. This is based on the fact that the theory is to the effect that law is applied within various semi-autonomous institutions within a state, whose workings are dictated by socio-economic changes abounding around them. See generally Moore SF *Law as a Process: An Anthropological Approach* (1978).

[131] Abraham G (2014) 134. The Historical School achieves this because it considers diverse legal systems and disputes the mystical belief of the uniqueness of a people and its law.

[132] Abraham G (2014) 134. The latter aspect is of importance particularly if new legislation or a working model is to be adopted from another legal system. The same should be modified to fit into the prevailing circumstances in Kenya and needs of the people or nation.

[133] This qualifies the adoption of a model from another country which has been successful or from which mistakes have been learnt and will thus be avoided.

vital as it will avoid an indiscriminate adoption of approaches, without factoring in the circumstances in Kenya.[134] The efficacy and suitability of such laws can be measured against the fourth stage of social development proposed by Sir Henry Maine.[135] The fourth stage entails modification of fundamental customs and traditions,[136] so as to bring law in harmony with the progressing society.[137] This stage is instrumental in the approach that will be proposed by this study, which is aimed at enhancing the recognition and enforcement of TJS succession decisions by the FJS and ultimately developing the interaction between the TJS and the FJS in Kenya.

Further, the importance of this interaction is pegged on the fact that the Historical School is premised on the view that judges should consider the history of legislation in issue while interpreting or constructing a statute.[138] It is by failure to apply this premise [at times],[139] that this study advocates for an approach that would aid in recognition of TJS succession decisions by the FJS. It is hoped that this approach will play a key role in making the requirements laid

[134] Lack of caution on this aspect saw blanket transplantation of legislation from other colonies into Kenya during the colonial period, without factoring in the inhabitants. However, the detriments associated with such an approach were realised and borrowed legislation would be modified to suit in with the needs of the settlers in the Kenya colony.

[135] Sir Maine made a comprehensive comparative study of the development of law in both the primitive and progressive society, and came up with various conclusions, which later anthropological studies, accept and show that Sir Henry Maine, 'had succeeded remarkably well in tracing the origin of law, outlining its evolution from primitive society to the progressive societies.' See Omony JP (2014) 103. See also Abraham G (2014) 128-130.

[136] As earlier noted. See Omony JP (2014) 102-3.

[137] It is not necessary to establish that all societies passed all the stages proposed by Maine, as he pointed out that not all societies succeeded in passing through all the stages he had advanced, and as a result, legal development does not reveal uniformity. Omony JP (2014) 103.

[138] See Subbarao GCV (2012) 10.

[139] An evaluation of judgments made by the FJS on succession matters where customary law rules are applied or contested, elucidates varying pronouncements by different judges based on their understanding of the customs of the particular community and other reasons. These will be discussed in detail in Chapter Five section 5.2.1 and 5.2.5.

down by the FJS simpler (less technical) for persons seeking redress from the FJS,[140] and assist in making judgments by the FJS, when customary rules before it come into question.[141] This view is aptly captured by Oliver Wendell Holmes Jr, who held:

> The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. *In order to know what it is, we must know what it has been, and what it intends to become.* We must alternately consult history and existing theories of legislation.[142]

Thirdly, the Historical School further serves to illustrate that law of a state reflects and expresses a whole cultural outlook.[143] As expressed by the Historical School proponents, 'law is something much more than a mere collection of rules or judicial precedents.'[144] Therefore, Kenya's legal system should incorporate ACL, as 'the spirit of a nation or people is the encapsulation of its whole history, the collective experience of the social group[s] extending back through the ages of its existence.'[145] In this way, customary succession laws in Kenya will have validity as a result of a historical process rather than exclusively by acts of the

[140] This is one of the reasons noted in this study that limits access to the FJS by majority of persons. See other reasons as noted in Chapter One.

[141] In this regard, Onyango P argues that a good foundation for jurists, scholars and legal practitioners is well developed when they are well versed in customary law. He notes the importance of incorporating courses into the curricula of training and education of various professionals, and gives the example of Nigeria, where for one to hold public office, one should have some experience with ACL or Islamic law. See Onyango P (2013) 9.

[142] [own emphasis]. As cited in Abraham G (2014) 131.

[143] As advanced by its proponents.

[144] Abraham G (2014) 124.

[145] Savingny held that 'in the earliest time to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution.' See Freeman M *Introduction to Jurisprudence* 6 ed (1996) 786.

legislature.[146] In this regard, it was noted that the Kenyan Government through the judiciary is seeking to re-affirm the fundamental place of customary law in its legal system, by encouraging the use of TDRMs and calling on members of the bench to apply indigenous jurisprudence which applies ACL in resolving disputes.[147] Further, Savigny recognised that culture is the product of complex social, political and economic processes and that these components need to be contemplated if their cultural expression is to be understood.[148] In this regard, the Kenya Constitution 2010 recognises the importance culture plays in society as its art 11(1) is to the effect that the Constitution '*recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation*.'[149]

However, the Kenya legal system does not entirely observe the idea advanced by the Historical School proponents that 'law is comprehensible as a social phenomenon only within the perspective of history of the society within which it operates.'[150] This assertion is made on the basis that ACL has not been fully integrated within the formal system and further that decisions stemming from traditional justice system are not formally enforced.[151] In this regard, it is important to assess the considerations partaken by the legislature in enacting various laws to

[146] Holmes (1881) stated that 'legal prudence must have its roots in the legal custom of the people which he called, 'experience' and which embodies a story of a nation's development through many centuries'. Holmes OW *The Common Law* (1881) in Onyango P (2013) 3.

[147] See Chapter One.

[148] Abraham G (2014) 127.

[149] [own emphasis].

[150] This was a belief advanced by Savigny. See Abraham G (2014) 124.

[151] See observations by Karimi M, Rabar B, Pkalya R, Adan M & Masinde I (2004) from their study of the Pokot, Turkana, Samburu and Marakwet TJS in Kenya, where they note that the respondents in their study wanted the judiciary (FJS) to help enforce the rulings and verdicts of the traditional courts by linking TDRMs to the FJS. To achieve this, it was noted that TJS should work with the FJS to develop a legal framework which would legitimise the TJS and its TDRM structure. Karimi M, Rabar B, Pkalya R, Adan M & Masinde I (2004) 90.

which ACL plays a crucial role,[152] and further examine the position of the FJS in making decisions on matters to which ACL is applicable, such as succession matters stemming from the TJS.[153] This assessment will establish whether there exists a justification for the recognition, application and enforcement of customary succession decisions by the FJS in Kenya. In this context, Abraham G states that '[a]ny effort aimed at the abandonment of customary law — to the extent that customary law continues to reflect the values, and express the uniqueness of, a community [society] – should be treated with great circumspection.'[154] This is buttressed by Savigny's view when he stated:

> History is a noble instructress, and only through her can living contact with the primitive life of the people be maintained. The loss of this connection would rob the nation of the best part of its spiritual life… .[155]

In light of the above quote, one can gauge the effectiveness with which ACL rules are integrated into the FJS, by assessing whether their incorporation observes the stages involved in legal development within a people. [156] This entails a two-stage approach. First, it requires that States conform to the common consciousness of the people which determines the law.[157]

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[152] As noted in Chapter One, current legislation that is enacted factors in various provisions that recognise ACL and use of TDRMs. See for instance s 68(1) of the Marriage Act No. 4 of 2014, which calls for the use of conciliation before divorce proceedings are presented before the FJS; and s 39 (1) of the Community Land Act, No. 27 of 2016 which recognises that a community may use alternative methods of dispute resolution mechanisms for purposes of settling disputes and conflicts involving community land.

[153] As will be discussed in Chapter Five.

[154] Abraham G (2014) 134.

[155] Abraham G (2014) 135.

[156] Which stages are as advanced by Sir Henry Maine, earlier noted and the two-pronged approach advanced by Savigny is discussed in Abraham G (2014) 124.

[157] Herein, conformity presents itself by the law being developed in response to changing circumstances under the influence of the 'law of inner necessity.' See Abraham G (2014) 124.

Secondly, that customs are codified as rules of law, following consensus among the people.[158] However, committing laws to writing (codification), plays wayward to the often-remarked danger of losing the character of custom.[159] Therefore, to obviate this, Kenyan legislators should embark on codification 'in a way that allows for the possibility of continued evolutionary change'.[160] This not only applies to legislators, but to the FJS, to ensure that any approach or mechanism developed to enhance the integration of ACL within the judiciary allows for the growth of ACL. This is possible through the recognition of living customary laws as pertain in Kenya, which allows for the recognition of the development and/or reform of ACL in various spheres that it regulates; such as marriage and succession.[161]

2.5 CHAPTER SUMMARY

This Chapter examined various theories with a view of identifying an appropriate theory that can be applied in addressing the research questions for the study. These questions seek to justify the need for integrating ACL within the FJS in Kenya as this study credits custom (customary law) as the source of laws which apply to people in any given society. Following this view, the

[158] It is worthy of note that the Historical School in advancing the writing down of customs, exposes its contradiction to its tenets against codification of laws. See earlier discussion on the same in this Chapter.

[159] Abraham G (2014) 125. See also earlier discussions on the same in this Chapter.

[160] As espoused by Savigny in Abraham G (2014) 125. This view is adopted by this study as will be shown in Chapter Six, which proposes an approach that will allow room for revision of any legislation adopted in relation to the integration of ACL within the FJS in Kenya.

[161] In support of this, as early as the 1960s, distinguished scholars, Allot and Verhelst, called for ACL to be recognised by African states as part of their law. See Oba AA (2011) 73. Verhelst particularly argued that ACL 'should be retained in a number of fields because it is the body of law best suited to the African society' because unlike foreign law, it 'reflects the cultural and societal patterns of the population to which it applies'. See Verhelst T 'Safeguarding African Customary Law: Judicial and Legislative Processes for Its Adaptation and Integration' 8 African Studies Center, University of California, Los Angeles, Occasional Paper No. 7, 1968, 5-6 available at *http://escholarship.org/uc/item/33g2v27d#page-18* (accessed 24 May 2018).

chapter discussed various theories. The first theory was the natural law theory, which advances that law emanates from a higher deity. It was noted that naturalists are idealists, as they believe in the existence of a higher knowledge incomprehensible by man.[162] For this reason, the natural law theory was discredited from application to this study. The second theory was that of positivism, which credits a sovereign as being the source of law in a society. Accordingly, positivists believe that laws must be backed by sanctions for them to be valid.[163] Owing to these aspects, the positivist theory was deemed incongruous to this study, which does not view sanctions as the reason why laws are adhered to.[164] The Historical School theory was the third to be analysed, which advances the idea that law emanates from the customs and traditions of a particular people and develops in an evolutionary manner.[165] On this note, the Historical School supports the argument of this study and was, therefore identified as the appropriate theory for this study. Subsequently, the components of the Historical School that were discussed included the tenets of the Historical School, key among them being that it posits that any laws should reflect the history or culture of a state and further that any laws adopted by the state should reflect and express a whole cultural outlook of communities within it. Another tenet indicated that the Historical School argues that judges reflect on the foundation of legislation to ensure correct interpretation of a certain law. In relation to this tenet, it was revealed that any legislation adopted should consider other legal systems for effective comparison before such laws are adopted by a State, in order to ensure that the laws fit in with the state's circumstances. Further, the relevance of the Historical School's propositions in

[162] As noted in section 2.2.

[163] As highlighted in section 2.3.

[164] In this regard, this Chapter noted that customary rules are adhered to out of a reciprocate responsibility from individuals to adhere to certain rules, and not due to fear of retribution. Further, it was noted in Chapter One that one of the advantages of TJS is that they promote reconciliation above retribution.

[165] See discussion in section 2.4.

Kenya's legal system was analysed and three key aspects that support the application of the School were identified. First, it was noted that the Historical School provides insights on how the law is and how it can be developed; secondly, that the Historical School believes that any laws of a State should embody the story of a nation so as to reflect a whole cultural outlook; and lastly that judges should consider the history of legislation while constructing a statute. Conversely, it was found that Kenya's legal system does not entirely observe the ideas advanced by the Historical School proponents, as exemplified by the limited integration of ACL within the FJS.[166] However, the overall analysis of the Historical School reveals that there is merit to apply the theory to this study and therefore, the Historical School is found appropriate as the theoretical framework for this study.

Therefore, by using the Historical School to analyse the interaction between ACL and the FJS, the following Chapter will address the historical recognition and application of ACL in Kenya.

[166] See earlier discussion in section 2.4.3.

CHAPTER THREE

HISTORICAL RECOGNITION AND APPLICATION OF AFRICAN CUSTOMARY LAW IN KENYA

3.1 INTRODUCTION

The preceding chapter identified the Historical School theory as advanced by Karl von Savigny, as instructive in appreciating the background to the application of ACL by the FJS.[1] This is attributed to the fact that the theory advances that true laws stems from the culture of a people, by virtue of their customs which regulate various spheres of their lives.[2] Accordingly, it was noted that the Historical School proponents advanced that customs should be embraced in law making.[3] It is this reasoning by the School's proponents that led this study to adopt the theory in support of the study's argument which advocates for the enhanced integration between the TJS and the FJS using the Historical School. It is submitted, that this can be achieved through the enhanced application of ACL in dispute determination and the subsequent enforcement of TJS decisions.[4] In this context, it was noted that the FJS relies on ACL in addition to formal law, in making its orders, signifying that ACL can function within the FJS framework with a view to achieving the common goal of justice.[5] Therefore, the relevance of

[1]This is attributed to the ideologies advanced by the theory, key among them that law stems from the customs of a people in any given society; therefore, that customs should be embraced in law making.

[2] In relation to this proposition, Chapter One noted that the same applies in Kenya, as it was shown that people's relations in Kenya are regulated by ACL alongside state law. This was noted in various areas and more specific to this study are the areas of marriage and succession.

[3] See views of Historical School proponents as discussed in Chapter Two.

[4] In particular, customary succession decisions stemming from the TJS, as the focus of this study is on succession law.

[5] This implies that state law does not work in a vacuum but also operates alongside other rules [ACL] as pertain within the State.

further integrating ACL within the FJS is well-supported by its utility in dispute resolution,[6] as well as the advantages advanced in favour of customs in any given society by the Historical School.[7] On this background, the historical recognition and application of ACL in Kenya is important in establishing how succession decisions by TJS can further be recognised and enforced by the FJS.[8] Accordingly, to understand the current interaction between the TJS and FJS, this Chapter traces the historical recognition and application of ACL in Kenya from the pre-colonial period to post-2010. The aim is to highlight the historical interface between the TJS and FJS in the Kenyan legal system. To achieve this, the Chapter analyses the TJS in pre-colonial Kenya, then examines the chronological development or application of ACL in the FJS, leading to the current structure of the FJS.[9] The analysis will engage the pre-colonial, colonial and post-colonial era, aiming to highlight that while TJS thrived during the pre-colonial era, it was subsequently affected by the introduction of the FJS in both the colonial and post-colonial periods.[10] The second section of the Chapter provides a brief description of

[6] Which is recognised through its elevation and that of TJS by both the State and the FJS. See discussion in Chapter One which highlights the constitutional recognition of TDRMs and the recognition of the application of ACL to various matters by domestic legislation.

[7] See discussion on the Historical School in Chapter Two section 2.4, which highlights customs as the foundation of the development of law in any given society.

[8] The importance of succession decisions by TJS being recognised by the FJS cannot be over-emphasised. This is further supported by the FJS as highlighted in Chapter One, which seeks to recognise indigenous jurisprudence in decision making. In addition, Chapter One noted that there are many legal issues pertaining to land, succession and family law that can be and are resolved through ACL, which has been accepted by many communities in Kenya as a fair, just and cost-effective system. In this regard, Ochich GO asserts that ACL presents a desirable, less costly, informal and speedy framework for the resolution of various disputes that may arise out of various transactions. He further notes that ACL provides a legal framework taking into consideration the social dynamics in the society in which it operates. See Ochich GO (2011) 110. As noted earlier in chapter One, other authors note that ACL has an emphasis on reconciliation and compromise, group responsibility and frequent use of informal enforcement procedures, which make it desirable among communities. See Oba AA (2011) 60.

[9] Analysis of the structure of the FJS will focus on its composition and its jurisdiction on matters where ACL is applied. In doing so, the Chapter will also discuss the various sources of law in Kenya with an emphasis on ACL.

[10] It is to be noted that these TJS still exist and are used in modern and contemporary Kenya. See for example Chapter One, where it was noted that the FJS refers matters to some TJS for determination. See also the study of the Pokot, Turkana, Samburu and Marakwet TJS of Kenya by Karimi M, Rabar B, Pkalya R, Adan M & Masinde I (2004) generally on the use of TDRMs in dispute resolution.

Kenya. The description is instructive in understanding the circumstances in which ACL operates in Kenya. The third section of the Chapter examines TJS of some selected communities in Kenya.[11] The selection of these communities is based on their representation of part of the three main community groups in Kenya, and is further dictated by the availability of literature on the various TJS of the communities. The fourth section is a critical overview of the historical interface of TJS and the FJS from the pre-colonial era to present day.[12] This section evaluates the impact of the FJS on the application of ACL and subsequently, the recognition of TJS in the post-colonial era. The section also analyses the recognition and application of ACL post-2010, following the promulgation of the Kenya Constitution, 2010. This discussion aims to highlight that Kenya to some extent, concurs with the advancements of the Historical School proponents that *'customs should be embraced in law making as law stems from the natives.'*[13] The last section forms the conclusion on the historical recognition and application of ACL throughout the different eras in Kenya. In sum, this Chapter examines the chronological recognition, development and application of ACL in the FJS, leading to the current situation in Kenya in relation to African customary law.

[11] The analysis focuses on the Meru and Kipsigis communities, which form part of the two major community groups in Kenya. The Meru community represents a sub-group of the Bantu group while the Kipsigis community represents a sub-group of the Kalenjin community, which form part of the Nilotic group.

[12] In the last decade, ACL law has been identified as a major area of study requiring the determination of its relevance and applicability in various African legal systems, as it has continued to play an integral part in most of these systems. See Onyango P (2013) 4. Many countries such as South Africa, Ethiopia, Nigeria, Ghana and Somalia (to name a few), have subsequently established its relevance and applicability through various studies on its significance in their legal systems. This recognition has in turn led to ACL being integrated into their domestic laws or legal systems. Ghana presents a good example in which it applies customary arbitration to resolve disputes, which has been adopted as a mode of adjudication of conflicts and disputes in civil matters. See Akamba JB & Tufuor IK 'The Future of Customary law in Ghana' in Fenrich J, Galizzi P & Higgins TE (eds) *The Future of African Customary Law* (2011) 207. In Nigeria on the other hand, for one to hold public office, one should have some experience with ACL or Islamic Law. In this regard, it can be argued, that a good foundation for jurists, scholars and legal practitioners is well developed when they are well versed in customary law. See Onyango P (2013) 9.

[13] [own emphasis]. See views of Historical School proponents as discussed in Chapter Two.

3.2 BACKGROUND TO KENYA

From a historical perspective, Kenya attained republic status on 12 December 1964.[14] The day is recognised and celebrated as a public holiday and is known as 'Jamhuri' Day, Swahili for Republic.[15] Initially, Kenya was declared a British Protectorate in 1895, prior to which the Imperial British East African Company (IBEACo) administered the territory. IBEACo, carried out all the obligations undertaken by the British Government under any treaty or agreement made with another State. In1896 it became known as the East African Protectorate until 1920, when it was renamed Kenya Colony and Protectorate. The territory remained so known until 12 December 1963, when it attained independence. The Kenyan flag has three horizontal stripes: red, black, and green, separated by thin white bands. The black symbolizes the people of Kenya, the red stands for the bloodshed in the fight for independence, and the green symbolises agriculture. In the centre of the flag is a red shield with black and white markings and two crossed spears, which stands for vigilance in the defense of freedom. Further, Kenya is situated on the equator on Africa's east coast, with a current estimated population of 50.5 million.[16] The official languages are English and Swahili.[17]

[14] For a historical account, see Singh C 'The Republican Constitution of Kenya: Historical Background and Analysis' (1965) 14(3) *International & Comparative Law Quarterly* 878-949.

[15] On the other hand, 1 June 1963 signifies the day Kenya gained internal self-government. Kenya was still a colony but various governmental positions were held by black natives. This day is referred to as *Madaraka* day in Swahili.

[16] See World Population Review available at http://worldpopulationreview.com/countries/kenya-population/ (accessed 9 December 2018). The last official census in 2009, showed the country's population stood at 38.6 million.

[17] Though the main official languages, most Kenyans still speak their native languages and retain certain aspects of their culture.

Kenya like many African countries,[18] has various community groupings with diverse customary rules.[19] These rules are applied in regulating family and succession matters as well as in dispensing justice.[20] With regard to community groupings, Kenya is comprised of 44 distinct ethnic communities, with Indians being the 44th most recently recognised community by the State, through a presidential proclamation.[21] Such proclamations ensure that new communities are recognised by all persons in line with articles 11 and 44 of the Kenya Constitution, 2010, which enshrine the duty of the government to promote and protect the diverse cultural heritage of Kenya. [22]

[18] For instance, Tanzania has more than 120 distinct ethnic groups, Nigeria over 300 tribes, while Uganda has more that 50 customary groupings, to name a few.

[19] One of the features of customary law in Africa is its diversity. In this regard. Onyango P argues that divergence in ACL is not necessarily unfavourable to national unity as the population is alive to the fact that there is dichotomy of law. See Onyango P (2013) 9. Further, Oba AA argues that even though there are more than 800 ethnic groups in Africa each with its own customary laws, there are some common features in the content of ACL that makes it identifiable as a distinct family of laws. For example, ACL is unwritten and expressed communally. In addition, it depends on acceptance by society and is flexible as it adapts to changing times and circumstances. These similar features of ACL indicate how it regulates most, if not all, spheres of life, thus making it all-encompassing. For a further discussion, see Oba AA (2011) 60. Kariuki F on the other hand notes that although ACL differs from one ethnic community to the other, due to the diversity in customary laws, there are similarities amongst the various communities, (as will be shown later in this Chapter). Kariuki argues that ACL has developed out of the customs and practices of the people in response to their circumstances and challenges in life. Hence, by applying their laws and customs, the various tribes in Kenya have been able to resolve disputes, which in turn contributes to social cohesion and peaceful coexistence despite the divergence. See Kariuki F (2016) 1.

[20] As noted in Chapter One.

[21] The presidential proclamation was contained in the special gazette issue of 21 July 2017. See http://www.nation.co.ke/news/Hindu-officially-becomes-Kenya-s-44th-tribe/1056-4027242-12m5ygj/index.html (accessed 10 October 2018). A similar presidential proclamation was made in 2016, recognising the Makonde community as the 43rd tribe of Kenya. The Makonde live in the Coastal region of Kenya and are originally from Mozambique. See Chanji T 'President Uhuru declares Makonde 43rd tribe of Kenya' *Standard Digital* 1 February 2018 available at https://www.standardmedia.co.ke/article/2001227966/president-uhuru-declares-makonde-43rd-tribe-of-Kenya (accessed10 October 2018).

[22] Article 11(1) is to the effect that the Constitution 'recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.', while Article 44 (1) provides that '[e]very person has the right to use the language, and to participate in the cultural life, of the person's choice.' See Constitution of Kenya, 2010.

Kenya's diverse ethnic groups are divided into three main groups, namely: Bantus, Nilotes and Cushites.[23] The Bantus account for majority of the population and comprise of the Kikuyu, Meru, Embu, Luhya, Kamba, Kisii, and Mijikenda.[24] The Kikuyu are the largest group and account for the largest number in the country's population. The Bantus have similar practices such as farming and share the Bantu language, which is mutually intelligible.[25] However, they have their own languages which have many dialects and variations.[26]

The Nilotes are the second largest group and comprise of three distinct groups. The first group is the Highland Nilotes whom are known as the Kalenjin, and include smaller sub-groups namely the Kipsigis, Nandi, Tugen, Pokot, Marakwet, Keiyo and Sabaot. The second group comprises the River-lake Nilotes who are the Luo, while the third group consists of Plain Nilotes who include the Maasai, Samburu, Turkana, Jemps, Iteso and Nubi.[27]

The last and smallest ethnic group in Kenya are the Cushites. This Cushitic group consists of two main groups namely the Oromo speakers and the Sam speakers. The Oromo speakers include the Borana, Gabbra, Sakuye, Orma and Burji. The Sam speakers include the Somali, Rendile and Arrial. Cushites live in the arid and semi-arid Eastern and North-Eastern parts of

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[23] For a detailed discussion on the origins, structure and practices of the various Kenyan communities, see Ng'ang'a W *Kenya's Ethnic Communities: Foundation of the Nation* (2006). See also Amin M, Willets D & Tetley B *The Beautiful People of Kenya* (1997) for a general discussion.

[24] The Mijikenda mean 'nine tribes' and form the coastal Bantu of Kenya.

[25] The mutual intelligibility of the Bantu language spans across most of Africa where Bantu communities are found, for example Rwanda, South Africa, Cameroon, Tanzania and Congo.

[26] See generally Ng'ang'a W (2006).

[27] The Plain Nilotes are mostly pastoral tribes and have retained their traditional way of life. See Ng'ang'a W (2006) 307-393.

Kenya. They are nomadic pastoralists and keep large herds of cattle, camels and goats. They have close ties with Cushites in neighbouring countries of Ethiopia and Somalia.[28] These groups occupy the 47 counties, created by the new Constitution, 2010.[29]

3.3 INTERACTION OF THE FORMAL JUSTICE SYSTEM AND TRADITIONAL JUSTICE SYSTEM

3.3.1 Pre-colonial period

The pre-colonial period in Kenya was characterised by the wide application of ACL in regulating the lives and social order of the various communities as outlined above.[30] By extension, TJS were used in regulation of that social order through decision making in various pertinent areas that affected the Kenyan natives within their respective communities.[31] The various communities had distinct customs and traditions of dispensing justice, regulation of marriage and division of property.[32] They were, however, similar in many respects.[33] Further, decisions in the TJS were administered by councils of elders or respected community members, in the various community groupings.[34] According to Kariuki F (2016), the institution of elders

[28] See Makoloo MO, Ghai YP & Ghai YP *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity* (2005) generally.

[29] Before the coming into force of the 2010 Constitution, Kenya was divided into eight Provinces namely: Nairobi, Eastern, Coast, Rift Valley, Central, Western, Nyanza and North Eastern.

[30] See similar observations by Ochich GO (2011) 104.

[31] As noted earlier, the application of ACL was recognised in matters of personal law, including adoption, marriage, divorce, burial and succession.

[32] This period was thus devoid of any colonial influences.

[33] These similarities included the payment of bride wealth, the patriarchal nature of the communities which dictated division of property and succession.

[34] This will be discussed in detail later in this section.

is one of the crucial institutions for conflict resolution in most African societies.[35] He asserts that the institution of elders has remained resilient and continues to exist outside the spheres of state influence, even in countries with no formal state recognition of the institution of elders.[36] This lends credence to the longevity of TJS which apply TDRMs and which are presided over by elders in the community. In this connection, examples of TJS in Kenya were noted in Chapter One.[37] Among those noted, the *Njuri Ncheke* of the Meru, and *Kokwet* of the Kipsigis are discussed as follows.

3.3.1.1 The *Njuri-Ncheke* of the Meru

The Njuri-Ncheke was (and still is) comprised of a council of elders, who formed the supreme TJS that governed the Meru community.[38] The council comprises of only male elders as women are excluded from this institution. In the past, their exclusion was thought to safeguard state (Meru) security, as it was believed that women could not be entrusted with state secrets due to

[35] See Kariuki F, 'Conflict resolution by Elders in Africa: Successes, Challenges and Opportunities' 1, available at https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/francis-kariuki.pdf?sfvrsn=0 (accessed 22 April 2018).

[36] See Kariuki F, 'Conflict resolution by Elders in Africa: Successes, Challenges and Opportunities' 1, available at https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/francis-kariuki.pdf?sfvrsn=0 (accessed 22 April 2018).

[37] To recap, these were noted to comprise the *Njuri Ncheke* of the Meru; *Kokwet* of the Kipsigis; *Athuri Aitora* of the Kikuyu; *Kaya* of the Digo; *Kokwo* of the Pokot; *Ngaisikou Ekitoe* of the Turkana; *Oo-olpaiyan* of the Samburu and *Piny* of the Luo.

[38] The Meru (Ameru or Amîîru) are a Bantu ethnic group who live in the area adjoining the north-eastern slopes of Mount Kenya. The community consists of seven sub-groups which speak the Meru dialect or Kimîîru language but each sub-group has its own dialect. See generally Nyaga D *Customs and Traditions of the Meru* (1997). Governance of the Meru people by a council of elected elders is a legacy that has been handed down through generations. It is a unique aspect of the Meru history, as it identifies the Meru, as the only tribe which practiced a democratic system before colonisation by the British. A key distinguishing factor of the Meruitic democracy from the Western style of democracy is that while the latter is based on pyramidal hierarchy, the former is based on a non-pyramidal hierarchy. No individual was the overall head and institutions continued to operate in the same way even after the demise of its leaders. This was because selecting a successor was easy as there was no competition for the vacated position. Therefore, the "system of organisation remained intangible," and there was no material gain for leaders in the Meruitic institutions unlike in the Western democracies. See M'Imanyara AM *The Restatement of Bantu Origin and Meru History* (1992) 78. See also Rimita DM *The Njuri-Ncheke of Meru* (1988) for a general discussion.

fear of them divulging them if abducted during interstate wars and raids, which would consequently compromise state security.[39] The elders were deemed to be Meru's wisest and were elected from the seven sub-groups of the Meru community.[40] Members to the council had to possess qualities of a leader,[41] and one could only be appointed, if it was evident that he was committed to fair judgement, honesty and devotion, and to steering the affairs of the institution in the best interest of the society.[42] When an individual in the community was identified as possessing such qualities, the members in the council would nominate such person they would like to be recognised as an elder, and the same was deliberated upon.[43] Once chosen, the elected members had the responsibility to conduct functions of the council, just like the other elders.[44] Functions of the council included discussing new bills, making laws, issuing orders and decrees, fixing fines for various offences committed in society,[45] and agreeing (by consensus), on what was to be communicated to the villagers and what was to be retained as secrets of the

[39] See M'Imanyara AM (1992) 77.

[40] These sub-groups consist of the Imenti, Tigania, Chuka,Tharaka, Muthambi, Mitine, Igoji, Igembe, and Mwimbi. See Ng'ang'a W (2016) for a detailed discussion.

[41] These qualities included maturity, integrity, being morally upright, a good communicator, and highly respected in society. M'Imanyara AM (1992) 84. The author further highlights that in modern times, other factors such as professional expertise, academic qualifications and affluence, are considered in determining who should be an elder. He asserts that these modern factors have not only altered the criteria applied in Kenya's TJS, in determining who should be a leader, but also in most African societies. For a detailed discussion see M'Imanyara (1992) 79.

[42] M'Imanyara AM (1992) 77.

[43] The same criterion of leadership is still currently applied in selecting members to the council.

[44] M'Imanyara AM (1992) 83.

[45] This assisted in standardising payments made to the plaintiff. For example, for the offence of homicide, 12 goats,1 bull, 20 heifers and 1 cow were the prescribed fine. If homicide involved a girl, one was required to 'give' a girl (to act as a replacement), in addition to the prescribed fine. Insults to parents or their age mates required the payment of a billy goat to the plaintiff (if male), or a ram, if the plaintiff was female. Other serious offences such as witchcraft or poisoning attracted death by stoning, or being hauled down a waterfall in a closed beehive, or being burnt while wrapped in dry banana leaves. Death by stoning was carried out by the stoning council (*Kiama kia Nkomango*), but would only be done after one of the accused's relatives threw a token stick or stone at him, to signify acquiescence with the judges' verdict. See M'Imanyara AM (1992) 93-4, for a detailed discussion.

Njuri-Ncheke.[46] These functions were executed by the *Njuri-Ncheke* when it met at its shrine or headquarters, a place known as *Nchiru*.[47] Here, they performed their key function as the parliament of the Meru society by making laws, which applied to the entire community.[48] Its resolutions and laws were communicated to the villagers through the *Kiama* (extra-ordinary council),[49] in their respective jurisdictions or through public fora by a chosen spokesperson.[50] In addition to making edicts, *Njuri-Ncheke* also performed the function of settling personal disputes among parties.[51] The parties were usually called before the elders for the matter to be heard. The hearing process was conducted as discussed below.

The elders would allow a plaintiff and defendant to invite their own trustees in court,[52] whose role was to repeat the plaintiff's and defendant's submissions during the 'court proceedings'.[53] A commission of judges then decided whether to issue a verdict or to continue with a hearing

[46] These functions were made possible through verbal memorandums submitted by every delegate (elder) concerning his area of jurisdiction. M'Imanyara AM (1992) 84.

[47] This meeting place remains the same to date since the historical *Njuri-Ncheke* meetings. It is also known as *Nciru*. See M'Imanyara AM (1992) 84 for a detailed discussion.

[48] In modern times, however, the influence of the *Njuri- Ncheke* on the community is limited, but it still provides guidance to the Meru people. See Ng'ang'a W (1997) 12.

[49] *Kiama,* with the assistance of the military (*Ramare*), was responsible for enforcement of law and order, and execution of the orders and decrees of the *Njuri-Ncheke*. See M'Imanyara AM (1992) 78, 83.

[50] In the past, it was uncommon for the members of *Njuri-Ncheke* to announce their resolutions to the public. This practice conformed to the tradition of observing secrecy in handling *Njuri-Ncheke* matters. Also, the resolutions could be announced by the legal experts (*Agambi*) on their behalf, as it was against customary practice for any member to boast of having represented the public at any forum. The announcements took place at dances organised by the *Ramare* (military) at the request of *Kiama*. For a further discussion see M'Imanyara AM (1992) 84.

[51] They listened and deliberated upon such matters if the parties were not satisfied with the decisions of the lower ranks of elders; namely the Kiama and Njuri.

[52] It was imperative that the trustees have vast knowledge in legal practice, as they acted as intermediaries between the plaintiff or the defendant and the court. It was also essential that they have a deep comprehension of the Meru language, because messages or orders could be passed by use of proverbs, poetic language and songs. See M'Imanyara AM (1992) 85.

[53] During the courts sitting, *Agambi* were invited from other Houses of *Kiama* to act as assessors. If a defendant was absent during court proceedings, the judges would place a rod at the centre of the court (to represent him) and would then pass the verdict in the defendant's absence. See M'Imanyara AM (1992) 84, 86.

at the end of every court session. [54] A hearing was adjourned if any of the parties to a case needed to consult their witnesses and/or advisors further.[55] A verdict was usually issued by either the elders clapping their hands once, or hitting the ground with staves four times.[56]

3.3.1.2 *Kokwet* of the Kipsigis

The Kipsigis are the largest sub-group of the Kalenjin community in Kenya.[57] They, like most communities in Kenya, held strongly to their customs and laws.[58] Determination of penalties for the violation of such rules was conducted by councils of elders at three levels; the main level being the *kokwet*, meaning judges or adjudicators.[59] As such, the *kokwet* was the main judicial institution of the Kipsigis, and handled the more serious disputes. It was presided over by a volunteer who had to be a senior male,[60] and consisted of 'at least three to five persons,

[54] A jury of seven judges would be appointed to issue a verdict on serious cases of law and custom. This was an essential requirement of the court procedure. To signify that the court was in session, an ox shoulder-blade was placed on a pole. See M'Imanyara AM (1992) 86.

[55] To do this, a party simply stated that he did not have his 'father' in court. Proceedings could also be adjourned if the elders (judges) were not satisfied with the information given by the parties. M'Imanyara AM (1992) 85.

[56] M'Imanyara AM (1992) 85. This still happens but with some variations.

[57] All sub-groups have similar customs and share a common language, although with variations in word pronunciation. See Kiplangat JS 'Strengthening the Application of Informal Justice Systems in Land Disputes: A Case Study of the Kipsigis Community' (2016) 4 (1) *Africa Nazarene University Law Journal*, 152-176. Due to the similarity in customary law application in all sub-groups, the Kipsigis TJS will provide an assessment of the Kalenjin community.

[58] Anyone who broke any of the laws was considered to have done something unnatural. Kiplangat JS (2016) 160.

[59] The lowest level was the *kotigonet*, which in its literal meaning refers to giving advice. This level had no structured procedure and constituted four to five male adults, who resolved minor disputes in households or among neighbours. See Gakeri JK 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2006) 1 (6) *International Journal of Humanities and Social Science* 219-241, as cited in Kiplangat JS (2016) 160.

[60] This volunteer was required to facilitate resolution of the dispute while maintaining order during the hearing process. Kiplangat JS (2016) 160.

including two judges, who participated in decision making'.[61] The elders of the *kokwet* had to be hardworking, of sound mind, and possess self-control.[62] They were appointed by the public after consideration of their integrity, expertise in solving disputes and previous positions held in society.[63]

The *kokwet* held its meetings under a tree,[64] and the place where the elders met was called *kapkiruog*.[65] There was a formal procedure that was followed during its hearings. For instance, before any proceedings commenced, a prayer would be said and the litigants allowed to take an oath, which was administered by one of the elders.[66] The elders would listen to the evidence presented, then retire to deliberate on the matter in a private session. If their decisions were unanimous, a matter was deemed resolved.[67] However, in cases of dissenting opinions, there was room for appeal.[68]

In summation, the discussion on the two TJS, namely the *Njuri-Ncheke* of the Meru and the *Kokwet* of the Kipsigis, augments the various recognised truths pertaining to most TJS

[61] Ochardson IQ *The Kipsigis* (1961) 17 in Kiplangat JS (2016). The elders comprised of only men but women are currently included. Kiplangat JS (2016) 161. Inclusion of women in some TJS in Kenya illustrates the flexibility of ACL in adapting to social changes.

[62] These considerations are similar as obtained in selection of the Meru council of elders as previously discussed.

[63] Kiplangat JS (2016) 161.

[64] There was no specific meeting place, as proceedings usually took place at the scene of a dispute.

[65] Ochardson IQ (1961) 17.

[66] Oath taking was carried out in different ways. In some, a litigant would raise a stone before giving evidence, while in others, a litigant would lick a brick, hold it up and swear before giving evidence. Oath taking was considered as a critical part in the proceedings, and there were serious repercussions for those who lied under oath such as disqualification from being a witness. Kiplangat states that the belief of 'a curse or bad omen' befalling one due to lying, bound the litigants to state the truth. See Kiplangat JS (2016) 163.

[67] The council's decision was considered final due to the absence of any disagreements in the final decision.

[68] A litigant had a right to lodge an appeal to the *kiruogindet* or *kiruogik*, which was the appellate council of elders, for review of the matter. See Kiplangat JS (2016) 165.

worldwide. First, the discussion sheds light on the composition of elders within the TJS. It was evidenced that elders in all the TJS consisted of only men, with women participation being strictly forbidden or unheard of.[69] This state of affairs persists to-date in most TJS,[70] and may be one of the leading factors why decisions stemming from the TJS fail to be enforced by the FJS.[71] An important factor of the TJS was the requirement that elders in the justice institutions had to be above reproach, before being afforded the privilege of being an elder. It is argued that this requirement ensured that harmony was maintained in society as its leaders strived to ensure that laws were upheld.

Secondly, the discussion highlights the presence of a structured system in the conduct of processes in the TJS.[72] This is evidenced for instance, in the TJS 'court proceedings' which would take place at special designated locations (which could be likened to a court in the FJS). In addition, there was systematic consideration of the facts to a dispute brought before the elders.[73] This demonstrates that dispute resolution was not haphazard and further that precedent was followed when making decisions by the elders.[74] This is evidenced by the fact that the

[69] However, this state of affairs does not occur in all African states. The exceptions arise particularly in countries with matrilineal societies, such as Malawi, where women were (and still are) looked upon as the root of a lineage, thus giving them high status and some degree of freedom; which is not present in patrilineal societies. See Phiri IA Women, *Presbyterianism and Patriarchy: Religious Experiences of Chewa Women in Central Malawi* (2000) 35.

[70] Although efforts are being made to include women in the deliberations.

[71] This will be analysed in detail later in Chapter Five.

[72] It has been shown in the earlier discussions of this Chapter that the procedures though different, had vast similarities.

[73] For instance, there had to be indication that the 'court' was in session. In addition, oaths were administered and witnesses summoned at the hearings. Regarding evidence presented before the elders, rules of evidence were applied in reaching decisions and presumption of innocence in considered.

[74] Use of precedent is illustrated in the communities discussed, where decisions applied in matters were applied to similar matters if presented before the TJS. The standardisation of fines and penalties also supports this study's assertion of a well-structured TJS.

procedure(s) in the various TJS was akin to the common-law court system albeit in a traditional setting.[75] In this connection, the foregoing state of affairs supports the main argument advanced by this study that TJS decisions should be recognised and enforced by the TJS, as the processes applied in arriving at such decisions are orderly and follow similar rules and procedures as those applied in the FJS.

Thirdly, the provision of an appeal system within the TJS highlights that TJS operated in a fair manner as there was room for review of a matter and promotion of reconciliation.[76] As with human nature, the losers felt aggrieved by decisions that did not favour them.[77] However, most penalties meted out focused on restitution to maintain harmony in the society, and the methods used in enforcing TJS decisions, depended on the magnitude of the offence.[78] These reasons, therefore, support the call of this study for the enhanced recognition and enforcement of TJS decisions, as the relevance of ACL and its operation within TJS is illustrated. For instance, in this context, the appeal system in TJS assists in maintaining law and order in the community as it provides room for fairness through various hearings of a matter in different fora.[79]

[75] As noted in relation to the 'courts' process, administration of oaths, production of evidence and the presumption of an accused as innocent until proven guilty.

[76] This was a central aim of TJS which advocated for reconciliation and preservation of the status quo, other than pitting victims against each other. The element of reconciliation is dominant in most TJS, which strive to promote restorative justice as opposed to retributive justice. See Kiplangat JS (2016) 162.

[77] Their grievances were not solely based on the penalties that were meted out, but on their standing in society.

[78] As noted, serious offences such as witchcraft or poisoning attracted death by stoning, or being hauled down a waterfall in a closed beehive, or being burnt while wrapped in dry banana leaves in the Meru community, while minor offences attracted simple fines such as payment of an animal.

[79] In support of this observation, see study by Karimi M, Rabar B, Pkalya R, Adan M & Masinde I (2004) generally on appeal processes and procedures in the TJS of the Pokot, Turkana, Samburu and Marakwet communities of Kenya.

Of important note is that the discussed TJS, as well as other TJS of various communities in Kenya, continue to apply in Kenya to date,[80] with their procedures having been modified to fit with changing times and circumstances.[81] However, as pointed out in Chapter One, their decisions are not formally recognised by the State in majority of the instances,[82] yet they have an enduring cultural legacy.[83] Further, it was also noted that many communities look to them as the primary source of dispute resolution, despite the trite and widely known fact that they are fraught with a myriad of challenges.[84] However, the same cannot outweigh their usefulness in dispute resolution as will be shown in the following discussion, which will highlight the resilience of ACL throughout different eras in Kenya.

3.3.2 Colonial period

In the preceding section, it has been noted that council of elders adjudicated over matters in the TJS and meted out justice based on rules and procedures tailor-made for each respective community.[85] However, the advent of colonialism in Kenya attempted to do away with TJS by limiting the application of ACL. This was evident in the imposition of a FJS upon the natives.[86]

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[80] This position also pertains in most African societies. For example, Nigeria, Somalia, Namibia and Ethiopia.

[81] For instance, see earlier cited study of the Pokot, Turkana, Samburu and Marakwet TJS of Kenya by Karimi M, Rabar B, Pkalya R, Adan M & Masinde I (2004).

[82] For example, the *Njuri-Ncheke* council is the only TJS recognised by the Kenyan state and is still powerful when it comes to political decision making. In addition, see also the current referral by the FJS of land marital disputes to the institution for determination, as noted in Chapter One. See Leenas of *Lubaru M'Imanyara v Daniel Murungi* [2013] eKLR and *Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others* [2012] eKLR.

[83] As noted in Chapter One.

[84] One notable challenge is that of gender discrimination, as will be shown in Chapter Five.

[85] As discussed above, although rules and processes in the TJS had similarities, they had certain aspects that were specific to every community in Kenya to which they applied.

[86] The white settlers believed that the imposition of English law was an essential tool to their project, which was to 'advance and protect their racial, political and economic dominance' in the Protectorate. They further believed that 'English law was the culmination of centuries of evolution and was unsurpassed for its justice and logic'. See

They believed that English law in Kenya would serve their interests, key of which was to keep the natives subordinate, as the courts could be tilted in their favour.[87] They further believed the use of the FJS would make it easier for them to teach the natives new ways of thinking and acting.[88]

As a consequence, the British settlers regarded ACL as a lesser law due to various factors such as the perception that it conflicted with English law.[89] They 'believed that English law was the culmination of centuries of evolution and was unsurpassed for its justice and logic.'[90] This colonial attitude of giving ACL as limited latitude as possible, can be illustrated by the case of *R v Amkeyo*,[91] where a defendant was charged and convicted for being in possession of stolen goods. His conviction was effected based on his wife's evidence in which she claimed to have seen her husband in possession of the goods in question. The defendant claimed to have married the woman under native custom, which concluded a customary marriage between them. The court allowed the wife's evidence despite the presence of a customary marriage, thereby rebutting spousal privilege as between married persons.[92] The court stated that a woman married under ACL was not recognised as a wife for purposes of spousal privilege under the English Law of Evidence. This case also illustrated the non-recognition of customary marriages

Shadle B 'White Settlers and the law in early colonial Kenya' (2010) *Journal of East African Studies* 510-524, 510.

[87] In this instance for example, they ensured that they had unfettered freedom to do as they wished. Shadle B states that this would allow them to impose extra-judicial punishment on Africans. See Shadle (2010) 510-1.

[88] Shadle B (2010) 510.

[89] Onyango P (2013) 4.

[90] Shadle B (2010) 510.

[91] *R v Amkeyo* (1917) 7 EALR 14.

[92] This was against the rules of evidence which protect spouses against each other's testimonies. See rules on spousal privilege in Law of Evidence generally.

as 'proper' marriage by the colonialists. The court [presided over by settlers], argued that customary marriages practice of polygamy and payment of bride wealth were repugnant to good morals and did not fit in the idea of marriage as generally understood amongst civilised peoples.[93] In this context, Chief Justice Sir Robert Hamilton stated: "I know no word that correctly describes it [customary marriage]; 'wife purchase' is not altogether satisfactory, but it comes much nearer to the idea than that of 'marriage' as generally understood among civilized people." To understand this view and other decisions handed down during the colonial period, it is imperative to comprehend the nature of the colonial administration as presented below.

As previously noted, prior to being declared Britain's protectorate in 1895, Kenya was governed by the Imperial British East African Company (IBEACo), during which period administration of justice was erratic, as there was no structured legal system.[94] IBEACo controlled different regions of the country in a dissimilar manner,[95] and as a result, development of the country's judicial system was compromised.[96] The inconsistency of justice administered during the rule of IBEACo, prompted the British settlers to adopt laws and a judicial system that would govern their matters in an orderly manner.[97]

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[93] According to Chief Justice Sir Robert Hamilton, who advanced this view based on the standards of the English settlers as to what a proper marriage is deemed to entail. That is, a one man, one woman union and without the payment of bride wealth which amounts to wife purchase.

[94] IBEACo carried out all the obligations undertaken by the British Government under any treaty or agreement made with another State.

[95] For example, the coastal region of Kenya would resort to Islamic courts to administer justice (as majority of the settlers at the coastal region were Arabs), while different systems were applied in other parts of the country. See Mbondenyi MK & Ambani JO *The New Constitutional Law of Kenya: Principles, Government & Human Rights* (2012).

[96] Ghai YP & McAuslan JP *Public Law and Political Change in Kenya* (1970) 125 in Mbondenyi MK & Ambani JO (2012).

[97] This was because the British settlers did not align themselves to ACL applied by the Kenyan natives hence, they wanted laws that suited them and those that would govern their matters. To achieve this, the British settlers

The desire by the settlers to have a FJS that would govern their matters, saw the emergence of Kenya's first judicial system, which was established through the East African Order in Council of 1897.[98] Under this Order, the colonial judiciary established a dual system of superior courts — one for Europeans and the other for Africans.[99] The African courts were deemed subordinate, and were comprised of Native Courts, Muslim Courts and Colonial Courts.[100] With regard to the colonial judiciary, a critical aspect that will be discussed later in this Chapter, is the fact that the FJS was fraught with the aspect of racial imbalance; which played a role in the non-recognition of TJS.

The dual court system was founded on various arguments as advanced by the white settlers.[101] First, the majority of the settlers contended that English law and legal procedure were extremely ill-suited to a 'savage African setting'.[102] Secondly, they contended that 'applying English law and legal procedure to Africans was unfair to the less advanced race'.[103] In their

borrowed laws from their other colonies, which they modified to fit in with the prevailing circumstances in their respective Protectorates. India was the country of choice for settlers in Kenya.

[98] Mbondenyi MK & Ambani JO (2012) 130. It is important to note that, the first system of courts in the East African Protectorate began in 1895; having resulted from agreements between the British Government and the Sultan of Zanzibar.

[99] Mbondenyi MK & Ambani JO (2012)130.

[100] Colonial courts were staffed by magistrates and administrative officers.

[101] Arguments were advanced as early as 1900. A major argument for having courts purely for the Africans, was that the settlers believed that 'African societies had not yet sufficiently evolved to where English law and justice could keep the peace'. See Shadle B (2010) 511.

[102] Shadle B (2010) 510. 'The settlers argued that principles central to English legal traditions, were simply incomprehensible to Africans. In the Evidence of Capt. WFS Edwards, to the Native Labour Commission, Capt. Edwards, an Inspector General of Police then, put it that English law 'was unsuited to the character of the native peoples in stages of infantile thought and primitive conception', as cited in Shadle B (2010) 513.

[103] See Shadle (2010) 513.

view, an African was not civilised like an Englishman, despite dressing and speaking like one. The settlers said of the African thus:

> He was but one step removed from his savage ancestors. He had picked up only a gloss of civilization; he lost all that was good in African culture while adopting all the vices of western civilization. Perhaps, his descendants, decades or centuries hence, constantly nurtured and exposed to education and Christianity, might become truly civilized.[104]

As punitive as the above quote may seem, it is important to note that the settlers still believed that African customs had some good. This is despite their rejection of all notions of ACL and their frowning upon TJS. This can be inferred from the above quote, as they deemed it unfortunate that the African native was losing his customs to Western traditions.[105] However, the settlers did not overtly admit the positive attributes of ACL but continued to shun TJS while imposing English laws on the natives.[106] In essence, TJS were under the regulation of the Kenyan Protectorate.

Unfortunately, the settlers realised that the FJS was incompatible with most of the natives who still resorted to TJS to settle their disputes.[107] In this regard, Shadle B states that the settlers

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[104] Shadle (2010) 513.

[105] See part that reads '…he lost all that was good in African culture while adopting all the vices of western civilization' in the quote.

[106] There were various reasons for such imposition by the British settlers. First, they based their superiority on ancestry. They argued that British history gave them the right and duty as Britons, to rule Kenya, and their thinking was rarely disputed by other white settlers. Secondly, '[t]he cruder racists in East Africa asserted that Africans were physiologically different from whites, or that whites were divinely predestined to rule the other races'. This argument was advanced and propelled by writers and editors, who strongly stated that whites should in fact rule and not that God had willed them (whites) to rule. This as noted in Shadle B (2010) 512-13.

[107] This view by the settlers was supported by the colonial administrators, who argued that 'African societies had not yet sufficiently evolved to where English law and justice could keep the peace.' See Shadle B (2010) 511.

believed that Africans were more puzzled than assured by English law.[108] For instance, in relation to court hearings, many white observers stated that:

> [s]tanding perhaps for the first time before a white man; trying in vain to follow evidence, objections, and rulings translated once, sometimes twice, from English into his own language; ordered to leave out supposedly irrelevant background and inadmissible hearsay that he considered essential; left Africans more confused than reassured by the majesty of the law.[109]

The above rationale by the settlers perhaps, led them to realise that despite having a FJS, they could not impose its application on the natives.[110] Further, despite majority of the colonialists frowning upon the TJS, remarkably, some settlers became part of the TJS process, by joining clan elders in adjudicating disputes.[111] This albeit that they did not speak the native dialect and further, did not understand the procedures in the TJS.[112] This practice started when Africans purportedly brought their disputes to their white employers who then 'acted as if magistrates,[sic] by determining right and wrong and handing down punishment'.[113] It is

[108] Shadle B (2010) 513.

[109] In relation to the above quote, the settlers further argued that 'applying English legal norms to Africans, imperiled the preservation of law and order.' They premised this on the fact that in cases involving Europeans, the parties were 'civilized enough to appreciate such rules and reasons' that English law had to offer. Critics of the natives argued that such 'niceties had no place when dealing with ignorant Africans in isolated bomas or the reserves. See Shadle B (2010) 513.

[110] What was justice to the Englishman could fail to qualify as the same to the native, when English law was applied. This was acknowledged by some settlers who said that 'sometimes procedures that ensured justice in London meant injustice in Londiani'. Stated in Shadle B (2010) 513.

[111] Farm owners (lords) sat in customary tribunals of their native farm employees. For example, some settlers sat alongside elder men, in the Kikuyu tribunals: *kiama*, who were chosen from the squatters or employees on their farms. The aim of the lords was to keep traditional lore applicable to the natives, keep farm disputes within the farm, and allow the lord influence in community affairs. See Shadle B (2010) 518.

[112] For example, Karen Blixen, a settler in Kenya, stated and admitted that she 'presided over intra-African disputes on her farm even though she "knew nothing whatever of the [Gikuyu customary] laws according to which I judged."' Cited in Shadle B (2010) 518 from Isak D *Out of Africa* (1985) 111.

[113] Shadle B (2010) 518 writes that in 1933 one Roger Noel Money explained to his brother thus: "As far as possible we are a little self-governing community here, with our own rules and regulations, and any serious cases

submitted that the settlers unconsciously applied tenets of the Historical School by recognising TJS and being part of the system to which ACL regulated.[114]

Such incidences as indicated above, compounded by the fact that most native disputes were incompatible with the FJS,[115] bore the realisation that there was need to recognise TJS by the settlers. In addition, the inevitability to recognise TJS was augmented by the fact that TJS were applied throughout the country by the various communities.[116] Accordingly, the settlers realised that they could not impose a uniform TJS to be applied in the country as they had done with the FJS.[117] Hence, the colonial administration resolved to recognise the TJS by empowering village elders, chiefs and headmen overseeing the dispute resolution processes within their respective communities.[118] By implication therefore, the settlers gave cognisance to the TJS.[119] Due to their widespread application, TJS gradually developed into tribunals and attained official recognition upon promulgation of the Native Courts Ordinance in 1907.[120] To understand the influence of colonisation on Kenya's FJS, a history of the Kenyan judiciary in the post-colonial period is indispensable. This is discussed below.

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of litigation are tried according to Kikuyu custom by a parliament of my old men, with me in the chair." Excerpt from Money RN *Ginia: My Kenya Coffee Shamba*, *1918-1939* (2000) 242.

[114] This is attributed to the fact that the Historical School advances that true law stems from the customs of a people, as discussed in Chapter Two.

[115] As such matters relied heavily on ACL for their resolution.

[116] This as noted in the first section of this chapter and further buttressed by the fact that ACL was applied in regulating both civil and criminal matters of the natives.

[117] This resulted from the fact that they could not will a certain community to conform to the TJS procedures of another community.

[118] Mbondenyi MK & Ambani JO (2012)130.

[119] Mbondenyi MK & Ambani JO (2012)130.

[120] The Native Court Tribunals were guided by ACL and handled matters in which both parties were African.

3.3.3 Post-Colonial period

As previously noted, Kenya attained her independence on 1 June 1963 while republic status was attained on 12 December 1964. Upon attaining republic status, one would have been pardoned then (and even now) to think that this would spell the beginning of a state free from western influences. However, this was far from the truth particularly regarding the FJS and the recognition and application of ACL as will be examined below. Accordingly, the following section will evaluate the structure of the FJS and its position regarding ACL, to assess how TJS were regarded in the provision of justice.

As indicated earlier, the FJS was fraught with the aspect of racial imbalance. However, upon independence, the FJS was reoriented and restructured in an attempt to remedy the racial imbalance of its judges, and to accommodate the socio-political changes in the country at the time.[121] To do this, the Judicial Service Commission (JSC) was established to ensure unbiased appointment of judges.[122] In this regard, the establishment of the JSC was fused with the constitutional recognition of the higher courts of judicature as well as the lower courts.[123] The higher courts of judicature that were established included the Supreme Court,[124] the Court of

[121] Mbondenyi MK & Ambani JO (2012) 131.

[122] The Constitution 1963, s 184. Chapter X of the Constitution 1963 provided for the judiciary generally with regard to the court systems and the mandates that each court was required to dispense.

[123] Chapter 5 of the Constitution 1963.

[124] The Constitution 1963, s 171. The Supreme Court had unlimited jurisdiction in both criminal and civil matters in accordance with the Constitution 1963.

Appeal of Eastern Africa,[125] and the Court of Appeal of Kenya.[126] The Supreme Court was the highest appellate Court of Kenya in all matters.[127] It had the power to adjudicate cases which were referred to it with regard to the interpretation of the Constitution.[128] The other superior court was the Court of Appeal that had the mandate to hear appeals from lower courts, and provide a ground of appeal to the Supreme Court.[129] The Constitution 1963 did not establish the Court of Appeal of Eastern Africa because it was established under the East African Common Services Act.[130] The Constitution 1963, however, recognised this court as an inter-territorial court, that would hear appeals from the Court of Appeal of Kenya and the Supreme Court.[131] The constitutional recognition of the Court of Appeal of Eastern Africa was an attempt to recognise the territorial application of this court in East Africa.[132] The constitutional recognition of the qualified continuity of the East African Court of Appeal after independence in Kenya, was informed by various reasons in the East African space. First there was the need

[125] The Constitution 1963, s 176. The Court of Appeal of Eastern Africa served as the appellate court of the East African Countries of Uganda, Kenya and Tanzania. While there is limited wealth of drafting history to contextualise why it was in the Constitution of Kenya, it is proposed that its recognition was for the purposes of ensuring that the pending cases were not affected by the coming in force of the New Constitution. It was evident that the Court of Appeal would have the mandate to handle appeal cases from the Republic of Kenya within the court structures.

[126] The Constitution 1963, s 177.

[127] The Constitution 1963, s 171.

[128] The Constitution 1963, s 175.

[129] Section 177(1).

[130] The relevant laws that enabled the application of the East African Court was the Act of the East African Common Services Organization Ordinance No. 26 of 1961. See also Treaty for East African Co-operation 1967, art. 80.

[131] Section 176(1) (a) and (b).

[132] Section 176(1) (a). further, it should be noted that the Court of Appeal for East Africa has origins from 'His Britannic Majesty's Court of Appeal for Eastern Africa', established by an Order-in-Council in 1902, This Court was expected to exercise its jurisdiction on appeal matters over the High Courts and other surbodinate courts in the East Africa Protectorate (Kenya), Uganda and the British Central African Protectorate (Malawi). See Katende JW & Kanyeihamba GW 'Legalism and Politics in East Africa: The Dilemma of the Court of Appeal for East Africa' (1973) *Transition* (43) 43-54 at 43.

for administrative expediency, problems arising from staffing and financial implications.[133] Secondly, the point of departure was in the issue of the powers and jurisdiction and how it would be balanced with the political reasons at the time.[134] The Treaty provides that the powers and jurisdiction of the Court of Appeal shall be determined by the Parliament of each partner state. Consequently, for all intents and purposes, the Court of Appeal for East Africa is a court of appeal required a willingness from the States parties.[135]

Further, various laws were enacted to aid the re-orientation and restructuring of the FJS after independence.[136] Among these laws was the Judicature Act of 1967, whose enactment regulated the operation of ACL within the FJS. [137] This regulation was guided by section 3(2) of the Act which provided for the circumstances and conditions to which ACL was applicable in Kenya.[138] The section also set out the position of ACL as pertains sources of law in Kenya. In this context, the Act provided for the sources of law in a given chronology, where the Constitution was the first source of the law, followed by other written laws, common law, doctrines of equity and the statutes of general application in England while ACL ranked lowest in the hierarchy.[139] The Act further provided that the application of ACL was limited to the

[133] Katende JW & Kayeihamba GW (1973) 44.

[134] Katende JW & Kayeihamba GW (1973) 44. See s 64, the Kenya Constitution 1963.

[135] The other courts that were established included the Khadis' Courts (under s 179), the Magistrate Courts (s 185(3) and the African Court. It is noted that this signified an engagement (interaction) of the two systems.

[136] These new laws included the Judicature Act 1967, the Magistrate Courts Act 1967 and the Kadhis' Court Act 1967.

[137] See generally the Judicature Act now Chapter 8, Laws of Kenya.

[138] It is observed that s 3(2) Judicature Act contains substantive rules governing the application of ACL in Kenya. See Ochich GO (2011) 109. Similar observations have been made about Judicature Acts in other former British colonies, for example, Tanzania. See Bakari AH 'Africa's Paradoxes of Legal Pluralism in Personal Laws: A Comparative Case Study of Tanzania and Kenya' (1991) *Afr. J. Int'l & Comp. L.* 545-557.

[139] The Judicature Act, s 3(1) (a) - (c). It is observed that the ranking of ACL as the lowest in the hierarchy of Kenya's laws 'is absurd…in that local law remains subordinate to imported law…', further considering that

High Court, the Court of Appeal and the subordinate courts.[140] In this context, the Judicature Act created a fusion of the FJS with the TJS, as it recognised the application of ACL by the FJS.[141] However, the application of ACL was subject to some qualifications. First, ACL was limited to civil cases where one of the parties was subjected to it or was affected by it.[142] Secondly, it was applicable as long as it was not repugnant to justice and morality, or was not inconsistent with any other written law.[143] The former qualification is known as the 'repugnancy clause' while the latter is known as the 'inconsistency clause'.[144]

It is observed that the repugnancy clause was used by British colonialists as a way of restricting the use of ACL by inhabitants in its colonies.[145] This restriction was imposed if ACL violated principles of natural justice, which determination was subject to British interpretations of what amounted to such.[146] By applying the repugnancy clause, the colonialists subjected Kenyan communities to their standards and effectively managed to reject and condemn ACL in the

'…English common law, doctrines of equity and ACL are all unwritten bodies of law…' See Ochich GO (2011) 123, 125.

[140] Section 3(2).

[141] The Judicature Act achieved this by providing the courts in which ACL would be applied. See s 3(2).

[142] Section 3(2). As noted earlier, ACL was applicable to criminal matters as well, until the 1960s. However, despite this application, Ochich GO observes that even before independence, the colonial government did not favour customary criminal law as it was of the view that such law was used indiscriminately by the authorities to punish acts or omissions that were not approved by the colonial administrative officers. He further argues that this could have led to customary offences not being retained after independence, subsequently limiting the application of ACL to civil matters only. See Ochich GO (2011) 111.

[143] Section 3(2).

[144] It is observed that the repugnancy clause is applied without consideration of the utility of the custom in question and that the inconsistency clause subordinates ACL simply because of its unwritten nature. For a detailed discussion see Ochich GO (2011) 113-8, 122-3.

[145] For instance see observations by Oba AA (2011) 62 and Ochich GO (2011) 113.

[146] See Levy JT (2000) 300.

colony, by using justice and morality standards as the determinants of the repugnancy of ACL.[147] In this context, Ochich GO observes that:

> …judicial decisions during the colonial era which applied the repugnancy clause, reflect little empirical investigations of the origins, purposes, or effects of the customary norms in question, and they present little discussion of the processes by which the repugnancy or other wise of the customs was assessed.[148]

Therefore, this restriction meant that ACL was deemed to be incompatible with English law, which discordancy is largely credited to the dominant notions of 'justice' attributed to the western notions of law.[149] It is observed that this view by the colonialists resulted from the realisation that reception clauses, which allowed a dual application of English and ACL, gave ACL limitless application, as it was applied equally to the English law.[150] Consequently, this led to a modification of the colonial reception clauses through the introduction of the Judicature Act, which recognised ACL as absolute and deserving recognition and application.[151] However, as noted, the application of ACL in the Judicature Act was restricted by being limited to civil matters only and to the qualification of the repugnancy clause. Accordingly, judicial decisions after the introduction of the Judicature Act, heavily relied on the application of the repugnancy clause to limit the upholding of ACL in matters before the FJS. From the foregoing discussion, it is instructive to establish how the FJS has dealt with the fusion of ACL within the

[147] See Ochich GO (2011) 114.

[148] See Ochich GO (2011) 115. The author further argues that the application of the repugnancy clause was incorrect, as each Kenyan community had its own notions of what constitutes justice and morality, which was based on a community's history, experiences and level of socio-economic development. See Ochich GO (2011) 113.

[149] See Chirayath L, Sage C and Woolcock M (2005) 4.

[150] See Bakari AH (1991) 545.

[151] Bakari AH (1991) 546.

formal legal system, particularly with regard to the application of the repugnancy clause. This is discussed below.

Cases that were decided after the adoption of the Constitution 1963 show that a lot of weight was accorded to ACL by the FJS as a key feature of the sources of law in Kenya.[152] In this regard, it is submitted that the Historical School which recognises customs as the true source of law in any given society was applied by the FJS.[153] For example, the Court of Appeal for Eastern Africa in *Kimani v Gikanga*,[154] emphasised that ACL was a source of law that had to be applied other than being perceived as an inferior system. This view of the court was in relation to how the repugnancy test as provided for in the Judicature Act was being applied by the FJS.[155] The brief facts of the case are that it was an appeal with regard to a dispute over land title. The appellant claimed ownership of land as a result of it being gifted to him by one Gikanga under Kikuyu customary law. However, the respondents claimed that he was simply a tenant at will or a *muhoi* as known under Kikuyu customary law. This was based on the fact that he had no title to the land and further that there was no evidence of the grant to which he was gifted the land. The question for determination, therefore, was whether Kikuyu customary law could be applied to determine the requisite ceremony for a valid gift under customary law to entitle the appellant to ownership of the disputed land. Another question for determination was on the onus of proof of ascertaining customary law in the courts, and whether such

[152] This is in contrast with the colonial period in which ACL was relegated to a loose source of the law with limited application, as noted earlier in the Chapter.

[153] It is further submitted that the FJS in recognising ACL as a source of law did not necessarily do so with the tenets of the Historical School in mind, but rather as a realisation that ACL was ingrained within the Kenya society as a result of its continued use and resilience even after colonisation.

[154] See *Kinyanjui Kimani v Muiru Gikanga and Anor* civil appeal number 17 of 1965 (1965) EA 735, 739.

[155] See the Judicature Act, s 3(2) as earlier discussed.

ascertainment as to the existence or content of rule of customary law, was a question of law or a question of fact.[156]

From the foregoing context, it is important to note that some judges consistently hesitated to strike down ACL on grounds of its repugnancy to justice morality. However, a contrary view was held in instances where the application of ACL would be detrimental to the parties. This was illustrated in *Karuru v Njeri,*[157] where Simpson J perceived a Kikuyu custom regarding custody of children as repugnant where the customs did not consider the welfare of the child. It is submitted that in reaching this decision, the FJS was patently guided by the qualification set out by the repugnancy clause in the Judicature Act.[158] It is further submitted that by adopting the qualification of ACL as set out by the repugnancy clause in the Judicature Act, the FJS was opposed to the views advanced by the Historical School.[159] These views are that judges should consider the history of legislation in issue while constructing a statute,[160] and that tradition should be embraced in law making as law stems from the natives.[161]

Accordingly, the above examples of cases indicate that there been an inconsistent trend in the recognition, application and enforcement of ACL due to the repugnancy test. This is due to the

[156] During trial in the subordinate court, the plaintiff was not given an opportunity to produce evidence to show that any ceremony was essential to show validity of a gift of land under Kikuyu customary law. He, therefore was denied the opportunity to show that he exercised rights of ownership over the land, which would lead to the presumption of ownership in favour of the appellant.

[157] *Karuru v Njeri* [1976-1985] EALR 416.

[158] See s 3(2) of the Judicature Act, Chap 8 Laws of Kenya.

[159] See various views of the Historical School as discussed in section 2.4 of Chapter Two, key among them being that true law stems from the culture of a people and that as a result, customs should be embraced in law making.

[160] See observation by Subbarao GVC (2012) 10.

[161] See view as advanced by the Historical School proponents and further supported by Baron de la Brede et de Montesquieu (1689-1755), as discussed in section 2.4 of Chapter Two.

fact that the FJS has engaged the repugnancy test as the defining feature that informs the application of ACL in Kenya. Therefore, the repugnancy test has been a subjective evaluation of ACL, as its application is based on whether it meets standards of good conscience, justice and morality, all of which have their foundations on the English settlers in Kenya.[162] In this context, the repugnancy clause acts as a factor that impedes the recognition and enforcement of TJS decisions by the FJS. This identification answers part of the fourth research question, which seeks to establish factors that enhance or impede the recognition and enforcement of TJS decisions by the FJS.[163] This leads to the irresistible conclusion regarding the position of ACL and the subsequent interface between TJS and FJS at the onset of the post-independence period; that TJS only operate or are recognised within the FJS, if ACL passes the repugnance test. Further that, as the repugnancy test is still applicable to date, it effectually sets back the interface between the TJS and the FJS in Kenya.[164] In doing so, it reinforces the conflict between customary and common law, which has permeated the history of colonialism in Africa.[165]

Beyond the enactment of the Constitution 1963 and the Judicature Act 1967, there were various administrative Acts that created an institutional framework that was set to become the basis of the operation of both the FJS and the TJS.[166] The administrative Acts led to the integration of the

[162] See Ochich GO (2011) 118, where he argues that the repugnancy clause 'forces "modernity" down the throats of the society'; rather than letting society develop at its own pace by shedding negative values and retaining the values it holds dear.

[163] The other factors will be highlighted in 5.3 of Chapter Five.

[164] As will also be shown in Chapter Five which analyses courts' jurisprudence in relation to the application of ACL in succession matters.

[165] See observation by Herbst M and Plessis WD 'Customary Law v Common Law Marriages: a Hybrid Approach in South Africa'(2008) 3 *Electronic Journal of Comparative Law* 1-15, 1.

[166] Cotran E 'The development and reform of the law in Kenya' (1983) 27(1) *Journal of African Law* 42, 48.

court system to improve the FJS on a general continuum whereby all administrators who doubled as judicial officers were removed from the system.[167] Consequently, administrative officers ceased to be ex-officio Resident Magistrates, paving way for the appointment of professional Resident Magistrates.[168] This move had a negative effect on the African Courts system, whereby the traditional elders were relegated and replaced by young men who only had an education and skills.[169] Individuals who wielded considerable powers in the African Courts systems like the African Courts Officer became officers within the FJS which was headed by the Chief Justice.[170]

It is important to note that the post-independence period between 1963 and 1967 foresaw the improvements to the FJS, where the judicial officers would apply ACL as a source of law within the FJS.[171] Following this, both the administrative and legal developments all pointed towards the improvement of the FJS through the Constitutional creation of Resident Magistrates' and District Magistrates' Courts, a High Court and the Kenya Court of Appeal.[172] The application of ACL was concretised by the Magistrates Courts Act, [173] which provided for the application of ACL and how a claim in the Magistrates Court was conceptualised. With regard to the application of ACL, the Act provides that a District Magistrate's Court may exercise jurisdiction and powers of a civil nature with regard to proceedings concerning a claim under

[167] Cotran E (1983) 48.

[168] Cotran E (1983) 48.

[169] Through the then Kenya Institute of Administration. See Cotran E (1983) 48.

[170] Cotran E (1983) 48.

[171] The Judicature Act, s 3 generally.

[172] Cotran E (1983) 48.

[173] The Magistrate Courts Act, Act 17 of 1967.

customary law.[174] The Act went further to 'define' a claim under ACL on an inclusionary basis of what such a claim includes. In this regard, a claim under ACL meant a claim concerning land held under customary tenure; [175] marriage, divorce, maintenance or dowry.[176] Hence, the provision relates to the inclusion criteria for a claim under ACL other than a descriptive approach to the term 'claim'.[177]

Furthermore, the loose wording in section 2 of the Magistrates Courts Act avoided a direct conflict with s 3(2) of the Judicature Act, which required that all courts (including District Magistrates Courts) be guided by ACL in civil cases, and not only those that were provided for in the 'definition' under s 2 of the Magistrates' Courts Act.[178] Notwithstanding the various interpretations that may be lent to the Magistrate Courts Act, its provisions along with those in the Judicature Act reiterates the position that ACL was recognised to operate within the framework of the FJS.

In sum, the post-colonial period recognised the application of ACL in the FJS. This was made possible by virtue of the Judicature Act of 1967, which recognised ACL as a source of law in Kenya.[179] However, the application of ACL was limited to the test laid out in the Judicature Act,

[174] See s 10.

[175] Section 2 (a).

[176] Section 2 (b). Other instances include seduction or pregnancy of an unmarried woman or girl; enticement of or adultery with a married woman; matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy; succession, both testate and intestate, and administration of estates, except as regards property disposed of by a will made under a written law. Cotran argues that the definition in s 2 is not comprehensive, even though it says 'means' not 'includes'. See Cotran E (1983) 49.

[177] Section 2.

[178] Cotran E (1983) 49.

[179] See s 3 of the Judicature Act, Chap 8 Laws of Kenya.

which provided that the application of ACL would only be possible where the customary law was not inconsistent with any other written law or repugnant to justice and morality.[180] Despite the repugnancy clause qualification, the application of ACL in the FJS is an indication that the use of ACL as applied in the TJS, was fused in the FJS insofar as the former passed the tests laid down in the Judicature Act.[181]

3.3.4 Post-2010

The promulgation of the 2010 Constitution created a new FJS structure with a two-tier system of courts.[182] This includes the superior courts and subordinate courts.[183] The superior courts constitute the Supreme Court,[184] the Court of Appeal,[185] and the High Court.[186] These courts have a hierarchical structure, with the Supreme Court at the helm, followed by the Court of Appeal and subsequently the High Court.[187] The subordinate courts include the Magistrates

[180] See s 3(2).

[181] In this context, Cotran E suggested that the word 'guided' in s 3(2) of the Judicature Act be replaced by the word 'apply'. See Cotran E (1968) 150 as cited in Ambani OJ and Ahaya O (2015) 58.

[182] Chapter 10 of the Constitution provides for the judiciary and is divided into three parts. Part 1 deals with judicial authority and the independence of the judiciary, Part 2 deals with the superior courts while Part 3 deals with the subordinate courts.

[183] Mbondenyi MK & and Ambani JO (2012) 136.

[184] See Article 163 (1) Constitution 2010, which establishes the Supreme Court and outlines it to include the Chief Justice, Deputy Chief Justice and five other judges. Further, the Supreme Court is deemed properly constituted if it is composed of five judges — art. 163(2); and has exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of the President — art 163(3)(a). The Court also has appellate jurisdiction to hear and determine appeals from the Court of Appeal and any other court or tribunal as prescribed by national legislation — art 163(3)(b)(i)(ii).

[185] Established by art 164 Constitution 2010. The Court of Appeal is to be comprised of not less than twelve judges. See art 164(1)(a).

[186] Established by art 165 Constitution 2010. The High Court is to be organised, administered and comprised of judges as prescribed by an Act of Parliament. See art 165 (1)(a)(b).

[187] Mbondenyi MK & Ambani JO (2012) 137.

Courts, Kadhis' Courts, Courts Martial, and other courts that may be established by the legislature.[188]

With regard to adjudicative jurisdiction, the Supreme Court has both original and appellate jurisdiction, whereby original jurisdiction is limited to the exclusive mandate to determine presidential elections, and the executive's power to declare a state of emergency.[189] The point of departure from the 1963 Constitution is the Supreme Court's jurisdiction to inquire into the Executive's declaration of a State of emergence.[190] It may be argued that that this does not speak to the application of ACL, yet, the Court is a fortress of human rights without due regard to the existence of instances of extreme emergency.[191] The Supreme Court also has appellate jurisdiction to hear matters on appeals from the Court of Appeal.[192] Other areas that the Supreme Court has jurisdiction include hearing appeals from specialised tribunals that consider the suitability of judges.[193] Further jurisdiction of the Supreme Court is found in the Supreme

[188] See art 169 (1)(a)-(d), (2) which provides: '(1) The subordinate courts are – (a) the Magistrates courts; (b) the Kadhis' courts; (c) the Courts Martial; and (d) any other court or local tribunal as may be stablished by an Act of Parliament, other than the courts established as required by art 162 (2). (2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).

[189] See arts 163(3) (a) and 58(5).

[190] Compare arts 163(3)(a), 58(5) of the Constitution 2010 and s 171 Constitution 1963.

[191] Mbondenyi MK & Ambani JO (2012) 138.

[192] The appellate jurisdiction is by way of rights in any case that requires an interpretation or application of the Constitution or other matters where the Court of Appeal certifies that the matter is of general importance. See art 163(4) of the Constitution.

[193] See art 168 of the Constitution 2010. This deals with the mode of removal of a judge of a superior court from tribunals such as the Judicial Service Commission.

Court Act,[194] which provides that the Supreme Court may offer an advisory opinion and give reasons for it.[195]

On the other hand, the Court of Appeal has the jurisdiction to handle appeals from the High Court, and any other court or tribunal as prescribed by an Act of Parliament.[196] Just like the jurisdiction of the Supreme Court, the Court of Appeal handles appeals.[197] The High Court enjoys unlimited original jurisdiction in all matters, and appellate jurisdiction in matters from the lowers court.[198] It also enjoys supervisory jurisdiction over subordinate courts or person, body or individual that exercises quasi-judicial powers.[199] From a cumulative perspective, the application of ACL in the FJS is to a great extent limited to the appeals that are presented.

The Magistrates' courts, as a type of subordinate courts, are divided into two categories, the Resident Magistrates Courts and the District Magistrates Courts.[200] The court may be presided over by a chief magistrate, a senior principal magistrate, a principal magistrate, a senior resident

[194] Act 7 of 2011.

[195] This advisory opinion has been engaged in some cases. In *Re the matter of the Interim Independent Electoral Commission* [2011] eKLR where the Court offers insights on when it may offer its advisory jurisdiction. The Supreme Court stated that it cannot offer the advisory jurisdiction if the case in issue forms proceedings in a lower court. In addition, that the exercise of advisory jurisdiction should not be invoked as a matter of first resort. Mbondenyi MK and Ambani JO (2012) at 139 propose that this hesitation may be due to the need to protect the sanctity of the court process at the lower courts and not to create a think tank for State Organs.

[196] Constitution 2010, art165 (3) (a), (b).

[197] Art 164(3). The article does not provide for original jurisdiction for the Court of Appeal. This is a replica of s 177 of the Constitution 1963.

[198] Other areas of jurisdiction under art 165(3) include a violation of the right or fundamental freedom in the Bill of Rights, hearing appeals from a decision of a tribunal appointed under this Constitution with regard to the removal of a person from office, and any question on the interpretation of this Constitution.

[199] Constitution 2010, art 165(6). The qualification to this position that the supervisory powers do not extend to superior courts.

[200] Mbondenyi MK and Ambani JO (2012) 146-47.

magistrate or a resident magistrate.[201] With regard to ACL, other than the Judicature Act, the Magistrates' Courts Act provides for bounds within which to apply ACL; for example in intestate succession and the administration of estates.[202] As earlier provided for in Magistrates Courts Act of 1967, the 2015 Act provides the areas in which these courts should engage customary law.[203] The point of departure is that the 2015 Act does not define a claim, but rather lists down the claims that may be engaged by the Court.[204] This position recognises the consistent position of the Judicature Act with regard to the sources of law in Kenya.[205] In this regard, ACL being recognised as one of the sources of law, and to which the FJS can adjudicate over, has a strong bearing on family and succession matters brought before the FJS from the TJS to which ACL is applicable.[206] Consequently, the following chapter will evaluate the legal and customary framework on marriage and succession laws in Kenya.

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[201] The Magistrates' Courts Act 26 of 2015, s 5.

[202] In this regard, see s 7 (3) which outlines that the magistrate's court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law — (a) land held under customary tenure; (b) marriage, divorce, maintenance or dowry; (c) seduction or pregnancy of an unmarried woman or girl; (d) enticement of, or adultery with a married person; (e) matters affecting status, and in particular the status of widows and children including guardianship, custody, adoption and legitimacy; and (f) *intestate succession and administration of intestate estates, so far as they are not governed by any written law.* [own emphasis].

[203] See s 7 (a)-(f) as earlier noted. This section is a replica of the jurisdiction provided for under the Magistrates' Courts Act No 17 of 1967. Compare with The Magistrates' Courts Act 17 of 1967, s 2(a)-(f).

[204] See for instance s 8 which covers claims relating to violation of human rights and s 9 which lists claims relating to employment, labour relations, land and environment cases.

[205] That is the fact that ACL forms a source of law in Kenya. Further, as noted in Chapter One of this study, Kenya is a legally pluralistic country and hence another type of law that is applied is Islamic law. In this regard, Kadhis' courts are limited to the application of Muslim law with regard to personal status, marriage, divorce, inheritance in proceedings. See s 5 of the Kadhis' Courts Act, Chapter 11 Revised Edition 2018 [1967], which provides for the jurisdiction of Kadhis' courts thus:

A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.

[206] Of note is that the jurisdiction of the magistrate's courts has been given a wider ambit through the Magistrates' Courts Act of 2015, which increases the pecuniary limit of magistrate's courts for matters brought before them. See s 7(1) of the Act.

3.4 CHAPTER SUMMARY

The purpose of this chapter was to determine the recognition and application of ACL through an examination of the pre-colonial, colonial and post-colonial period. The analysis revealed that the application of TJS thrived during the pre-colonial period and partly thrived during the colonial period due to the recognition and application of Native Tribunals. However, it was noted that during the post-colonial period, TJS were not recognised and further that the recognition and application of ACL was subjected to various criteria such as the repugnancy and inconsistency clause, for it to be applicable within the FJS.[207] In this regard, it was noted that the repugnancy clause reinforces the conflict in the integration between ACL and common law in Kenya. However, it was highlighted that the promulgation of the Kenya Constitution 2010, resulted to the elevation of TJS and TDRMs which are strongly anchored on ACL.[208] Conversely, the application and enforcement of ACL is still subject to various standards, key among them being the repugnancy clause which applies to all matters to which ACL is applicable, such as marriage and succession.[209] Accordingly, in relation to this study, the repugnancy clause is identified as the first impeding factor in the integration of ACL within the FJS.[210] This view is based on the fact that the clause subjects ACL to standards of justice and morality before it can be upheld by the FJS,[211] consequently affecting the harmonious

[207] See discussion in section 3.3.3 of this Chapter.

[208] See art 159 Constitution 2010.

[209] See wording of art 159(3) Constitution 2010, as earlier cited, which is construed as a repugnancy clause on the application of ACL in Kenya.

[210] The other impeding factors as identified by this study will be highlighted in Chapter Five. An example includes the need to prove ACL before it is upheld in the FJS.

[211] See discussion in section 3.3.3 of this Chapter.

interaction between the two systems.[212] This is indicated by the cases discussed in this Chapter which highlight that by subjecting ACL to the repugnancy clause before its application, prompts a limiting approach to the application of ACL by the FJS.[213]

Consequently, this study proposes that the repugnancy clause as contained in the Judicature Act should be repealed.[214] This proposition is supported by two main factors. First, that the Kenya Constitution 2010 embodies a repugnancy clause which can be deduced from its wording in article 159(3).[215] This article limits the application of TDRMs that contravene the Bill of Rights or are inconsistent with the Constitution or any written law.[216] In this regard, as the Constitution reigns supreme over all other laws of the land, its embodiment of a repugnancy clause suffices in matters to which the application of ACL (and by extension its components such as TJS and TDRMs) is to be determined by the FJS. Secondly, that the repeal of the repugnancy clause has been realised in other former colonies in Africa. For instance, this is the case that pertains in Tanzania.[217] With focus on succession, the Tanzanian Judicature Act[218] in its section 11 (1) (b) provides:

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[212] This study identifies this position as the major problem which curtails the interface between ACL and the formal legal system in Kenya.

[213] This denotes that in as much as the FJS upholds African customary rules, there are limits in its application. In this context, it is imperative to note that this study concurs with the FJS in its limit to the application of ACL in succession matters, particularly in instances where such customary rules occasion discrimination upon beneficiaries. This aspect will be shown and discussed in detail in Chapter Five.

[214] See s 3(2) of the Judicature Act Chap 8, Laws of Kenya, which embodies the repugnancy clause.

[215] Clause 3 of art 159 reads: 'Traditional dispute resolution mechanisms shall not be used in a way that — (a) contravenes the Bill of Rights; (b) *is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality*; or (c) is inconsistent with this Constitution or any written law. [own emphasis].

[216] See art 159 (3), Constitution 2010 of Kenya.

[217] See Bakari AH (1991) 546.

[218] The Judicature and Application of Laws Act, Chapter 358 of the Laws of Tanzania.

> Customary law shall be applicable to, and courts shall exercise jurisdiction in accordance therewith in, matters of a civil nature – (b) relating to any matter of status of, or *succession* to, a person who is or was a member of a community in which rules of customary law relevant to the matter are established and accepted.

The Act further provides under section 11 (3):

> In any proceedings where the law applicable is customary law, the court shall apply the customary law prevailing within the area of its local jurisdiction, …provided that the court shall not apply any rule or practice of customary law which is abolished, prohibited, punishable, *declared unlawful or expressly or impliedly disapplied or superseded by any written law.*[219]

The above provisions of the Tanzanian Judicature Act indicate that ACL is ascribed absolute application, however, subject to the provisions of the Constitution and other written laws. Accordingly, borrowing from the above provisions in Judicature Act of Tanzania, this study advocates for the repeal of the repugnancy clause, as the limit subjected to ACL to be in conformity with the Constitution's Bill of Rights, supersedes the intent of the repugnancy clause.[220] Bakari AH sums up this argument by observing that 'as a rule, where there is an indication of being governed by customary law rules but that law conflicts with either the Constitution or written laws, the latter shall prevail.'[221] This is similar in Kenya, noting that though the Constitution 2010 promotes the various aspects and rules of ACL, it subjects the same to its Bill of Rights.[222] Consequently, the repugnancy clause can be repealed without affecting its intent in limiting ACL contrary to the standards enshrined in the Bill of Rights,

[219] [own emphasis].

[220] Which position is possible due to constitutional supremacy, which operates by overriding all other laws inconsistent with the Constitution.

[221] See Bakari AH (1991) 547-8.

[222] See Chapter Four, Constitution 2010.

but most importantly, to enable doing away with a clause that has its foundations on colonial standard of what is moral or just. [223]

From the foregoing context which analyses the interaction between ACL and formal law in Kenya, Chapter Four will examine the customary and legal frameworks governing marriage and succession in Kenya. This will be done with a view of highlighting various provisions of formal law that embody certain aspects of ACL, so as to indicate the inherent interface between ACL and formal law in Kenya.

[223] For further insights, see Bakari AH (1991) generally.

CHAPTER FOUR

LEGAL AND CUSTOMARY FRAMEWORK ON MARRIAGE AND SUCCESSION LAWS IN KENYA

4.1 INTRODUCTION

The preceding chapters highlighted that there exists an interaction between formal law and ACL in Kenya.[1] This interaction is attributed to the recognition of ACL as a source of law in Kenya by the Constitution and various statutes such as the Judicature Act.[2] Further, it was highlighted that several provisions in the various statutes outline the circumstances and matters to which ACL is applicable.[3] In this context, it was noted that the Judicature Act limits the application of ACL to civil matters only.[4] Consequently, the purpose of this Chapter is to examine the interaction between formal laws and ACL in Kenya, with a focus on marriage and succession, both of which fall within the realm of civil matters to which ACL is applicable. In this context, the available literature indicates that various laws have a bearing on the law of succession.[5] An example of such laws is that of marriage, and the law of patrimony.[6] Both laws

[1] This was noted in Chapter One as inevitable in most legally pluralistic states.

[2] See art 159(2) of the Kenya Constitution 2010 and s 3(2) of the Judicature Act Chap 8, Laws of Kenya.

[3] See for instance secs 2(1) and 33 of the Law of Succession Act Chap 160, Laws of Kenya.

[4] See s 3(2) of the Judicature Act.

[5] See for instance Waal MJ & Schoeman-Malan MC *Law of Succession* 5 ed (2017) 1. This is also true of other facets of family law which include divorce and adoption. Generally, Law of Succession deals with devolution of property upon death . Transmission of property occurs under the two categories of succession law namely, testate succession and intestate succession. Testate succession applies in instances where property is transmitted by a will or testament while intestate succession occurs through inheritance. In Kenya, both testate and intestate succession apply. See Musyoka WM *Law of Succession* (2006) 3. This will be discussed later in this Chapter under section 4.4.

[6] Law of patrimony entails property inherited from one's father or male ancestor which arises from intestacy, consequently leading to inheritance. Law of succession, therefore, offers a mechanism by which property devolves to next of kin or beneficiaries of a deceased person, thereby ensuring that the rightful claimants inherit the property of the deceased person. Apart from inheritance, property can also be passed upon death through other ways

influence succession as marriage laws determine who a deceased's heirs or beneficiaries are, while patrimony informs one's bloodline.[7] Consequently, it follows that in most succession disputes, the question usually raised is whether a person claiming to be a dependant of the deceased is a spouse or child of the deceased or related to the deceased in a legal way.[8] This is similar in Kenya as most communities are patrilineal.[9] Subsequently, this position leads to the issue of how property should be divided among the heirs or beneficiaries of a deceased person.[10] Accordingly, the law of succession cannot be probed without considering other laws that influence its operation, such as marriage laws. For this reason, the second section of this Chapter will focus on a discussion of customary marriages in Kenya and the requirements therein.[11] The focus on customary marriages emanates from the earlier noted fact that marriage

namely: (i) survivorship – This occurs in cases of joint tenancy where property is jointly owned. Through the principle of survivorship (principle of *jus accrescendi*), a co-owner's interest passes to the surviving joint tenant(s) upon death. This principle removes jointly owned property from regulation of the law of succession as such property does not form part of a deceased's estate and cannot pass by a will. This can be contrasted with the principle of tenancy in common where one's share of the common tenancy can pass under a will. (ii) Nomination – This occurs where a person (nominator) directs another, holding investment on his behalf, to pay funds to a third party(nominee) upon his (nominator's) death. The nominee is usually nominated by the nominator during his lifetime. (iii) *Donatio mortis causa* – This is a gift made by a person in contemplation of their death. For a detailed discussion see Musyoka WM (2006) 31-37.

[7] In this regard, Bennett TW notes that "Rules of succession also perpetuate a bloodline and transmit a deceased's rights and duties to selected members of his or her close kin." See Bennett TW*Customary Law in South Africa* (2004) 334.

[8] See Musyoka WM (2006) 4-5.

[9] Except for the Digo and Duruma, who are matrilineal. See Musyoka WM (2006) 279. Cotran E identified the patrilineal nature of most Kenyan communities in his *Restatement of African Law: Volume 2*, 8 where he observed that 'Inheritance under Kikuyu customary law is patrilineal. The pattern of inheritance is based on the equal distribution of a man's property among his sons, subject to the proviso that the eldest son may get a slightly larger share. Daughters are normally excluded, but may also receive a share if they remain unmarried. In the absence of sons, the heirs are the nearest patrilineal relatives of the deceased, namely father, full brothers, half-brothers, and paternal uncles.' This was also echoed in part in the judgment of *Kivuitu v Kivuitu* (1991) 2 KAR 241, where Masime JA stated that 'Most of the Kenya African communities are patrilineal and the matrimonial home is usually settled by the husband….'.

[10] Such disputes arise in most jurisdictions, Kenya included, as one's property is shared among members of his immediate family who survive him.

[11] The focus on customary marriages emanates from the earlier noted fact that marriage laws have a bearing on succession matters. Customary marriages are provided for under s 43 of the Marriage Act 2014 and are conducted in accordance with the customs of the various Kenyan communities, in which one or both parties belong to.

laws have a bearing on succession matters, and further that most customary marriages are polygamous and thus require the ascertainment of all spouses and children of a deceased. In Kenya, this usually presents a problem in succession especially regarding the distribution of the estate as often the deceased dies intestate.[12] Generally, there exists other forms of marriages in Kenya other than the customary marriage, all of which are regulated by the Marriage Act, 2014.[13] These include Christian,[14] Civil,[15] Hindu[16] and Islamic[17] marriages. Subsequently, the third section of this Chapter will analyse customary laws of succession, to further highlight how customary marriages have a bearing on customary rules of succession as apply in various communities in Kenya. To allow a contrast of both formal and customary laws of succession in Kenya, the fourth section will entail a discussion on the formal laws that regulate succession in Kenya, namely the Law of Succession Act.[18] The last section will entail a discussion on how

[12] This will be discussed further in Chapter Five, which will highlight that determination of a deceased's spouse(s) and children is a common issue in succession matters before the FJS.

[13] The Marriage Act, No. 4 of 2014, recognises marriage as between persons of the opposite sex. See s 3(1) which provides that '[m]arriage is the voluntary union of *a man and a woman* whether in a monogamous or polygamous union and registered in accordance with this Act.' [own emphasis]. This requirement is buttressed by the Kenya Constitution, 2010 under its Article 45(2), which recognises the right of every adult to marry a person of the *opposite sex*, based on the free consent of the parties. [own emphasis]. Though not expressly prohibiting gay unions, the wording of the Constitution can be interpreted to exclude same-sex marriages. This exclusion however, is not applicable in all African states, as marriage between parties of the same sex is not a requirement. For instance, same-sex marriages are now recognised in South Africa, having been legalised on 30 November 2006 under the Civil Union Act, 17 of 2006.

[14] This type of marriage is conducted by parties who profess the Christian faith. Most churches require that parties go for matrimonial classes or counselling before the union. There are legal requirements such as giving notice to the registrar of marriage of the intention to marry so that the same is on record and to ensure no objections were raised that could impede the marriage ceremony. Parties are usually presented with a marriage certificate after meeting all the requirements and the marriage ceremony is conducted. See s 17.

[15] Such marriage is recognised as monogamous and is conducted by the Registrar of Marriages at any place chosen by him. See s 24.

[16] Such unions only apply to persons who profess the Hindu faith and are also recognised as being monogamous. See s 46.

[17] These only apply to persons who profess the Islamic faith. See s 48. Such marriages are recognised as being potentially polygamous, similar to customary marriages.

[18] Chap 160, Laws of Kenya.

the FJS interacts with the TJS in matters of succession. This will be highlighted through a discussion of the provisions the LSA which embody various aspects of ACL. These customary aspects include first, the recognition of customary wives for purposes of succession,[19] secondly the giving of a wider ambit to whom would qualify as a dependant(s) of a deceased,[20] thirdly the curtailment of testamentary freedom to ensure all dependants of a deceased are catered for,[21] and lastly by recognising that a testator can dispose of his property by reference to customary laws of succession.[22]

4.2 CUSTOMARY MARRIAGES AND ATTENDANT REQUIREMENTS

As generally observed, customary marriages are a fundamental building block in traditional African family law.[23] They include both a social and legal process, characterised by 'a value system that emphasises the non-individual nature of the relationship which traditionally involved family purposes beyond the immediate interests of the couple.'[24] Customary marriages are usually between parties of the opposite sex, but there exist other 'forms' of marriage under customary law such as the leviratic unions or woman to woman marriages.[25]

[19] S 3(5) Law of Succession Act Chap 160, Laws of Kenya.

[20] S 29 Law of Succession Act Chap 160, Laws of Kenya.

[21] S 26 Law of Succession Act Chap 160, Laws of Kenya.

[22] S 5(1) Law of Succession Act Chap 160, Laws of Kenya.

[23] See Nhlapo T & Himonga C (eds) African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives (2014) 92.

[24] Nhlapo T & Himonga C (2014) 92.

[25] Woman-to-woman marriage is noted to entail a union where a woman marries another woman and assumes control over her and her offspring. See generally Cadigan RJ 'Woman-to-Woman Marriage: Practices and Benefits in Sub-Saharan Africa' (1998) 29 (1) *Journal of Comparative Family Studies*: Comparative Perspectives on Black Family Life, 89-98. In Kenya, woman-to-woman marriages are commonly found among the Nandi, Kipsigis, and Keiyo communities of the Kalenjin (though not customary among other Kalenjin sub-tribes). Woman-to-woman marriage in Kenya has also been discussed in Njambi WM and O'Brien WE *Revisiting 'Woman-Woman Marriage: Notes on Gikuyu Women'* (2005) 145-165; *African Gender Studies A Reader*145-165; Kareithi MW *A historical-legal analysis of woman-to-woman marriage in Kenya* (unpublished LLD Thesis, University of Pretoria, 2018) and Oboler RS 'Is the Female Husband a Man? Woman/Woman Marriage among

Further, one main feature of customary marriages is the plural wives that arise therein, denoting their polygamous nature or the existence of polygyny.[26] The polygamous nature of customary marriages is recognised under s 6(3) of the Marriage Act, 2014 which provides that '[a] marriage celebrated under *customary law* or Islamic law is presumed to be polygamous or potentially polygamous.'[27]

Following the above features of customary marriages, all communities in Kenya have traditions or practices that are observed, to signify a valid customary marriage or ceremony between two parties.[28] These traditions are recognised by the Kenya Constitution 2010 through its article 11(2)(*a*) which provides that the State shall 'promote all forms of national and cultural expression through … *traditional celebrations*, … and other cultural heritage.'[29]

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the Nandi of Kenya' (1980) 19 (1) *Ethnology*, 69-88. On the other hand, leviratic unions entail a type of marriage in which the brother of a deceased man is obliged to marry his brother's widow under particular customs of a community. Some have likened this union to 'unintentional polygamy' as customs dictate one to enter into such unions. See generally Falen DJ 'Polygyny and Christian Marriage in Africa: The Case of Benin' (2008) 51 (2) *African Studies Review*, 51-74.

[26] Polygyny is a deeply embedded African tradition. The term 'polygyny' is preferred to 'polygamy', as it denotes a series of unions with more than one woman, while polygamy signifies more than one marriage, by the husband or wife. See Bennett TW (2004) 243. In Kenya, men are allowed to marry as many wives as they can afford, and among the communities that practice it, is viewed as prestigious. Being polygamous is a matter of personal choice. Polygyny is however abhorred in Western communities, as illustrated by a Natal Commission of 1852-3 which asserted that polygyny was 'reprehensible as it provided men with cheap labour and gave them the freedom to idle away their lives in sexual indulgence.' Further, a statement in a World Missionary Conference in 1910, stated of polygyny as 'one of the gross evils of heathen society which, like habitual murder or slavery, must at all costs be ended'. Noted in Bennett TW (2004) 189. See also Mwambene LM 'What is the Future of Polygyny (Polygamy) in Africa?' (2017) 20 *PER/PELJ* 1-33 and Ojwang JB 'Polygamy as a Legal and Social Institution in Kenya' (1974) 10 *E. Afr. L. J.* 63 -91 for a general discussion.

[27] [own emphasis].

[28] For example, in the Kikuyu and Meru communities, the ceremony is referred to as *ruracio*, while in the Kalenjin community it is known as *koito*.

[29] See also art 11 (1) which 'recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.'

Although the ceremonies differ from each group, there are similar requirements that can be drawn from all communities.[30] These requirements must be met to signify a valid customary marriage between two parties.[31] They include payment of dowry, consent of the parties, parties being over 18 years, and parties not having close degrees of consanguinity.[32] These requirements are also outlined under s 45(3) of the Marriage Act 2014.[33] These requirements are discussed below in relation to various communities in Kenya.

4.2.1 Dowry or bride wealth

In most Kenyan communities, payment of dowry signifies a marriage union as complete.[34] In this context, various reasons are advanced for the significance bride wealth plays in validating a customary marriage. For instance, its payment is viewed as a bond that unites the two families, that it marks the man's respect for his wife, and that it is a token that seals the marriage contract.[35] Therefore, its payment plays a very significant role in African customary

[30] Some of these similarities include the payment of dowry and a traditional marriage ceremony. These will be discussed further in this Chapter.

[31] The validity of the union depends on the agreement reached by the families involved. This explains why customary marriages are described as processual, as they involve the study of processes. See Nhlapo T & Himonga C (2014) 92. See also Cotran E *Casebook on Kenya Customary Law* (1987) 30-1.

[32] In this context, Cotran E notes that one of the difficulties encountered in his works of Restatement of Marriage Laws in Kenya, was the attempt to distinguish between descriptive formalities and ceremonies of the creation of a customary marriage, with those that have legal significance amounting to legal essentials. The author identified payment of dowry, capacity, consent, prohibited degrees and other bars as well as a traditional ceremony as amounting to legal essentials of customary marriages in Kenya. See Cotran E (1987) 30-1.

[33] See s 45(3)(a)(b)(c) which outlines the requirements as those that should be contained in a notification for a customary marriage to enable registration of the customary union. Further s 6(1)(c) provides that a marriage may be registered under the Act, if it is celebrated in accordance with the customary rites relating to any of the communities in Kenya.

[34] The aspect of finding an English term to appropriately describe the institution of dowry payment as fits into the African culture or customs, has occasioned difficulty amongst academic writers and amongst judicial and administrative officers. See Cotran E (1968) 35.

[35] Other reasons include that it acts as a deterrent to misconduct on the part of the wife, due to the liability to repayment on divorce, and that it is the price for the children that result from the marriage. See Cotran E (1968) 36.

marriages.[36] The marriage ceremony usually takes place after the pre-marital material exchange between the families of the bride and bridegroom. In the Meru community, this material exchange is not regarded as bride price or dowry, as the Meru believe it is impossible to fix a value in material or monetary terms for a person.[37] Therefore, it is referred to as 'bride wealth', and is usually paid by the groom with the help of his family in most communities.[38]

What constitutes bride wealth and how much (amount) should be paid, also differs from community to community but there is similarity in the bride wealth such as the payment of livestock.[39] Among the Bantu, for example, in the Meru community, bride wealth is standardised to five cows.[40] It also includes five other items collectively known as *Ruracio* (bride wealth). These are: a drum of honey,[41] a hogget, a 'ram', [42] a bull[43] and a heifer.[44] This still applies to date though some variations in payment can be made as the same is given as a

[36] Cotran E (1968) 36.

[37] 'Bride wealth' is the term preferred to the term 'bride price' as it signifies the wealth which the family of the bride received prior to the wedding. See M'Imanyara AM (1992) 132-4, 146-7. However, Bennett TW (2004), argues that none of the English translations such as 'brideprice', 'bridewealth', 'childprice' or 'dowry', do justice to the custom that is dominant to the African conception of marriage. See Bennett TW *Customary Law in South Africa* (2004) 220.

[38] Contrast with the Indian community where the bride's family pay dowry to the groom's family. In some communities, after the father helps to pay dowry for his first son, he is under no obligation to give a helping hand to the other sons. However, they can be assisted by their elder brother or uncles to pay the same.

[39] The giving of cattle as the main commodity for bride wealth is also similar in South Africa. See Bennett TW (2004) 224-245.

[40] See M'Imanyara AM (1992) 133.

[41] Referred to as *Giempe*, in the Meru dialect.

[42] Referred to as *Nturume*, which is a bull equivalent to five goats.

[43] Referred to as *Ndegwa-ya-Mathaga*, which in the past, was only payable if the bride possessed ornaments.

[44] Referred to as *Mwari-e-Ndungu*, meaning 'a heifer of relatives' which is meant to create strong bonds with the mother's lineage.

token.[45] Further that bride wealth signifies that the bridegroom has enough wealth to adequately cater for a family.[46] This is similar to the Kamba community wherein dowry is paid by a man before marriage in the form of cattle, sheep and goats, to the family of the bride. [47] Also among the Luhya community, bride wealth (*Bukhwi*) is a vital requirement as there can be no valid marriage unless it is paid, or at least partly paid. [48]Among the Kalenjin of the Nilotic group, traditionally, marriage took place in two stages: *ratet,* a small ceremony after which the couple lived together, and *tunisiet*, a large public feast held only at the completion of bride wealth payment.[49] Most Kalenjin, pay bride wealth in cattle.[50] Once payment is complete, marriage is theoretically irrevocable.[51]

[45] The Kikuyu community has similar traditions, where the groom pays dowry with cows, goats, honey, green bananas and traditional brews. However, in modern times, most Kikuyu families pay the dowry in cash. The groom and his family pay all the expenses related to the dowry and the dowry itself. See https://project82kenya.com/kenyan-weddings-the-dowry/ (accessed 10 October 2018).

[46] In the past, bride wealth was also used to allow for an interim period to test the friendship of the two young persons as to whether they were ready to marry. Bride wealth also signifies the groom's worthiness as a suitor. For a further discussion see M'Imanyara AM (1992) 133-134, 146-147.

[47] See http://www.kenya-information-guide.com/kamba-tribe.html (accessed 10 October 2017).

[48] See Cotran E (1987) 31.

[49] See http://www.everyculture.com/Africa-Middle-East/Nandi-and-Other-Kalenjin-Peoples-Marriage-and-Family.html (accessed 10 October 2017).

[50] Except for the Okiek. See http://www.everyculture.com/Africa-Middle-East/Nandi-and-Other-Kalenjin-Peoples-Marriage-and-Family.html (accessed 10 October 2017). However, it is important to note that modern times have led to modification of the form bride wealth is paid, not only among the Kalenjin, but also in other communities. Therefore, bride wealth does not have to strictly constitute livestock.

[51] Traditional divorce grounds and proceedings exist but divorce is extremely rare, even in modern times. Permanent separations occur but do not technically negate marriage. See http://www.everyculture.com/Africa-Middle-East/Nandi-and-Other-Kalenjin-Peoples-Marriage-and-Family.html (accessed 10 October 2017).

Among the Cushites, payment of dowry is also similar to the other two groups.[52] This indicates that livestock as bride wealth is of great significance in majority of the communities.[53] However, although livestock is significant as bride wealth, the same is not limited to it. There are other forms in which bride wealth can be paid such as gifts, property or in monetary terms.[54] Of important note is that that the bride wealth need not be paid in full before the marriage.[55] The part-payment of bride wealth is also recognised by the Marriage Act, 2014 in its s 43(2) which provides that '[w]here the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.' In addition, bride wealth can also be waived by the bride's father, if he so wishes.[56]

The validity of customary marriages is of utmost importance as it bears various consequences on the spouses.[57] Such include proprietary consequences which have a direct influence in

[52] For example, among the Borana community, the boy's family in the beginning must bring 2-3 kilos of coffee which is referred to as the 'flower'. Cloth's gifts for the girl's parents are then brought and if accepted, the last batch of gifts is brought. This includes: one cow (for the girl's mother); 10-15 kilos of coffee; and the 'tax', which is a combination of a cow, an ox and a blanket (*badoo*). The cow is given to the mother while the ox and the blanket go to the father. The last gift is *Annuna*, (the mother's exclusive cow), which she gets from her son-in law. After the giving of the gifts is completed, a date is fixed for the marriage. For more see http://ayyaantuu.net/the-borana-tribe-kind-people-of-east-africa/ (accessed 10 November 2017).

[53] The amount to be given varies from family to family, depending on agreement between them. Further, in modern times, some families may not require the 'actual' livestock but rather a sum of money equivalent to the value of livestock (or what agreed upon) is given. Therefore, as noted earlier, payment is a matter of negotiation between the families.

[54] The payment of bride wealth with money in lieu or in addition to the traditional requirements, was also recognised by the Commission on Law of Marriage and Divorce of 1968.

[55] For example, among the Kikuyu, the payment of dowry can go on even after the parties are deemed married under customary law. It is not a one-off event. The initial payment represents a token, which is followed by payments over the years as when the husband can afford or the wife's family may need a further instalment. See Cotran E (1968) 35.

[56] This applies amongst most Kenyan communities. See Cotran E (1968) 35.

[57] Custody of children is also closely interlinked to divorce and return of dowry in most customary laws. See Cotran E (1968) 121.

succession matters, which form the focus of this study. Further is the consequence that arises as a result of the polygamous nature of customary marriages.[58] These are discussed below.

According to the customs of the various Kenyan communities, marriage is the last ceremony that denotes a girl's 'leave' from her home and that henceforth, she belongs to the husband's clan/village/family.[59] Consequently, from marriage stems the right of a wife to be entitled to her husband's property due to their union. Accordingly, upon the death of a husband, a widow is entitled to own his property.[60] The wife is considered as the most important person to accede to the husbands' property as the property would have been acquired by the deceased with her efforts and the fact that she needs the property most.[61] In most instances, the property includes land, the house items left and personal property of the deceased.[62] In effect, the validity of a customary marriage brings about proprietary consequences.[63]

[58] As earlier noted. See section 4.1 and 4.2.

[59] M'Imanyara AM (1992) 142. The late President Jomo Kenyatta also highlighted this position in his book *Facing Mount Kenya* (1965) 29. He stated that there is no system of spinsterhood in the Gikuyu society and that as such, women do not inherit land on their father's side. Rather, they play their part in the family or clan in which they marry.

[60] This is recognised in various cases as will be shown in Chapter Five.

[61] This follows the rules of inheritance under customary law, which is to hand over the estate to the person who will use it to the best interests of the deceased's heirs and dependants. In this case, the deceased's wife or wives. See Musyoka WM (2006) 96. This is also espoused by Bennett TW (2004). He states that, upon the death of the breadwinner, the surviving spouse bears full responsibility for rearing dependants. Bennett TW (2004) 356.

[62] Ownership of land, however, does not apply in communities where land is held communally. This applies mainly in the pastoral areas of Narok, Marsabit, Wajir, Samburu, Turkana, Mandera, Garissa, Tana River, West Pokot and Isiolo. The communities who inhabit these areas include the Maasai, Borana, Turkana, among others. This exception of communal land ownership is also recognised under s 32 of the Law of Succession Act, Chap. 160 Laws of Kenya, which is to the effect that property in the stated areas, is exempt from the statutory laws of succession and African customary law is to be applied in dealing with administration of property in the said areas. The Community Land Act (No. 27 of 2016), Laws of Kenya, also recognises communal ownership of property.

[63] Similarly, proprietary consequences also arise in the other forms of marriage as recognised by the Marriage Act, 2014.

As noted earlier, customary marriages are inherently polygamous. This is recognised by s 6(3) of the Marriage Act, 2014 which provides that '[a] marriage celebrated under *customary law* or Islamic law is presumed to be polygamous or potentially polygamous.'[64] Commonly, the polygamous nature of customary marriages causes succession matters to be complex in their determination. This arises particularly in cases of intestate succession, as ascertainment must be done of the plural wives and their issues to determine who a deceased's heirs or beneficiaries are for purposes of succession.[65] This is necessary as sometimes under ACL, separated wives are still entitled to a share of their husband's property.[66] This results from the fact that in most Kenyan communities, once payment of bride wealth is complete, marriage is theoretically irrevocable.[67] However, as with any form of marriage, divorce or dissolution of a customary marriage can occur.[68] Where divorce occurs, the common practice is the return of the bride wealth paid for the woman to the man's family.[69] Such decision to have a customary marriage dissolved, was arrived at by elders to whom the plea was brought before them by the parties.[70]

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[64] [own emphasis].

[65] Consequently, polygamy influences proprietary consequences of customary marriages as all dependants of a deceased should be provided for upon his demise. This will be shown in Chapter Five through analysis of courts' jurisprudence.

[66] This will be shown later in this Chapter under section 4.4.2, which highlights provisions of the Law of Succession Act, Chap 160 Laws of Kenya, that recognise the right of separated wives to have a share of the husband's property.

[67] However, traditional grounds for divorce and proceedings exist, but divorce is extremely rare, even in modern times. Permanent separations occur but do not technically negate marriage. See http://www.everyculture.com/Africa-Middle-East/Nandi-and-Other-Kalenjin-Peoples-Marriage-and-Family.html accessed (10 October 2017).

[68] The term 'divorce' is at times avoided in use by most customary law works, as they perceive it to be an unknown concept in Africa, where marriages were 'indissoluble or rarely dissolved'. See Bennett TW (2004) 266.

[69] However, the amount returned depends on which party was at fault. This practice is similar under customary marriages in South Africa as highlighted by Bennett TW (2004) 268.

[70] See Cotran E (1968) 121. In this regard, the case of *Johnson Opiyo v Simon Olang* civil appeal number 19 of 1975 High Court of Kenya at Kisumu, is illustrative.

This remains the position today regarding dissolution of customary marriages.[71] Reasons which can lead to divorce include desertion,[72] cruelty,[73] failure to provide for the family,[74] and adultery.[75] Where such grounds are satisfied and bride wealth is returned to the woman's family, divorce is finalised and the woman is not entitled to a share of the former husband's property.[76] Grounds for divorce vary from community to community but in most African cultures, the woman is always disadvantaged as she has to come up with very good reasons.[77] Further, divorce in most customary marriages is difficult to ascertain as most spouses resort to informal separations.[78] The Marriage Act 2014 provides for the grounds to which a customary marriage can be dissolved. These grounds are provided for under s 69(1)(a)-(f) and include:

[71] It is worthy of note that the Marriage Act, 2014 calls for conciliation using elders before a marriage can be dissolved. See s 68(1) of the Act. The need for conciliation by elders before a matter could be taken to court was a strong recommendation made by the Commission on the Law of Marriage and Divorce (Marriage Commission) as early as 1968, in which they recommended that conciliation be a prerequisite to any divorce petition before the courts. See Recommendation No. 113 as noted in Cotran E (1968) 121.

[72] See *Grace Atieno v Richard Bwala* civil appeal number 6 of 1973 High Court of Kenya at Kisii.

[73] See *Judis Nakhumicha v Francis Murutu* Divorce case number 204 of 1977 District Magistrate's Court at Bungoma.

[74] A woman may cite failure of the husband to provide but must justify such allegation. See *Marcella Okutoyi v Fredrick Nyongesa* civil case number 17 of 1978. See also similar observation by Bennett TW (2004) 269.

[75] Of important note is that, in most customary marriages, divorce cannot be granted to a woman on grounds of adultery by the man/ husband. Adultery by the wife is highly frowned upon. See, for instance, *Joseph Makanji v Sebenzia Isichi d/o Atondola* divorce case number 6 of 1997, Resident Magistrate's Court at Kakamega, wherein divorce was granted on the ground of the wife's adultery under Luhya customary law. Other grounds or reasons that can be advanced by the parties to support their plea for dissolution of a customary marriage include: witchcraft, refusal of intercourse and habitual theft. See Cotran E (1968) 121.

[76] This arises as divorce connotes breakdown of the marriage.

[77] Other attendant consequences of divorce are the determination of rights to the matrimonial estate, maintenance and custody of children. In most Kenyan communities, children belong to the father even upon divorce. Further, among the Meru community, for example, there is no issue of illegitimate children, as it is believed that all children belong to the father, even when begotten outside marriage. If, for example, a man allows a son born of his wife from an adulterous union to stay in his home and he organises for his circumcision, then such a son is regarded as the man's own child. See M'Imanyara AM (1992) 148.

[78] In addition, difficulty in ascertaining dissolution of the union is because at times, death does not necessarily dissolve the union. Marriages may continue through the invocation of the customs of the levirate or the sororate unions. This also applies to customary marriages in South Africa. For further reading on the same in South Africa, see Bennett TW (2004) 267 and Nhlapo T & Himonga C (2014) 92.

adultery, cruelty, desertion, exceptional depravity, irretrievable breakdown of the marriage or any valid ground under the customary law of the petitioner.

4.2.2 Consent, age and consanguinity

The aspect of consent of parties is a key element in most customary marriages as it ensures validity of the marriage.[79] Further, consent conveys respect for the marriage union as one enters it willingly.[80] Accordingly, lack of consent from either of the spouses invalidates the marriage. This is seen in *Mwagiru v Mumbi,*[81] where the defendant, Mary Mumbi, contested the plaintiff's prayer to have a declaration that a valid marriage subsisted between them. She averred that she was never a party to any arrangements for the marriage between the plaintiff and her father, one Charles Kigwe. She further averred that her consent was never sought or given and that she was never present at any stage of the necessary events that were required to constitute a valid customary marriage under Kikuyu customary law. As her consent was lacking, she escaped from the plaintiff's home a few days after her father had forcibly taken her against her will to live with the plaintiff. Consequently, the court held that no valid customary marriage existed between the plaintiff and defendant.[82] Therefore, consent is both a customary and legal essential in ensuring validity of a customary marriage.[83] Further, it is

[79] This was a key recommendation by the Commission on the Law of Marriage and Divorce of 1968 in Kenya.

[80] This can be contrasted to forced marriages, such as child marriages, which still occur in some parts of Kenya, as noted earlier in this Chapter.

[81] *Mwagiru v Mumbi* High Court of Kenya [1967] EA 639.

[82] This can be contrasted with the case of South Africa, where there were cases of forced marriages in some communities as the consent of the bride was deemed irrelevant. This arose from the fact that marriage was treated as an agreement between families, negotiated by senior males, usually with the exclusion of the bride. See Bennett TW (2004) 199. However, this has since changed since the coming into force of the Recognition of Customary Marriages Act (RCMA) 120 of 1998 which requires the consent of both prospective spouses to a customary marriage for it to be deemed valid. See section 3 (a) *(ii)* of the Act.

[83] As earlier noted, the legal requirement is outlined in s 45(3)(c) of the Marriage Act 2014.

observed that entering into the customary marriage willingly, requires the spouses to keep the union chaste. In this regard, adultery is frowned upon and in the past was a punishable offence.[84] Further, as earlier noted, adultery is a ground for divorce in customary marriages.[85]

Alongside consent of parties, is the consent of the parties' parents or guardians. In this regard, it is observed that in most African traditions, a father's consent to his daughters' marriage is regarded as an essential element of a valid marriage.[86] Further, consent from the parents signifies blessings for the marriage in most of the communities. Therefore, it follows that lack of parents' consent can lead to disinheritance of a spouse after her husband's demise. This will occur as the husband's family does not recognise her as belonging to their clan / village.[87]

Parties in a customary marriage should also have attained 18 years of age before they can enter any customary union. As noted earlier, this is also the minimum age set by the Marriage Act.[88] Although the Act prescribes 18 years as the age of consent, there are cases of child-marriages in some parts of Kenya, for example in Narok, Samburu, Isiolo, Homa Bay and Tana River. It

[84] Among the Kamba for example, one was fined a bull and a goat. The goat was killed and used in cleansing the husband of the offending wife before he got back to his house. The fine was much higher if an adulterous wife died in childbirth. In this case, the paramour had to pay five cows and one bull. The community insisted on this deterrent fine because the responsibility of the woman's death was considered to lie with the offending man. Among the Kikuyu, the adulterer was fined three rams, a small ram or a he-goat, which he paid to the council of elders. He also took a *muuma* (oath), that he would never again visit that woman, and that he would never again commit adultery with any other woman. Among the Pokot of Baringo, an adulterous man was punished physically and materially. The man was first tied to a tree in which stinging ants resided. The ants were then disturbed and as they stung him, he was beaten as his lover watched. After this, he was fined 6 cows, 6 goats, a pregnant sheep and six ostrich feathers. In addition, he prepared a tin of honey to appease the offended husband. For more see http://africa.peacelink.org/wajibu/articles/art_4484.html (accessed 17 October 2018).

[85] See discussion in section 4.2.1.

[86] See Bennett TW (2004) 204.

[87] Belonging to a husband's clan / village / family, was noted as one the consequences of marriage. See discussion under section 4.2.1.

[88] See s 45(3) Marriage Act No. 4 of 2014, Laws of Kenya.

is estimated that 23% of Kenyan girls are married before attaining the age of 18, while 4% are married below attaining 15 years of age; for instance, in Migori county. Further, UNICEF ranks Kenya as having the 20th highest absolute child brides in the world and it is observed that this arises from the living customary laws (traditional customs) of some communities which do not place much value to gender equality as well as other factors such as poverty, FGM and adolescent pregnancy. However, of important note is that there are efforts to curb the practice through Government initiatives such as the ratification of the Convention on the Rights of the Child in 1990 which sets the minimum age of marriage as 18; as well as various NGO initiatives and awareness campaigns.[89] Therefore; if parties to a customary marriage are below the age of majority, the customary marriage is invalid.[90] Parties to a customary marriage should also not have close degrees of consanguinity.[91] This prohibition guards against incestuous unions amongst clans.[92]

In sum, customary marriages remain an important part of Kenyan culture.[93] This is seen where in most instances, it is common practice for parties to conduct traditional ceremonies before having the official Christian ceremony.[94] This indicates that customary law is the primary

[89] For a detailed discussion see https://www.girlsnotbrides.org/child-marriage/kenya/ (accessed 19 April 2019).

[90] The requirement of consent and age is similar in South Africa. See the Recognition of Customary Marriages Act (RCMA) 120 of 1998 which provides that both parties to a customary marriage must consent to the union and must be 18 years of age.

[91] This stems from the function of a kinship system in African societies, which determines the range of relatives with whom marriage is allowed. Bennett TW (2004) 207.

[92] This restriction also applies under s 10 of the Marriage Act, No. 4 of 2014. Marriage of cousins is only allowed for Islamic marriages.

[93] This is similar in most of Africa where traditional weddings have a significant importance such as the binding of two families.

[94] However, it is important to note that parties to a marriage cannot enter into two forms of marriage. Parties must decide to either be bound by the rules of customary marriages or those of a Christian or civil marriage; which choice dictates whether the marriage union is potentially polygamous or monogamous respectively.

source of law for Kenyans particularly in personal matters.[95] This practice is recognised by Kenya's legal system as illustrated by the provisions of the Marriage Act 2014, which recognise various forms of marriage such as customary and Christian marriages.[96] It is submitted that this can be attributed to the views advanced by the Historical School which posit that the customs and traditions of a particular people influence the development of a legal system in an evolutionary manner.[97] Further that despite the evolutionary nature of law, it must remain faithful to its root stock.[98] Based on the latter context, it can be inferred that Kenyan communities still practise marriages in accordance with their respective customs, despite the modern developments in the society, indicating that individuals remain faithful to their roots [customs].

Consequently, upon fulfilling the above discussed requirements of a customary marriage and conducting the traditional marriage ceremony, parties are deemed to be husband and wife.[99] However, upon coming into force of the Marriage Act in 2014,[100] parties were required to register their marriages within three months of conducting the same, so as to be issued with a Certificate of Customary Marriage.[101] The requirement for registration still applies, however,

[95] See similar observations by the FJS in *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* civil case 4873 of 1986 (1987) eKLR, where it was stated that '…the personal laws of Kenyans is their customary laws in the first instance.'

[96] See ss 43 and 17 of the Marriage Act 2014, respectively.

[97] See the view of Historical School jurists as noted in Chapter Two section 2.4.

[98] See views of Sir Edmund Coke who embraced the idea of evolutionary progress of a legal system, as discussed in Chapter Two with regard to the Historical School, under section 2.4.

[99] This recognition is both from the State and society.

[100] Marriage Act No. 4 of 2014, Laws of Kenya.

[101] This is in accordance with s 44 of the Marriage Act 2014.

as of 1 August 2017, is now governed by the Marriage (Customary Marriage) Rules of 2017.[102] These rules are to the effect that parties marrying under traditional customs (ACL), must notify the Registrar of Marriages of their status as husband and wife, upon completion of the relevant customary rites that bestow upon them the status of a customary marriage.[103] Upon notification, a notice is displayed by the Registrar for 14 days to allow any objection to the marriage to be lodged. If no objection is filed within that period, an Acknowledgement Certificate is issued to the parties, following which the parties can apply for registration of the customary marriage. The Registrar then issues a Certificate of Customary Marriage after considering the parties application.[104] The issued certificate ensures that a customary marriage is recognised by law, just like Christian, Civil, Hindu and Islamic marriages.[105] In this way, the Kenyan government seeks to give customary marriages legal recognition, and makes customary marriages a legal process in addition to being a social one.[106] A significant aspect of state recognition of customary marriages is that it aids in the succession process where a deceased's heirs and dependants need to be established for purposes of succession and/or inheritance. [107]

[102] These rules were effected by Gazette Notice number 5345 issued on 9 June 2017. The rules also create two classes of customary marriages, namely those that existed before the rules came into force and those that are conducted after their coming into force.

[103] This requirement differs from the past where the state played no role in customary marriages, as they were deemed to be private matters.

[104] The Registrar must ascertain that the parties consented to the union freely, are not underage and that none of them is in a subsisting Christian, Civil and Hindu marriage, all of which are monogamous in nature. Further that, there exists no other impediment to the marriage.

[105] Any unregistered union is not regarded as marriage, despite completing the traditional practices such as payment of bride wealth.

[106] As noted in the previous discussions of this section.

[107] In this context, it was noted earlier that marriage bears consequences that arise from the spouse and subsequent issues of a marriage who are deemed as dependants and/or heirs to a deceased.

The preceding discussion highlighted various rules and practices that apply to customary marriages in Kenya.[108] It further highlighted the fundamental requirements that must be met for customary marriage to be considered valid.[109] With validity, follows the attendant right of a spouse and/or issues therein to be recognised as rightful heirs to a person (husband / father) upon his demise. This illustrates that marriage has an impact on the rules of succession as applied in Kenya, therefore denoting a form of correlation between the two. For this reason, the following section endeavours to highlight the general customary rules of succession, both testate and intestate, as applied by the various communities in Kenya.

4.3 CUSTOMARY LAWS OF SUCCESSION IN KENYA

Linked to the validity of customary marriages, are customary rules of succession which are as diverse as the communities they serve.[110] Each community has its own peculiar customary rules of succession that govern and apply in the distribution of one's property during lifetime and after death.[111] However, despite the array of customary rules, most communities apply general principles of succession in distribution of property.[112] For this reason, the discussion in the

[108] It is to be noted that similar requirements should be met for statutory marriages, with the exception of bride wealth and at times consent of the parents. Further, the attendant consequences of separation, divorce and custody of children still apply to the other types of marriage as identified in the discussion.

[109] It is evident that despite the diverse customary laws on marriage applicable in Kenya, the requirements to ensure a valid customary marriage are similar such as the requirement of bride wealth and consent of the parties.

[110] Although different rules of customary law apply to the various tribal groups in Kenya under various circumstances, the general principles of succession are common among all communities. See Musyoka WM (2006) 279.

[111] In the Meru community, for example, during one's lifetime, one can distribute property as he wishes, without coercion from anyone. But in doing so, one is required to ensure fair and equitable distribution among his heirs. M'Imanyara AM (1992) 143-4.

[112] Musyoka WM (2006) 279.

following section will focus on these general rules as applicable to most communities in Kenya.[113]

Generally, under Kenyan customary succession law, distribution is mainly done of the deceased's distributable intestate estate.[114] This estate comprises of land, livestock, traditional movable property,[115] and modern property.[116] It also includes his duties or obligations over various persons[117] and over his property.[118] Under customary law, such property can be distributed through three ways: first through the rules of intestacy,[119] secondly, through distribution during one's lifetime and lastly, through oral wills.[120] These customary rules of distribution are discussed below.

[113] It is to be noted that this section has a heavy reliance on Musyoka WM *Law of Succession* (2006) as his work is the most comprehensive scholarly reference available on the subject matter. This is noted in terms of the way the author presents the customary principles on succession in relation to the law of succession generally in Kenya.

[114] See Musyoka WM (2006) 280.

[115] This includes crops, furniture, spears, ornaments, shields, among others ornaments. Daughters are not entitled to any share of these, but may be given some crops by their mother. Musyoka WM (2006) 280, 283.

[116] This would include but not limited to modern furniture, motor vehicles, television sets, radios, money, shares, bank accounts, company shares and houses. Musyoka WM (2006) 280.

[117] Such persons include widows, minors and other dependants. Obligations over claims by and rights over debts against third parties are also distributed. Musyoka WM (2006) 280.

[118] Musyoka WM (2006) 282.

[119] This is the most common method of property distribution.

[120] Musyoka WM (2006) 279.

4.3.1 Distribution through Intestacy

As earlier noted, most communities in Kenya are patrilineal.[121] Subsequently, heirs or beneficiaries of a deceased are family members in the patrilineal lineage.[122] These family members are recognised as the surviving spouse, children, siblings and the deceased's parents.[123] The FJS in Kenya recognises that patrilineal lineage plays a key role in distribution of property to heirs as seen in several cases.[124] Owing to this consideration on lineage, distribution of a person's property in intestacy is highly dependent on the marital status of the deceased.[125] Therefore, once married, a woman belongs to her husband's community and is entitled to a share of her husband's property.[126] This position was highlighted in *Mukindia Kimuru and another v Margaret Kanario,*[127] where the FJS stated that under Meru customary law, women play their part in the clan or family in which they marry and therefore do not inherit land on their father's side.[128] Among the Meru, therefore, wives are considered in the

[121] See section 4.1.

[122] This is because heirs are identified by the relationship to the deceased through the male line. Such relationship does not necessarily denote a genetic link to the deceased, since at times, heirs can be adopted. Benett TW (2004) 335. Further see Musyoka WM (2006) 279.

[123] In *Wambugi w/o Gatimu v Stephen Nyaga Kimani* (1992) 2 KAR 292, it was emphasised that the term 'patrilineal' should be confined to the natural issues of the deceased. In matrilineal communities, family members refer to the woman's family who include her mother, her brothers, their children, her aunts and uncles and their children. Where the deceased is a married woman in a polygynous union, heirs include her co-wives and step-children. For a further discussion, see Musyoka WM (2006) 279.

[124] See *Mukindia Kimiru and another v Margaret Kanario* Nyeri Court of Appeal civil appeal 19 of 1999 John *Ndung'u Mubea v Milka Nyambura Mubea* Nairobi Court of Appeal civil appeal 76 of 1990 and *Mbuthi v Mbuthi* [1976] KLR 120.

[125] This is seen in the earlier discussion on proprietary consequences of marriage. For further reading see Musyoka WM (2006) 282.

[126] This highlights the close correlation succession law has with family law, making both interdependent. Law of succession also has a close interrelation with the law of trusts and property law. Musyoka WM (2006) 4.

[127] *Mukindia Kimuru and another v Margaret Kanario* Nyeri Court of Appeal civil appeal 19 of 1999.

[128] In past times amongst the Meru, daughters were not entitled to ownership of land but there was an exception where a man had no son(s). In such a case, the daughter was given a small share of the land, while the remaining part was given to either a nephew named after the deceased, or his brother. However, this rule is not applied in its entirety in modern time, as most fathers do not discriminate among children based on gender. In instances where a man had both sons and daughters, the daughters were indirectly catered for, depending on whether they are

distribution of their deceased husband's land.[129] The brief facts of the case are that the deceased died in 1979 following which a dispute arose between the respondent and the appellants as to whether she possessed a right to inherit the deceased's property. The respondent was the deceased's daughter (adopted) while the appellants were the adoptive father and his sons.

According to Musyoka WM, there are three general patterns or rules of distribution of property practised amongst Kenya's patrilineal communities.[130] First, there is equal distribution among the sons or among 'houses' in a polygamous household;[131] secondly, there is equal distribution among the younger sons or junior 'houses' with a slightly larger share to the eldest son or the senior 'house',[132] and lastly, there is the rule of unequal distribution among the sons or 'houses' on a descending scale, each senior 'house' getting slightly more than its next junior.[133]

named after a person in their father's lineage (C*iethe*), or after their mother's lineage (*Ciong'in*a). Whether a child has patrilineal or matrilineal lineage, depends on the number one occupies in the family's birth positions. Children of all odd-number birth positions are all *Ciethe*. For a further discussion see M'Imanyara AM (1992) 144-6. The practice of married daughters not inheriting their father's land was also practised under Embu customary law. This is exemplified in *Wambugi w/o Gatimu v Stephen Nyaga Kimani* (1992) 2 KAR 292, where property was purchased jointly by two brothers who subsequently died. The issue for determination was whether a married daughter of one of the deceased owners was entitled to inherit the land. The Court of Appeal held that she was not entitled to the land. The FJS stated that the customs and traditions of the Embu community are similar to those of the Kikuyu (wherein married women do not inherit land on their father's side). If the daughter was unmarried, she would have been entitled to inherit some land from her father. Kwach JA stated that the Embu custom of inheritance ensures that the land remains in the family and as such, upheld the custom. The Court of Appeal found this position not repugnant to justice and morality, a test enshrined under s 3(2) of the Judicature Act, Chap 8 Laws of Kenya. However, this position by the FJS and of communities has changed in current times, as will be shown in the following Chapter.

[129] This is in cases where a man had more than one wife. In the rural setting, the man shows each of them where to cultivate both on marriage and during marriage and subsequently, sons of each of the wives inherit the land in their mother's possession. M'Imanyara AM (1992) 145-6.

[130] Musyoka WM (2006) 280.

[131] This is the most common rule that is applied in distribution of the deceased's property. It is applied irrespective of whether the deceased is a monogamist or a polygamist. However, in some cases, the eldest or youngest son is entitled to receive a larger share. See Musyoka WM (2006) 280.

[132] Musyoka WM (2006) 280.

[133] Musyoka WM (2006) 280.

Starting with the estate of a monogamist, in most communities, a widow is entitled to retain any parcel or portion of land given to her by the deceased upon marriage, and has rights over its use and cultivation during her lifetime.[134] This right also extends to her youngest son, who usually inherits the parcel or portion of land upon her demise.[135] The other sons get an equal share of the land, and at times the eldest son may receive a larger share.[136] Daughters usually do not get a share of the land but this does not apply universally.[137] For example, among the Kikuyu, it is acceptable for unmarried daughters to inherit land.[138] This also applies under Kamba customary law where unmarried or divorced daughters can claim inheritance.[139] Such customary succession rules have an impact on the interface between the TJS and FJS in matters succession, as they adhere themselves to principles of gender equality in succession. Such adherence is as espoused by formal laws and the FJS in Kenya.[140] Therefore, customary succession laws of such nature support this study's argument that ACL decisions stemming from the TJS should be enforced by the FJS.

In relation to polygynous households, the general practice amongst most communities is that widows retain land apportioned to them by the husband during his lifetime,[141] and upon their

[134] The same rules apply in distribution of livestock and crops.

[135] It is customarily assumed that it is the responsibility of the youngest son to take care of the mother, and for doing so, he should inherit her land upon her death. Musyoka WM (2006) 282.

[136] Musyoka WM (2006) 282.

[137] Musyoka WM (2006) 280.

[138] This was recognised in *Kanyi v Muthiora* [1984] KLR 712.

[139] See the *Estate of Mutio Ikonyo* Machakos High Court Probate and Administration Number 203 of 1996.

[140] This will be discussed in detail in Chapter Five.

[141] See M'Imanyara AM (1992) 146, earlier cited.

death, the same reverts to their youngest sons.[142] The remaining land is usually shared equally by the houses.[143] This follows the principle of equality, which is a fundamental rule in distribution of property. In this regard, it is worthy of note that this study affirms that fair distribution does not necessarily require or entail equal distribution of property. Further, of important note is that the distribution in a polygamous household is similar to that in that a monogamous one, only that there is more than one household to which division of property is carried out. In this respect, the aspect of equality in distribution has an influence on the interface between the TJS and FJS in succession matters as it highlights that TJS succession decisions are aligned to FJS standards on fair distribution of property.[144] Thus, the position of the TJS in distribution of a polygamous household is also a positive factor in supporting this study's argument that ACL decisions stemming from the TJS should be enforced by the FJS.[145]

[142] While the ornaments and weapons of the deceased are shared amongst the eldest sons of each house. See Musyoka WM (2006) 283.

[143] In this regard, see *Kanyi v Muthiora* [1984] KLR 712, where it was held that under Kikuyu customary law, land is shared equally by the houses where a man is polygamous and dies without making a will. A similar approach is applied in division of crops (which are usually distributed according to the land on which they are grown), and livestock. However, any livestock received as dowry for a daughter, is not shared by the other houses, but goes to the house from which the daughter is married. This customary rule can be contrasted with s 40 of the LSA, which provides for distribution based on the number of persons in each household (not equally).This will be discussed further in the following Chapter.

[144] This observation will further be discussed in detail in Chapter Five.

[145] This is in addition to the gender equality factor previously discussed. However, Chapter Five will highlight that not all customary laws of succession adhere to gender equality in distribution of property, leading to a case of conflict in the integration of ACL within the FJS.

For the estate of women,[146] in cases where the deceased is a widow, her property is inherited by her sons in equal shares,[147] or by her husband's brother(s), in cases where she has no sons.[148] For property held by an unmarried woman, the same is inherited by her sons in equal shares.[149] However, if she does not have sons, the property is inherited by her father or her full brother.[150] This is practised in Meru customary law as was recognised by the FJS in the earlier cited case of *Mukindia Kimuru and another v Margaret Kanario.*[151] Lastly, in cases of property held by a married woman, the property is inherited by her husband.[152]

In cases of the estate of an unmarried man, property held by him is usually shared among male members in his lineage in the following order of priority: father, if dead or absent; next young brother; or if dead or absent, by his next older brother; or if dead or absent, by the son of his next young brother; or in his absence, son of his next older brother; or in his absence, half-brother; or in his absence, son of his half-brother; or in his absence, paternal uncles. This order

[146] In most communities in Kenya, women are allowed to own property under customary law as marriage gives them the right to inherit that which was left by the husband. However, this does not apply in communities where land is held communally, for example, among the Maasai.

[147] This applies in respect of any property acquired by herself or inherited from her husband. However, there are variations to this rule, where at times, the youngest or eldest son may receive a slightly larger share.

[148] Musyoka WM (2006) 284.

[149] Musyoka WM (2006) 285.

[150] This only applies in the absence of her father. In cases of several brothers, the estate is usually divided in equal shares.

[151] *Mukindia Kimuru and another v Margaret Kanario* Nyeri Court of Appeal civil appeal 19 of 1999 (Gicheru, Shah and Owuor JJA). Shah JA stated that 'it was a matter of general notoriety that under Meru customary law, the property of an unmarried girl is inherited by her father, or in his absence by her eldest full brother, who is expected to share in unspecified amounts with her other full brothers.'

[152] This applies even where the land was not given to her by the husband. See Musyoka WM (2006) 285.

is similar to the provisions of s 39 of the Law of Succession Act,[153] pertaining to devolution of property of an intestate's estate where there is no spouse or children. The section states:

> (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of 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 shares; or if none (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

For example, the above practice of distributing an unmarried deceased's property among male members of his lineage occurs among the Kikuyu community. This was recognised by the courts in *Mwathi v Mwathi and another*[154] where the court held that under Kikuyu customary law, property in an intestate estate is shared equally among the deceased's brothers to the exclusion of the sisters.[155]

4.3.2 Distribution during lifetime

In most instances, distribution during lifetime happens when the deceased is an elderly person.[156] In practice, the deceased apportions to each child his / her share of livestock or property before death.[157] A deceased can also assign property to his wife during his lifetime

[153] Chapter 160 Laws of Kenya.

[154] *Mwathi v Mwathi and another* [1995-1998] EA 229.

[155] In this regard, this study notes that this does not entirely reflect the correct position currently, as some families regard women as being entitled to inherit.

[156] Musyoka WM (2006) 281.

[157] Amongst the Kikuyu, it was common practice for the deceased to allocate each son his share of land and livestock upon getting married as recognised by the FJS in *Karanja Kariuki v Kariuki* [1983] KLR 209.

and she has the right during her lifetime to use the property given to her by the deceased.[158] However, such right terminates upon her remarriage.[159]

In addition, under customary law, the deceased has power to deviate from the general rules of inheritance,[160] by altering the shares to which each heir is entitled to under the rules of intestacy.[161] This flexibility in distribution of property caters for daughters, who in most communities, have no right of inheritance, particularly to land.[162] However, in some communities they are entitled to a small share.[163] In most communities, the cardinal rule in distribution is that the deceased should not disinherit an heir for whatever reason.[164] This is protected by the fact that any distribution made during lifetime is final and may not be altered by will to disinherit an heir.[165]

[158] For example, in the Meru community, all wives are considered in distribution of a man's land, (in cases where a man is polygamous). The man shows each of them where to cultivate both on marriage and during marriage. See M'Imanyara AM (1992) 146.

[159] Widows also lose any rights to such property upon moving back to their parents or upon their demise. Musyoka WM (2006) 282. The same is provided under s 35 of the LSA which provides that a widow's interest in the intestate's net estate determines upon her re-marriage.

[160] Deviation from the general rules of intestacy is also possible through the making of an oral will, as will be discussed later in this Chapter.

[161] Musyoka WM (2006) 281.

[162] Musyoka WM (2006) 280. Chapter Five will show a change in attitude of some communities to this rule.

[163] Among the Pokot, for example, daughters are entitled to one cow among their marriage. See Musyoka WM (2006) 280.

[164] For example, in the Meru community, if a testator fails to give his legitimate sons a piece of land and gives the same to strangers outside the clan, such testament will not be valid. See M'Imanyara AM (1992) 146.

[165] In some communities, gifts given *inter vivos* are considered while determining the share to be given to an heir as inheritance, while in some communities, they are not. See Musyoka WM (2006) 281.

4.3.3 Testate Succession

Testate succession is possible under customary law through the making of oral wills.[166] This usually occurs when a person calls a meeting of immediate and close family members, other relatives, friends and clansmen.[167] Consequently, the person declares orally how each of his property is to be distributed among them.[168] Such wills are recognised in Kenya under s 9 of the LSA.[169] Further, the making of oral wills is usually a preserve of the elderly and can be made by any person (male or female), during old age or on their death bed. [170] For instance, in *Re Rufus Munyua (deceased) Public Trustee v Wambui,*[171] it was held that under Kikuyu customary law, a valid oral will may be made when the testator is on his death bed in the presence of his close relatives by declaring how his property is to be distributed item by item and by appointing the administrator of his estate.[172] This position is also similar in the Meru community as seen in the earlier cited case of *Mukindia Kimuru and another v Margaret Kanario,*[173] where the FJS held that under Meru customary law, any man or woman who owns property and is very old or on his deathbed, makes a valid oral will, if it is made in the presence

[166] Oral wills are also known as nuncupative wills, referring to a will made by speech as opposed to writing.

[167] All these persons need not be present. S 9 of the LSA recognises this as it only requires an oral will to be made before two or more competent witnesses for it to be valid.

[168] Musyoka WM (2006) 281.

[169] Law of Succession Act Chap 160, Laws of Kenya.

[170] In most traditional settings, a young person is not allowed to make a will. It is an exercise in futility if they attempt to do so, as such will not be honoured. Relatives will not allow such, as doing so is viewed as inviting death. See Musyoka WM (2006) 282 and M'Imanyara AM (1992) 146. One can, therefore, only make an oral will if they are of advanced age or are of the age of majority. Further, a senile, drunk or insane person cannot make a valid oral will. These customary law requirements are similar to the provisions under s 5 of the LSA. The section further recognises that a written will can be made by relying on customary law.

[171] *Re Rufus Munyua (deceased) Public Trustee v Wambui* [1977] KLR 137. Also see *John Kinuthia Githinji v Githua Kiarie and Others* Nairobi Court of Appeal civil appeal 99 of 1988.

[172] Musyoka WM (2006) 281-2.

[173] *Mukindia Kimuru and another v Margaret Kanario* Nyeri Court of Appeal civil appeal number 19 of 1999.

of clan elders, close relatives and friends, and declares who will be the elder of the home by way of appointing an administrator.[174]

The main purpose of the customary oral wills in most cases is to appoint a successor (administrator) to act as the head of the family and/or legal guardian.[175] For example, in the Meru community, appointment of a guardian is an important consideration when making a will.[176] In Meru practice, a testator appoints a family head known as *Mukuru mwene Nja*, who is to act as a guardian to his wife and minor children upon his demise.[177] Other roles of the guardian are to administer the estate of the deceased,[178] and to settle disputes among the deceased's family members.[179]

[174] These requirements recognised by the FJS are the same customary rules that have been applied since the emergence of the Meru community as highlighted by M'Imnyara AM (1992). The author states that in the Meru community, oral wills were made usually at a time when a man felt he was about to die and that in most cases, the will was made before a man's immediate family members, members of his lineage and other clan (*Mwiriga*) members. (The assumption is that a man died at his home and therefore it was easy to call the witnesses as outlined above. However, if one dies away from home and makes his will before non-clan members, his will would still be honoured). In the Meru community, members of a man's lineage are important as they inherit his property, especially where a man's family is non-existent and guards against non-patrilineal inheritance. For a further discussion see M'Imanyara AM (1992) 146, 148.

[175] The successor becomes the head of the family and represents the family for all legal purposes. Musyoka WM (2006) 281, 285. In addition, other than appointing an administrator, a testator under ACL can also assign his debts and claims to relatives of his choice.

[176] As observed by M'Imanyara AM (1992) 147.

[177] In the past, a widow usually had two guardians. The first was the head of the family (*Mukuru Mwene Nja*) appointed by her deceased husband, while the second was the man she chose to cohabit with after her husband's demise but with approval of the clan (*Mwiriga*). M'Imanyara AM (1992) 147.

[178] According to Meru customs, if a family head is chosen, a man does not need to appoint an overseer (*Murungamiiri*). The overseer is usually the eldest son in the family, whose role is to ensure that the deceased's wishes are honoured. However, a son cannot be appointed as overseer by the father, if he is of unsound mind, irresponsible, or is an unfair person. M'Imanyara AM (1992) 146.

[179] Musyoka WM (2006) 281.

A further requirement of customary succession rules is that an oral will should not depart from the general rules of inheritance or intestacy.[180] For example, this rule applies under Kikuyu customary law as seen in *Koinange and thirteen others v Koinange*,[181] where it was stated that 'although Kikuyu customary law recognises will making, the will so made should not depart from the general pattern of inheritance'. This infers that the testator should not disinherit his heirs by will.[182] However, the making of an oral will allows a testator to have some flexibility in bequeathing his property. For example, a testator can make small gifts to strangers,[183] or is at liberty to vary the shares given to his heirs, other than that which is prescribed by customary rules.[184] Accordingly, such flexibility allows a deviation from the rules of intestacy under ACL.

With regard to the administration of the intestate estate, an administrator is responsible for its management. In most communities, an administrator of the intestate estate is either appointed through an oral will or by elders if the deceased did not appoint one before his death.[185] The deceased's eldest son is usually appointed as the administrator.[186] An administrator appointed under customary law has several functions, namely: the right to take control over the

[180] Musyoka WM (2006) 281.

[181] *Koinange and thirteen others v Koinange* [1986] KLR 23.

[182] This resonates to the provision in s 26 of the LSA which limits the testamentary freedom of a testator, to ensure that all heirs are reasonably or adequately provided for. This will be discussed in detail later in this Chapter.

[183] However, a testator should not bequeath land to strangers as alienation of land to strangers is usually frowned upon under ACL. See M'Imanyara AM (1992) 146. Also, a testator may bequeath property to family members who are not entitled in intestacy, but should not deprive his heirs their inheritance. See Musyoka WM (2006) 282.

[184] Musyoka WM (2006) 282.

[185] Musyoka WM (2006) 285.

[186] Unless there exists good cause to pass him over, in favour of the younger sons. In cases where the son is a minor, elders appoint the deceased's eldest brother, and where there are no sons, other male relatives of the deceased are appointed as administrators. Musyoka WM (2006) 285.

deceased's estate and manage it accordingly;[187] duty to distribute the shares to the heirs;[188] being liable to be sued for debts owed to the deceased;[189] and to act as a trustee of property of minor heirs until they attain majority age.[190]

The preceding section has discussed general principles as applied under customary succession laws of the various communities in Kenya.[191] It is submitted that the application of the above-discussed customary rules by the various communities in Kenya, infers an adherence to a tenet of the Historical School which postulates that law of a people is as it is due to the peculiar culture and traditions of the people.[192] Therefore, the rules as applied express the culture of the various communities of Kenya and further aid in understanding the social context in which the rules are applied.[193] As noted in Chapter One, Kenya is a legally pluralistic state, indicating that ACL is often considered alongside statutory law. Consequently, the foregoing customary succession rules are applied alongside formal law. For this reason, the following section will

[187] One key function of the administrator, is the responsibility to pay out funeral expenses from the estate. The duties, rights, powers and liabilities of administrators under customary law, are similar as those provided for under ss 82-84 of the LSA, with regard to personal representatives. Musyoka WM (2006) 285.

[188] This should be done according to the customary rules of intestacy or in accordance with the deceased's wishes in his will. Elders have the right to replace an administrator who does not perform his functions effectively, through appointment of another. Other than revocation of one's role as administrator by the elders, the role can cease when full administration of the estate is done or upon death of the administrator. See Musyoka WM (2006) 286.

[189] This does not apply in instances where such debts are assigned to particular heirs. Musyoka WM (2006) 285-286.

[190] Under Kikuyu customary law, upon death of the father, the eldest son acts as trustee over his land. This rule was given judicial recognition in *Gituanja v Gituanja* [1983] KLR 575, where the FJS emphasised that as trustee, a son has no more rights than those of other family members, and cannot therefore, sell the land or dispose it off in any manner.

[191] These principles can be identified as those which apply in the TJS of these communities.

[192] See discussion in Chapter Two section 2.4.1 and observations by Abraham G (2014) 117 in this context.

[193] For instance, why a married woman has proprietary rights to her deceased's husband property, due to the fact that marriage dictates that she henceforth belongs to the clan/ family of her husband as a result of a marriage union between them. See discussion on this under section 4.2.1 of this Chapter.

discuss the Law of Succession Act (LSA),[194] which regulates succession matters alongside African customary law. The section will contextualise the provisions of the LSA while highlighting their embodiment of ACL, which identifies the interaction between statutory law (LSA) and African customary law.

4.4 THE LAW OF SUCCESSION ACT

4.4.1 Brief background

The Law of Succession Act (LSA)[195] was enacted in 1972,[196] after the recommendations of the Commission on the Law of Succession appointed by the late president Jomo Kenyatta in 1967.[197] The mandate of the Commission was to define and consolidate all the existing laws of succession in Kenya at the time, namely English Law, Islamic Law, African Customary Law and Hindu Customary Law.[198] The Act commenced its application on 1st July 1981,[199] and caters for both testate and intestate succession.[200] The LSA scope of application is specified

[194] Chap 160, Laws of Kenya.

[195] Chap 160, Laws of Kenya.

[196] The Bill was initially presented to Parliament in 1970 and 1971 and eventually passed in 1972. However, it was not brought into force and was amended in 1976, 1977 and 1978. It was finally brought into force on 1st July 1981. See Cotran E *Casebook on Kenya Customary Law* (1987) 227.

[197] See Report of the Commission on the Law of Succession, 1968.

[198] This is captured in the Law of Succession Act preamble which states that it is '[a]n Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto.'

[199] See observations by Ang'awa MA *Procedure in the Law of Succession* (2011) 5 and Musyoka (2016), 13-21, 279.

[200] This is captured by s 2 (1) which states:

> Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

under section 2(1), which provides that the LSA is of universal application to all persons in Kenya.[201] The LSA, however, permits the application of ACL law to estates of deceased persons who died prior to the enactment of the LSA,[202] and in circumstances as may be allowed by the Act itself.[203] The latter aspect is addressed by s 33, which enables the application of ACL in succession matters in certain areas of Kenya.[204] The section provides *inter alia*: 'The law applicable to the distribution on intestacy shall be the law or *custom* applicable to the deceased's community or tribe, as the case may be.' [205] This provision has two-fold connotations.

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[201] However, this is not the position as other systems of law are applicable to succession matters by virtue of s 2(3) which provides as follows:

> Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.

[202] However, the procedural aspects to be applied to such estates should be in line with the LSA. This is provided for by s 2(2) which states:

> The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

[203] This position has been highlighted by the FJS, for example, in the case of *Mary Rono v Jane Rono and another civil appeal 66 of 2002* [2005] eKLR where it was stated that the application of African customary law is expressly excluded by section 2(1) of the Law of Succession Act, unless the Act itself makes provision for it. See also *Kuria and another v Kuria* [2004] eKLR.

[204] Through Legal Notice number 94 of 1981, certain Districts in Kenya were specified as those which the provisions of the LSA would not apply. These areas are provided for under s 32 and are listed as West Pokot, Turkana, Marsabit, Mandera, Wajir, Garissa, Tana River, Narok, Samburu, Isiolo, Lamu and Kajiado. The reason for exemption of these areas from the provisions of the LSA is to be found in paragraphs 72-74 of the Commission's Report which noted that 'there are certain people of the country who are not ready for or not willing to accept a new law and they will certainly ignore it.' The Commission further noted that '[o]n the other hand a total exclusion in an area might possibly result in hardship to the heirs of those few people in the area who may have modern types of property for which the customary law does not cater, such as the successful businessman in a small township.' As a compromise to these two situations, ss 32 and 33 of the LSA were then recommended and enacted.

[205] [own emphasis]. This section is to be read together with s 32, which lists areas in Kenya in which ACL of succession will apply to the exclusion of the LSA.

First, that the ideal of having the LSA be of universal application as envisaged by the Commission has not been fully realised.[206] Secondly, that the FJS recognises other systems of law applicable to succession matters (other than the LSA),[207] one of these systems invariably being ACL.[208] This recognition is evidenced by some provisions of the LSA, which exemplify certain features of ACL, and which have a great influence on succession matters and decisions thereof. These salient features are discussed below in detail.

4.4.2 Interaction between the Law of Succession Act and African Customary Law

The Law of Succession Act in some respects endeavours to foster African customary laws of succession.[209] The LSA does this by embodying various African customary practices[210] and African customary rules of succession,[211] which are applied by Kenyans to date.[212] This recognition amounts to an affirmation of such customary rules and practices by the FJS, and is in line with one of the intentions of the Act, which is 'to provide the Kenyan nation with

[206] Musyoka WM (2016) 18.

[207] Musyoka WM (2016) 18.

[208] The other is Islamic Law. Muslims are exempt from application of the LSA vide s 2(3), which disapplies the substantive provisions of the Act to the estate of a deceased Muslim. However, under s 2(4), the procedural aspects still apply to the estate of a deceased Muslim as long as the provisions are not inconsistent with Islamic Law.

[209] In this regard, Musyoka WM aptly observes that the LSA 'reflects its "Kenyan-ness" by embracing certain concepts which are purely African in nature.' See Musyoka WM (2016) 18.

[210] Such as customary marriages (which are inherently polygamous in nature), by recognising subsequent wives for purposes of succession under s 3(5), as will be discussed in detail in this Chapter.

[211] Such as those that consider the extended family to fall within the definition of 'dependants' to the deceased, and in effect, extending the benefits to members other than the deceased's immediate family. This will further be discussed when analysing s 29 LSA, which enables this consideration or inclusion.

[212] The intention of the Act was to provide the Kenyan nation with legislation that translates their customary beliefs and practices into law.

legislation that translates their customary beliefs and practices into law.'[213] In this connection, provisions in the LSA that are purely African oriented are discussed below.

First, s 3(5) recognises 'wives' for purposes of succession, which position arises from the inherently polygamous nature of customary marriages.[214] The section states:

> Notwithstanding the provisions of any other written law, a woman 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 purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act**.** [215]

This section accentuates that a woman who is regarded as a wife resulting from a union that is potentially polygamous stands to benefit from the deceased husband's estate.[216] This recognition is significant for women married under customary unions.[217] In this regard, Kamau W observes that 'for Kenyan women, *custom* is particularly important as it defines their identity within society [and] mediates their family relationships, entitlements and access to

[213] Musyoka WM (2016) 15.

[214] As earlier noted in this Chapter.

[215] Section 3(5) of the LSA.

[216] This is subjected to s 29 which refers to a wife or wives or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death, as dependants. This section also indicates that if the deceased was a woman and it is shown that the surviving husband was maintained by her prior to her death, then he is a dependant.

[217] This provision was explained by the FJS (Court of Appeal) in *Irene Njeri Macharia v Margaret Wairimu Njomo and another* civil appeal number 139 of 1994 [1996] eKLR, where it noted that it was meant for the benefit of women marrying men who had previously contracted statutory marriages, and if it was established that such a subsequent marriage exists, a woman in such union would be considered a wife for purposes of the Law of Succession Act. (Omolo, Tunoi, JJA and Bosire Ag JA).

resources.'[218] In addition, the section recognises polygyny as practised under ACL, and highlights the interplay between marriage laws and law of succession in Kenya.[219] On this basis, it is instructive to have a brief discussion on this interaction, in order to illustrate the effect customary marriages have on succession due to the plural wives in such unions.[220]

The previous Marriage Act[221] occasioned problems in dealing with succession matters, mainly regarding customary law wives from polygamous unions.[222] Section 37 of the Act did not recognise women in such unions as wives, as the section was to the effect that any woman married under any other system of law [customary law] was not a wife for any purpose (including succession).[223] They only gained recognition through s 3(5) of the LSA, which recognised them as wives for purposes of succession.[224] This situation invariably resulted into

[218] [own emphasis] See Kamau W (2011) 'Customary Law and Women's Rights in Kenya' available at http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf 1 (accessed 14 October 2018).

[219] As earlier noted in this Chapter. Further, Chapter One highlighted that ACL plays a significant role in the lives of Kenyans, particularly in the context of family relations and succession matters. This is also noted by Kamau W (2011) 1.

[220] Kamau W (2011) 27 notes that the law of succession is intricately connected to the law of marriage, divorce and property law, hence conflict in these areas is likely to affect the application of the law of succession.

[221] Chapter 150, Laws of Kenya, repealed upon enactment of the Marriage Act No. 4 of 2014.

[222] Wives married under customary law were not recognised as wives by the previous Marriage Act. Under the repealed Act, customary marriages were referred to as a condition that denies a celebrant of a civil marriage a certificate of recognition where they is evidence of a subsisting customary marriage. See s 11(1)(*d*), and Form 7 under the First Schedule. This perception could be attributed to the fact that the family law statutes applied then were adopted and retained from those introduced in Kenya during colonial times, which only gave recognition to statutory marriages. See Musyoka WM (2016) 19.

[223] This was held in the cases of *Re Ruenji's Estate* [1977] KLR 21 and *Re Ogolla's Estate* [1978] KLR 18. Observations were made after these decisions, indicating that it was unfair to women married under customary law and their children, to be deprived of benefit from the estate of the person who maintained them during his lifetime, simply because a family law system did not recognise the conversion from English law [statutory marriages] to African customary law [polygamous marriages], yet polygamy is allowed under African customary law. The FJS further noted that there was 'nothing inherently wrong for a man who had married under statute to contract other marriages under customary law during the subsistence of the statutory marriage.' See Musyoka WM (2016) 297.

[224] The amendment to s 3 of the LSA, which inserted paragraph (5), was intended to protect women who contracted a marriage with a man already married under statute and therefore lacked any capacity to enter any other marriage

a conflict between the Marriage Act provisions and those of the LSA. This conflict was remedied by the coming into force of the Marriage Act 2014, which recognised customary marriages and consequently, recognised wives from polygamous unions.[225] It is submitted that this brings in tandem the provisions of the LSA and those of the Marriage Act 2014, in recognising the nature of customary marriages.[226] This is an indication that the FJS enhances the recognition of customary marriages insofar as it recognises the potential polygamous nature of such unions, which are celebrated in accordance with the customary rites among the various communities of Kenya.[227] From these provisions, it can be inferred that application of some statutory rules effectively enable the applicability of African customs as perceived under customary law, which recognition has also been given force by the FJS as will be shown below.[228]

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under any family law system. See Musyoka WM (2016) 297. The legislature effected the amendment through the Statute Law (Repeals and Miscellaneous Amendments) Act of 1981, which inserted paragraph (5) to s 3.

[225] This a point of departure from the previous Marriage Act that neither recognised nor regulated customary marriages. The key defining feature, therefore, in the current Marriage Act 2014, is the recognition of customary marriages as one of the marriages in Kenya. This is by virtue of s 6 (1)(*c*) which provides: 'A marriage may be registered under this Act if it is celebrated in accordance with the customary rites relating to any of the communities in Kenya.' Section 6(1) of the Act provides for the other marriages that are recognised and which require registration to be legally recognised. They include the Christian, Civil, Hindu and Islamic marriages. This list is not exhaustive insofar as s 6(1)(*f*) provides for practices from other groups or faiths may be notified in the Gazette.

[226] Reference here as to the nature of customary marriages is intimated to the plural wives that can result from such unions. It is worthy of note that despite one contracting a customary marriage, it is not always the intention to have plural wives. Parties in customary marriages may opt for such union, due to various reasons such as personal preference and financial implications involved in conducting a statutory marriage. See Ojwang JB (1974) 63-91 on other factors that lead to such decisions.

[227] This recognition could be attributed to the challenges occasioned by s 37 of the previous Marriage Act, which had the effect of voiding any marriage contracted by a party, after having contracted a statutory marriage, as discussed.

[228] However, it is prudent to note that the application of ACL is curtailed by the FJS in some respects, as will be shown in the discussions in Chapter Five, as regards law of succession.

Despite the above provision being in place, the FJS interpreted it in a manner to disenfranchise 'wives' their recognition as intended, and occasioned them injustice. This is well illustrated *In the Matter of the Estate of Reuben Nzioka Mutua (deceased),*[229] in which Josephine Mumbua Mulili claimed to be married under customary law in 1980 by the deceased (Reuben).[230] The deceased had previously married under statutory law and that marriage was still subsisting.[231] He died testate and left his estate to his statutory wife to the exclusion of Josephine and her children. For this reason, she sought reasonable provision for herself and children.[232] This led to the issue as to whether she could be considered as Reuben's wife by reference to s 3(5) of the LSA as her customary law marriage to Reuben was in question.[233] The FJS stated that: '…[i]t is important, therefore, to decide whether the deceased was competent to contract "a legally valid marriage" with Josephine under Kamba Customary Law in March 1980.'[234] The FJS found that Josephine was not a wife for purposes of succession but that her children could get provision from Reuben's estate. In arriving at this decision, the FJS invoked the provisions

[229] *In the Matter of the Estate of Reuben Nzioka Mutua* (deceased) Nairobi High Court probate and administration number 843 of 1986.

[230] The FJS noted this as follows: 'But in March 1980, Mutua, once again being true to his African manhood, purported to marry Josephine Mumbua Mutua and that marriage was said to have been conducted in accordance with Kamba law and custom.'

[231] The deceased had contracted a statutory marriage under the African Christian Marriage and Divorce Act, Chapter 151 Laws of Kenya (repealed).

[232] Josephine made this application on her own behalf and on behalf of her three children and relied on s 26 of the LSA, which allows dependants not adequately or reasonably provided for from a deceased's estate, to apply for such provision by order of the FJS. Application of this section is discussed in detail under the discussion on limitation of testamentary freedom.

[233] This owing to the fact that Reuben had entered the customary union with her while his statutory marriage was subsisting and further that s 37 of the Marriage Act, Chap 150 deprived a man of any capacity to marry subsequently under any law [customary law] while his marriage under the Act was subsisting. The section provided: 'Any person who is married under this Act…shall be incapable during the continuance of such marriage from contracting a valid marriage under any native law or custom.' Reference was made to s 37 of the Marriage Act and s 4 of the African Christian Marriage and Divorce Act, Chap 151 under which Reuben's statutory marriage was conducted: 'Except as otherwise provided in this Act, the portions of the Marriage Act shall apply to all marriages celebrated under this Act.'

[234] Aluoch J.

of s 26 of the LSA and further relied on s 3(2) of the LSA which provides: '(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, *any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility* [own emphasis]. The FJS, therefore, held that Josephine's three children were the deceased's dependants and were entitled to reasonable provision for their maintenance out of his net intestate estate. It is argued the FJS erred in declaring Josephine not a wife of the deceased under ACL and ultimately occasioned her injustice, yet the law under s 3(5) had sought to remedy this injustice occasioned upon women married under ACL. This was because during the time of her case (1986), s 3(5) of the LSA was already in place and further that during the hearing, Josephine adduced evidence, and the same adduced by her father and brother, who testified to marriage ceremonies conducted between Josephine and Reuben, in accordance with Kamba customary law.[235] Injustice was also occasioned on Josephine by failure of the FJS to presume a marriage between the two.[236]

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[235] The error in the decision made was noted by the FJS in *Irene Njeri Macahria v Margaret Wairimu Njomo and another* Nairobi Court of Appeal civil appeal number 139 of 1994, where Omolo, Tunoi, JJA and Bosire Ag JA noted thus: 'We have unhesitatingly come to the conclusion that Mutua's case was wrongly decided and must now be treated as not correctly stating the position at law.'

[236] The FJS cited the leading authority of *Hotensiah Wanjiku Yawe v Public Trustee* Court of Appeal of East Africa (as it then was) civil appeal number 13 of 1976, which sought to determine if the appellant was a wife having contracted a customary marriage with the deceased. The FJS identified three requirements for a marriage to be presumed out of cohabitation. These were: long cohabitation between parties, general repute and/or the existence of issues. There was further evidence of marriage ceremonies performed by the deceased (Paul Makumbi Yawe) and Hortensiah. The FJS, therefore, presumed a marriage between the two and declared the appellant as the deceased's wife. It noted *inter alia* 'I can find nothing in the *Restatement of African Law* to suggest that Kikuyu customary law is opposed to the concept of presumption of marriage arising from long cohabitation. In my view, all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case should not apply just because she was married according to Kikuyu customary law.' As per Mustafa JA. Note, the FJS cited the *Restatement of African Law, Kenya I Marriage and Divorce (1968)* by Eugene Cotran which documented the customs of Kikuyu marriages in its Chapter 2, section iv at 15-16. The case of *Mary Njoki v John Kinyanjui Mutheru and others* civil appeal number 71 of 1984, is also instructive in this regard, in which the FJS determined the presumption of marriage. It noted that before a presumption of marriage can arise, long cohabitation needs to be established as well as acts of general repute. Further that the long cohabitation is not mere friendship between a man and the woman and that she is not a concubine and that

In the affirmative, the FJS consequently redeemed itself and interpreted the provision as intended, and the protection afforded to wives evidenced in subsequent judgements as shown in *Irene Njeri Macharia v Margaret Wairimu Njomo & another*,[237] wherein the FJS stated the following regarding s 3(5): 'I find the operative words of the amendment to be "a woman married under a system of law which permits polygamy…"Those are the words which *give a woman a ticket to seek refuge under the amendment to section 3 of the Succession Act*.'[238] In this case, the dispute centred around the intestate estate of the deceased (one Jonah Njogu Njeru Macharia). The appellant (Irene), was recognised as the lawful wife to the deceased by the FJS (High Court),[239] but was aggrieved by its decision on distribution of the estate between her and other beneficiaries, in particular one Jackline.[240] The FJS had to consider the question of how the estate of the deceased ought to have been shared between the appellant and the infant Jackline. The FJS agreed that the appellant was entitled to a share of her husband's estate available for distribution, being the deceased's widow. The FJS, however, 'disagreed with her that her entitlement took away the Judge's power to weigh the conflicting needs of the heirs and determine how much should go to each heir according to those needs.'[241] The FJS stated

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the cohabitation must have crystallised into a marriage and therefore safe to presume that there is a marriage. Sentiments of Nyarangi JA.

[237] *Irene Njeri Macharia v Margaret Wairimu Njomo & another* civil appeal number 139 of 1994 [1996] eKLR.

[238] [own emphasis].

[239] In this regard, the FJS (Court of Appeal) on the other hand stated: 'In the appeal before us, we have said we do not know whether the first respondent and the deceased ever went through any ceremony of marriage; we are also not certain if the concept of a presumed marriage could be applied to their circumstances. In the absence of such evidence, we are unable to say whether she could qualify as a "wife" under the provisions of section 3(5) of the Law of Succession Act.'

[240] Jackline was a child to the deceased.

[241] The FJS further stated that '[e]ven if the appellant had acquired the landed property wholly by herself and without any contribution from the deceased, it was a property she possessed and in weighing her needs against those of Jackline, the Judge was entitled to take it into consideration, just as much as he was entitled to take into consideration any paid job or business bringing income to her.'

'in order to forestall any allegations that the courts are disinheriting widows,[242] and in recognition of the appellant as the deceased's widow,' declared that:

> …[l]ike Shylock, she is entitled to her pound of flesh from the estate of the deceased. Only because we want to attain that objective, namely not to disinherit a widow, we order that out of the KShs. 186 086 available for distribution between the appellant and Jackline,[243] the appellant be given KShs.10 and the rest be left to Jackline to be invested in the manner ordered by the Judge.[244]

The second instance in which the LSA recognises ACL practices is in its determination of who qualifies to be a dependant of a deceased. The LSA in s 29 spells out persons who fall under such category. In part (a), it provides that 'dependant means the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.'

It is submitted that part (a) fosters customary practices such as polygyny, as it recognises 'wives' as dependants of a deceased.[245] However, in as much as wives are recognised, there is the concern that wives in woman-to-woman marriages as practised under ACL, are not

[242] The FJS referred to the decision in *Elizabeth Kamene Ndolo v George Matata Ndolo*, civil appeal number 128 of 1995 (1995) LLR 390 (CAK).

[243] The amount was arrived at after calculation by the FJS which combined the deceased's assets (money) other than his house. This included the deceased's pension benefits from his employer, the Teachers Service Commission, a sum due from Cannon Assurance (K) Ltd and a further sum due to the estate from Tena Co-operative Savings and Credit Society Limited.

[244] Omolo, Tunoi, JJA and Bosire Ag JA.

[245] As noted, plural wives can only result from a customary marriage which allows for polygamy. Further, some authors argue that this part gives the definition of 'wives' a wide ambit noting for instance, that a judicially separated wife and one who is a party to a voidable marriage which has not been annulled, is still considered a wife for purposes of succession. See Musyoka WM (2016) 296.

considered as wives from the wording of the section.[246] This is submitted from the argument that when ACL is considered in defining a wife, the concept of a wife under woman-to-woman marriages at times arises. In this regard, some authors argue that although not expressly stated under s 29 of the LSA, a woman married to another under customary law is considered a wife under s 29(a) of the LSA and as a consequence, is entitled to inherit the estate of the woman who had married her.[247] Further, this concern has been addressed by the FJS, which takes the view that where a woman-to-woman customary marriage is valid in customary law, a woman to such a marriage should benefit from the from the estate of the female husband upon her death.[248] This position is illustrated in *Monica Jesang Katam v Jackson Chepkwony & another*,[249] where the FJS gave recognition of woman-to-woman marriages as practised under ACL. The issue for determination herein *inter alia*, was whether a woman-to-woman marriage was a basis for the granting of letters of administration to the petitioner (Monica),[250] as the FJS noted that she was not a 'wife' in the conventional sense, nor are her sons 'children' of the deceased in the ordinary manner.[251] It was, therefore, necessary to consider how the law treats them, in relation to dependancy under the deceased's estate by determining how Monica fitted within the definition of 'wives' as provided for under s 29(a) LSA and how the law viewed her

[246] This view is as advanced by this study following the definition given to such unions, noted earlier in this Chapter as a union where a woman marries another woman and assumes control over her and her offspring.

[247] See Musyoka WM (2016) 111.

[248] This recognition enables various customary law unions to be considered, so as not to deprive a wife from such union her right to distribution of the deceased's estate. The following cases are informative in this regard: *In the Matter of the Estate of Naomi Wanjiku Mwangi (deceased)* Nairobi High Court civil number 1781 of 2001 and *In the Matter of the Estate of Tabutany Cherono Kiget (deceased)* Kericho High Court probate and administration number 157 of 2001.

[249] *Monica Jesang Katam v Jackson Chepkwony & another* High Court of Kenya succession cause number 212 of 2010 [2011] eKLR.

[250] Monica had been married to the deceased, one Cherotich Kimong'ony Kibserea, an elderly woman of 85 years, who had no husband and no children and died leaving a significant estate.

[251] Ojwang JB, J.

and her children.[252] The FJS expressly stated that the *governing law* in this regard was *Nandi customary law,*[253] and further cited the Constitution 2010 article 11(1) as a point of reference.[254] By relying on this constitutional provision, literature as cited, and Nandi customary law as the operative customary law, the FJS found the petitioner to be a 'wife' when s 29(a) of the LSA was applied, and that she and her sons belonged to the household of the deceased and therefore, entitled to inheritance rights.[255]

Having seen the wider ambit given to 'wives' by part (a) of s 29, it is also fitting to briefly note that the same wide ambit, is offered by part (b) of s 29 in relation to dependants. This is because members of the extended family are included in the definition, perhaps, in recognition of the fact that taking care of members of one's extended family is a common practice in most traditional African communities.[256] Section 29 (b) LSA captures this idea by providing:

> dependants include the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death.

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[252] Ojwang JB, J.

[253] [own emphasis]. The FJS once again, relied on the *Restatements* by Eugene Cotran The Law of Marriage and Divorce (1968), which provide that woman-to-woman marriage is a recognised family institution in Nandi customary law. The FJS also referred to *Esther Chepkuaui v Chepngeno Kobot Chebet and Jonathan Kipsang*, RMCC divorce cause number 16 of 1980, which demonstrated the functioning of the woman-to-woman marriage practice and on the scholarly works of Oboler RS 'Is the Female Husband a Man? Woman/Woman Marriage among the Nandi of Kenya' (1980) 19 (1) *Ethnology* 69-88, where she noted that 'All Nandi informants strongly insist that a woman who takes a wife becomes a man and (except for the absence of sexual intercourse with her wife) behaves in all social contexts exactly as would any ordinary man.' Oboler RS (1980) 80 as cited by the FJS.

[254] Art 11 (1) provides that '[t]his Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.'

[255] Consequently, the FJS granted the petitioner the grant of letters of representation to the deceased's intestate estate (Ojwang JB, J).

[256] As earlier noted in this Chapter.

The third instance in which the LSA embraces ACL principles, is by recognising that a testator can dispose of his property by reference to any secular or religious law. This is by virtue of s 5(1) which states as follows:

> Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.

The above section in effect means that a testator can make a will, which provides for the distribution of his estate according to his native customary laws.[257] In such a case, when the court has to construe the will, requirements of the particular custom must be ascertained.[258] It is in this regard that the study recaps that application of customary laws of succession cannot be done away with, even in the presence of statutory provisions (LSA). [259] This argument is based on the fact that the FJS is also informed by ACL in making decisions, other than having sole reliance on the LSA and other written laws.[260]

[257] See similar observations by Cotran E (1987) 228.

[258] Musyoka WM (2016) 23. This introduces the need to prove customary law if one relies upon it. This is further discussed in Chapter Five under section 5.2.4.

[259] This study posits that the LSA aims to regulate all matters succession in Kenya but as has been noted, it still considers instances in which ACL can be applied in determining succession matters. This fundamentally indicates that statutory provisions (LSA) cannot erode some aspects of ACL or reliance on the same by the FJS for guidance in succession matters. Relevance of ACL has been a highly debatable topic, whether being applied in civil or criminal matters as shown in the article by Read JS 'When is Customary Law Relevant?' (1963) 7 (1) *Journal of African Law*, 57-59. See also generally Stewart J 'Why I Can't Teach Customary Law' (1997) 14 *Zimbabwe Law Review*, 18-28.

[260] This will be shown in further discussions in Chapter Five, where the FJS indicates to be guided by ACL in making orders and further relying on other written laws such as the Judicature Act Chap 8 Laws of Kenya and international treatises.

The fourth instance in which the LSA embraces ACL principles is by limiting a testator's testamentary freedom.[261] This is possible through s 26,[262] which is to the effect that if a deceased person does not make reasonable provision for his heirs and /or dependants,[263] courts will interfere by ordering provision as they deem fit from the deceased's net estate for dependants not adequately provided for.[264] This limits a testator's wishes, whether made via a written will,[265] or a traditional oral will.[266] Musyoka WM observes that this limit guards against making of irresponsible wills by the testator, where his family are deprived completely to the benefit of outsiders.[267] This study agrees with this view, submitting that it protects the rightful heirs of a deceased from being uncatered for. Furthermore, the foregoing view has been upheld by the FJS in *Elizabeth Kamene Ndolo v George Matata Ndolo*,[268] where the deceased, one

[261] Also known as freedom of testation, which allows a testator to deal with his property as he so wishes by his will. In Kenya, it is given effect by s 5(1) of the Law of Succession Act, Chap 160, Laws of Kenya.

[262] The section provides:

> Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.

[263] The FJS through decisions in various cases, note that there exists a distinction between heirs and dependants. Heirs are deemed to be entitled to inheritance in intestacy, while dependants are only judged so, after a declaration by the courts following an application under s 26 of the LSA, which is made by one who claims to be a dependant of a deceased and feels aggrieved by the provision made / not made to him. See *In the Matter of the Estate of Ashford Njuguna Nduni (deceased)* Nairobi High Court succession cause number 1589 of 1994, in which the FJS made a clear distinction of both terms.

[264] There exist conflicting opinions in the FJS over what is to be considered as reasonable provision, as the Act also uses the term 'adequate provision.' Some judges interpret reasonable provision as being the same as adequate provision, while others avoid use of the term 'adequate' altogether. See Musyoka WM (2016) 311 for a detailed discussion.

[265] As provided for under s 5 of the LSA.

[266] As provided for under s 9 of the LSA.

[267] Musyoka WM (2016) 293.

[268] *Elizabeth Kamene Ndolo v George Matata Ndolo* civil appeal number 128 of 1995 (1995) LLR 390 (CAK).

Major General Joseph Musyimi Lele Ndolo, died on 6 April 1984 and was survived by three widows, Alice Katiwa Musyimi, Rose Mutinda Musyimi and the appellant, Elizabeth Kamene Ndolo. It was alleged that the deceased died testate, leaving behind a written will wherein he appointed the appellant and one Jackson Mulwa as the executors and trustees of his will. The deceased made no provision for the two widows, Alice and Rose. The appellant applied for a grant of probate in February of 1985 and the other two surviving widows objected. The FJS at first instance dismissed the objection, but went on to offer the two widows leave to file an application under s 26 of the LSA, which application was returned in favour of the two widows with a consequential order that the grant of probate to Elizabeth Kamene be revoked. This resulted in an appeal with regard to whether a testator had an obligation to provide for his or her dependants. The FJS at Appeal stated in part that:

> …[i]f a man by his will disinherits his wife who was dependant on him during his lifetime, the court will interfere with his freedom to dispose of his property by making reasonable provision for the disinherited wife….So that though a man may have unfettered freedom to dispose of his property by will as he sees fit, we do not think it is possible for a man in Kenya to leave all his property for the maintenance and up-keep of an animal orphanage if the effect of doing so would leave his dependants unprovided for.

From the expression of the FJS above, it can be inferred that the limit to testamentary freedom highlights the African belief that one has a duty or is morally bound to provide for persons dependent on him.[269] This limit highlights that the LSA embodies the aspect of ACL that all

[269] This is the same reasoning behind s 29 (c) LSA, the wording of which reflects the belief that it is a man's duty to provide for his wife and not vice versa. See Musyoka WM (2016) 305. The section is also to the effect that a man should establish that he was dependent on the deceased (woman) immediately before her death for him to get adequate provision from her estate. This is in total contrast to the requirements for a woman (wife/wives), who does not have to show dependency on the deceased immediately prior to his death. The only requirement is for them to prove marriage to the deceased. See Musyoka WM (2016) 296.

dependants should be catered for.[270] However, this recognition by the FJS does not mean that the provision is applied indiscriminately by the courts.[271] The courts' mandate is principally to make reasonable provision for a dependant(s), who has not been adequately provided for in a deceased's will.[272] Further, in considering the application of s 26, the FJS resorts to ACL to establish reasons why a deceased did not provide for a dependant, indicating an appreciation for ACL in determining matters succession.[273] For instance, Kikuyu customary law was considered in *In the Matter of the Estate of Humphrey Edward Githuru Kamuyu (deceased),*[274] where an heir was disinherited for being cruel to his deceased father. The brief facts indicate that the FJS revoked the grant of letters of administration issued to the applicant (Stephen Njuguna Githuri), and confirmed the deceased's will which declared Loise Margaret Waweru, the sole executrix. The issue for determination was whether the FJS could make provision for the applicant (Stephen) under s 26 of the LSA, as he had been excluded from his father's will.[275]

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[270] As earlier noted and illustrated by s 29(b) which gives dependants a wider ambit so as to include extended family members.

[271] The courts exercise their power with caution and do not re-write a testator's will no matter how 'weird' it may seem. See *In the Matter of the Estate of Sadhu Singh Hunjan (deceased)* Nairobi High Court Succession Cause Number 107 of 1994, where the FJS stated that 'Readjustments of the wishes of the dead by the living must be spared for the wills of eccentric and unreasonably harmful testators.' (Kuloba J).

[272] As noted by Shah JA in *John Gitata Mwangi and others v Jonathan Njuguna Mwangi and others* Nairobi Court of Appeal civil appeal number 213 of 1997.

[273] Similar statutory considerations as those considered under African customary intestacy laws, are set out in s 28 of the LSA, which provides that in considering whether any order should be made under section 26 [Provisions for dependants not adequately provided for by will or on intestacy], the court shall have regard to - (a) the nature and amount of the deceased's property; (b) any past, present or future capital or income from any source of the defendant; (c) the existing and future means and needs of the dependant; (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime; (e) the conduct of the dependant in relation to the deceased;(f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will; (g) the general circumstances of the case, Including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

[274] *In the Matter of the Estate of Humphrey Edward Githuru Kamuyu* (deceased**)** Nairobi High Court succession cause number 2322 of 1995.

[275] The FJS noted that '[t]he relationship between him and the deceased was less than cordial. In his will, the deceased had referred to the disrespect with which he was treated by the applicant. The deceased had in fact written to Kikuyu Police Station seeking police protection from the applicant and two other errant sons in a letter dated 19 April 1989.' (Visram J).

The FJS did not make a dependency order as applied for by the applicant and in doing so, relied on Kikuyu customary laws of intestacy as stated in Cotran's *Restatement*, which provided that a parent could disinherit an heir by will, if such heir had been cruel to the parent.[276] Thus, the deceased was justified in excluding the applicant from benefit of his estate. Hence, the grant of probate to the deceased's estate was issued in favour of the executrix.

In conclusion, the above-discussed provisions of the LSA which embody various aspects of ACL, are identified by this study as factors which enhance the enforcement of ACL by the FJS, thereby bridging the gap between the interaction of ACL and the FJS.

4.5 CHAPTER SUMMARY

This Chapter focused on marriage and succession rules that inform the interaction between the TJS and FJS in Kenya. In this context, the Chapter considered types of marriages in Kenya with a focus on customary marriages. It also analysed the governing legislation on marriage and succession in Kenya, namely the Marriage Act[277] and Law of Succession Act (LSA)[278] respectively. It was noted that the Marriage Act recognises various forms of marriage, all of which have an influence on succession matters.[279] The analysis further noted that the LSA governs both testate and intestate succession and strives to be of universal application in all matters of succession. However, it was noted that the LSA has failed to achieve this objective as it provides for exemptions as to the circumstances and areas in which ACL can be applied

[276] Reference to Cotran E *Restatement of African Law II* 16, where he wrote that an heir may be disinherited if he is cruel to his parents, for example, he beats them and is constantly disobedient.

[277] No. 4 of 2014, Laws of Kenya.

[278] Chap 160, Laws of Kenya.

[279] As earlier noted, this study limited itself to a discussion of customary marriages to show the interaction with customary rules of succession.

in matters of succession. In this regard, it is argued that the various aspects of ACL pertinent to succession are recognised by legislation (LSA) and enforced by the FJS as law due to the application of customary rules by the various communities, rather than it (ACL) being law due to enforcement by the FJS or recognition by the State. This view is grounded on the Historical School following the advancement of one of its proponent Karl von Savigny, who maintained that it is only people who can elevate rules into law through their customs and culture.[280] Accordingly, the partial realisation of universal applicability by the LSA permits the consideration of ACL by the FJS in determining succession matters before it. This is in addition to the provisions in the LSA which embody certain aspects or principles which are purely African in nature.[281] These provisions are identified as factors which enhance the enforcement of ACL by the FJS, thereby bridging the gap between the interaction of ACL and the FJS.[282] To reiterate, the provisions were identified as follows. First, the recognition of customary wives for purposes of succession,[283] secondly, giving a wider ambit to whom would qualify as a dependant(s) of a deceased,[284] thirdly, the curtailment of testamentary freedom to ensure all dependants of a deceased are catered for,[285] and lastly the recognition that a testator can dispose

[280] See view by Karl von Savigny as noted in Chapter Two section 2.4.

[281] In this context, the relevance of ACL in succession came to the fore and as earlier noted in this study, ACL still plays a major role in most personal laws of persons such as marriage and succession.

[282] This could be attributed to the FJS acknowledging the force that ACL still has in regulating succession matters in Kenya, despite the numerous instances in which it (ACL) has been rejected for notions of repugnancy and injustice. Further, this aspect on repugnancy forms one of the impediments that limit the recognition of ACL by the FJS as noted in Chapter Three and as will be shown in Chapter Five. In this context, Chapter Five will highlight how ACL is being reformed and/or developed to remedy this impediment, particularly in areas it has often been frowned upon, the most prominent being gender discrimination during inheritance.

[283] Section 3(5) Law of Succession Act Chap 160, Laws of Kenya.

[284] Section 29 Law of Succession Act Chap 160, Laws of Kenya.

[285] Section 26 Law of Succession Act Chap 160, Laws of Kenya.

of his property by reference to customary law.[286] In this context, it is submitted that consideration of these factors by the FJS in decision making on matters succession, results in the enforcement of decisions stemming from the TJS. Consequently, Chapter Five will focus on further identifying factors that enhance and/or impede the interaction between ACL and the FJS in succession matters. The Chapter aims to achieve this through an analysis of courts' jurisprudence, which will highlight how the FJS extends its application of ACL beyond the circumstances sanctioned by the LSA, as well as its limit to the application of ACL in succession matters.

[286] Section 5(1) LSA.

CHAPTER FIVE

FACTORS THAT ENHANCE OR IMPEDE THE INTERACTION BETWEEN AFRICAN CUSTOMARY LAWS OF SUCCESSION AND THE FORMAL JUSTICE SYSTEM IN KENYA

5.1 INTRODUCTION

The preceding chapter highlighted that certain aspects of African customary law that are pertinent in the law of succession in Kenya, are recognised by formal law.[1] It further highlighted that the FJS enforces these provisions, thereby applying both formal law and ACL in decision making in succession matters.[2] In this context, the purpose of this Chapter is to analyse the interaction between ACL and the FJS, in order to identify factors that enhance and/or impede the recognition and enforcement of customary laws of succession by the FJS. This is in consonance with the fourth research question of this study, which aims to identify factors that enhance or impede the recognition of TJS succession decisions by the FJS. In this regard, the Chapter focuses on courts' jurisprudence by analysing decisions of the FJS that uphold ACL as well as disregard it. In this perspective, the Chapter adopts a thematic approach

[1] See the provisions in the Law of Succession Act Chap 160 Laws of Kenya, which embody various aspects of ACL as discussed under section 4.4.2 of the Chapter. An example is the recognition of numerous wives for purposes of succession (see s 3(5) of the Act), which denotes the recognition of polygamy as practiced within the setting of ACL.

[2] This was illustrated through various cases as discussed in relation to the identified provisions. For instance, *Elizabeth Kamene Ndolo v George Matata Ndolo*, civil appeal number 128 of 1995 (1995) LLR 390 (CAK), illustrated the limit to a testator's testamentary freedom by virtue of s 26 of the LSA. It was noted that the section reflects the African belief that one has a duty to provide for persons dependent on him. See discussion in section 4.4.2.

in evaluating the factors that enhance and/or impede the interaction between ACL and the FJS. These themes include: guidance of the FJS by ACL; application of ACL based on FJS own knowledge of customs; reliance on restatements by the FJS; reliance on expert witnesses by FJS and general recognition of ACL by the FJS. The evaluation of the interaction between ACL and the FJS based on the five themes, is intended to establish what informs decisions by the FJS, where ACL is either enforced or disregarded.[3] Lastly, the Chapter will present a summary based on the analysis of the themes and the identified enhancing and/or impeding factors in the recognition and enforcement of ACL by the FJS.

5.2 COURTS' JURISPRUDENCE AND AFRICAN CUSTOMARY LAW

This section endeavours to analyse courts' jurisprudence in an effort to determine what leads the FJS to uphold various aspects or rules of ACL related to succession law in Kenya.[4] The enforcement of these customary rules by the FJS relates to those recognised under various provisions of the Law of Succession Act (LSA),[5] as well as those which are not prescribed by the Act.[6] The latter position is notwithstanding the Act's clarity as to circumstances in which ACL can be applied in succession matters.[7] In this context, of important note is the jurisdiction

[3] In discussing the five themes, the chapter will highlight that the FJS, either expressly or impliedly, applies ACL in circumstances not defined by the LSA, despite the Act expressly proscribing ACL from being applied in succession matters unless provided for by itself. This indicates that the LSA has failed to achieve its intended objective of universal application to all matters succession in Kenya, as earlier noted in Chapter Four.

[4] This objective emanates from the fact that ACL has been noted by this study, to be the law of first instance resorted to by Kenyans, in regulating their personal matters, key among them being succession and marriage.

[5] As earlier noted and discussed under section 4.4.2 of Chapter Four. An example includes the recognition of numerous wives for purposes of succession, as provided for under s 3(5) of the LSA Chap 160, Laws of Kenya.

[6] This means that the FJS 'overlooks' provisions of the LSA by applying ACL to succession matters not prescribed by the Act. In this regard, Musyoka WM deems this situation either to be 'out of ignorance or deliberate disregard of the provisions of the Act in a blind effort to elevate customary law above the statute.' See Musyoka WM (2016) 24.

[7] This will be discussed later in this chapter under section 5.2.5.

of succession matters, which is vested in the High Court and magistrates courts.[8] On this background, the following discussion analyses the five thematic areas identified by this study in evaluating the interaction between ACL and the FJS.

5.2.1 Guidance by African Customary Law

Under this theme, the FJS relies on ACL in making various orders, for example, regarding the distribution of a deceased intestate's estate.[9] This reliance is pegged on s 3(2) of the Judicature Act,[10] which provides that the High Court and all subordinate courts are to be *guided by African customary law* in all civil cases.[11] The FJS articulates such reliance in two ways. First, by expressly stating to have been guided by ACL and secondly, by leaving the reliance on African customary law to be implied. The first instance is well illustrated *In the Matter of the Estate of Humphrey Edward Githuru Kamuyu* (deceased),[12] where the FJS relied on Kikuyu customary law to disinherit an heir due to his cruelty to his deceased father. In this case, the FJS revoked the grant of letters of administration issued to the applicant (Stephen Njuguna Githuri), and confirmed the deceased's will which declared Loise Margaret Waweru, the sole executrix. The issue for determination was whether the FJS could make provision for the applicant (Stephen)

[8] Initially, magistrate's courts were vested with territorial jurisdiction where the gross value of the estate did not exceed Kshs. 100,000. See Ang'awa MA (2011) 9. However, this pecuniary limit was increased through the enactment of the Magistrates' Courts Act of 2015.

[9] The FJS also relies on ACL in making other determinations such as if a woman is a legitimate customary law wife so as to be entitled to inherit and/or administer her deceased husband's estate, if children claiming to be dependants of the deceased are rightfully so and whether there exists any impediment(s) in making the various orders if customary law is not relied upon to establish the correct position(s). These instances will further be discussed under this Chapter.

[10] Chap 8 Laws of Kenya.

[11] [own emphasis]. See earlier discussion on this provision in section 3.3.3 of Chapter Three.

[12] *In the Matter of the Estate of Humphrey Edward Githuru Kamuyu* (deceased) Nairobi High Court succession cause number 2322 of 1995 (Visram J).

under s 26 of the LSA, as he had been excluded from his father's will.[13] The FJS did not make a dependency order as applied for by the applicant and in doing so, relied on Kikuyu customary laws of intestacy as stated in Cotran's *Restatement*, which provided that a parent could disinherit an heir by will, if such heir had been cruel to the parent.[14] Thus, the deceased was justified in excluding the applicant from benefit of his estate. Hence, the grant of probate to the deceased's estate was issued in favour of the executrix. Following this decision, it is submitted that the FJS in addition to the provision of the Judicature Act which calls for the courts to be guided by ACL in decision-making, also inadvertently relied on views as advanced by the Historical School. In particular is the view that customary laws have their foundation on the customs of a people.[15] Accordingly, the FJS in reaching its decision considered the motive upon which the father disinherited his son, based on the reasons which permitted such exclusion under Kikuyu customary law.[16]

The second instance, where it is usually not clear which law the FJS applies in determining a matter,[17] can be illustrated by *In the Matter of the Estate of Chumo Arusei.*[18] In this matter, the

[13] The FJS noted that '[t]he relationship between him and the deceased was less than cordial. In his will, the deceased had referred to the disrespect with which he was treated by the applicant. The deceased had in fact written to Kikuyu Police Station seeking police protection from the applicant and two other errant sons in a letter dated 19 April 1989,' (Visram J).

[14] Reference to Cotran E *Restatement of African Law II* 16, where he wrote that an heir may be disinherited if he is cruel to his parents, for example, he beats them and is constantly disobedient.

[15] See discussion on the various views posited by Historical School jurists in section 2.4 of Chapter Two.

[16] In this case, Kikuyu customary law which allowed a father to disinherit his son due to cruelty on him, was the foundation of the customary rule upheld by the FJS.

[17] In other instances, the FJS indicates that it is guided by ACL, but is not clear how customary law is relied upon to arrive at orders made. This position applied in *Rael Chemutai Mayiek & another v Grace Chemutai Kiget*, [2005] eKLR, in which the FJS (Kimaru J) stated that it was guided by Kipsigis customary law in making distribution orders, however in the judgment, it was not clear how the FJS applied the said customary law in making the orders.

[18] *In the Matter of the Estate of Chumo Arusei* Eldoret High Court probate & administration cause 26 of 1998 [2003] eKLR.

FJS referred to both Nandi Customary Law on distribution of an intestate estate and to s 28 of the LSA.[19] It involved a dispute as to the distribution of the deceased's intestate estate among his two wives (Rael Arusei and Chemosbei Arusei) and several children, whom he had left behind upon his demise in 1997.[20] Administrators of the deceased's estate failed to agree on the mode of distribution hence this application before the FJS. The FJS relied on both customary and statutory law provisions in making the distribution orders regarding the estate.[21] In this regard, the FJS noted:

> It is on record and it has featured prominently that according to Nandi Customary Law the estate is to be shared equally among the houses. Counsel … urges the Court to distribute the estate equally thus upholding the principle of Nandi Customary Law. The observation of the Court is that in as much as customs should not be ignored when considering distribution herein this Court cannot overlook the provision *(sic)* of the Act – Succession Act. Chapter 160 Laws of Kenya.[22]

The FJS held a similar position in *In the Matter of the Estate of Sila Kibiwott Rono*,[23] where the issue for determination by the FJS was the distribution of the deceased's estate. The

[19] As per Nambuye RN, J. The Nandi customary law relied herein was to the effect that the estate of a deceased should be shared equally among the houses, as documented in Cotran E. *Restatements of African Law II* page 120 para 2. While, reliance on s 28 of the LSA Chap 160, was pegged on the considerations that the courts are enjoined to factor in while making distribution orders. These include: the nature and amount of the deceased's property; the existing and future means and needs of the dependant; whether the deceased had made any advancement or other gift to the dependant during his lifetime; the conduct of the dependant in relation to the deceased; and the situation and circumstances of the deceased's other dependants and the beneficiaries under any will. See s 28(a)-(g) for all considerations as provided for by the Act.

[20] There were 13 children in total. Six from the first wife Rael, and seven from Chemosbei, the second wife.

[21] See full judgement on distribution of the deceased's intestate estate to the two households.

[22] Nambuye RN, J. As per the quote, the FJS was making reference to s 28 of the LSA, Chap 160 Laws of Kenya, which enjoins the court to consider various aspects when making distribution orders.

[23] *In the Matter of the Estate of Sila Kibiwott Rono* Eldoret High Court probate and administration number 130 of 2000 (Nambuye RN, J).

deceased hailed from the Nandi community and died intestate in 2000. The FJS in making orders of distribution, expressly stated to be guided on Nandi customary law thus: 'The deceased was a Nandi by tribe and so his estate is *subject to Nandi customary law*.'[24] The FJS herein, further relied on Restatements of African Law,[25] and the provisions of s 28 of the LSA in making the distribution orders.[26]

From the two fore-going cases of *Arusei* and *Rono*, it is understood that the FJS opted to consider ACL alongside statutory law (LSA) which enabled the matter to be concluded. The study reasons that this must have been in consideration of the best interests of the beneficiaries and thus offers support to the approach taken by the FJS. However, the study concedes that at times, when ACL of succession is upheld by the FJS, the best interests (rights) of a beneficiary may be impeded. In this context, the study does not support consideration of ACL by the FJS, if its effect is to cause an injustice. This recognition is based on the fact that most African

[24] Nambuye RN, J. [own emphasis]. The FJS herein referred to Nandi customary law which provided that the estate is to be shared equally between the wives irrespective of the number of children in each house. Contrast this with s 40 which does not provide for equal distribution of property but that every wife be considered as a single unit when making distribution orders. This was aptly noted by the FJS in *Sophia Wangechi Mugo v Geoffrey Wambugu Mugo & another* [2016] eKLR as follows:

> My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has discretion to take into account the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account. Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in a case of young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.

[25] See Cotran E *Restatements of African Law II* page 120 para 2.

[26] As earlier noted, s 28 of the Act provides for considerations that the courts are enjoined to factor in while making distribution orders. In this regard, see observations by some authors, for example, Musyoka WM *A Casebook on the Law of Succession* (2014) 31, who notes that the FJS was wrong in applying s 28 in this case. He argues that the said section relates to applications for reasonable provision for dependants not provided for by the deceased.

customary rules on succession enhance gender discrimination due to non-recognition of the girl child or women, both married and unmarried to inherit.[27] This position is illustrated in *In the Matter of the Estate of Mutio Ikonyo (Deceased)*,[28] where the FJS being guided by Kamba customary law, held that a married daughter was not entitled to inherit from her father's estate.[29] The objector herein (one Mutanu Mwanzia) protested to the proposed confirmation of grant of letters of administration to the grandsons of the deceased. She wanted to be considered in the distribution of the estate on the ground that she was unmarried.[30] However, the FJS noted that she had not adduced evidence to the effect that her marriage to one Mwanza Nzuki had been ended by way of divorce and dowry returned.[31] On this basis, the FJS overruled her application and confirmed the grant to the deceased's grandsons.[32]

It is perhaps for the above injustice occasioned on women when the FJS is guided by ACL, that Musyoka WM holds the divergent view that '*customary law cannot be a guide nor lead the court in any matter where there are clear and mandatory statutory provisions on the*

[27] See similar observations by Woodman GR (2011) 12, who notes that this is one of the characteristics of customary law, whereby it sustains inequalities in the social order of its communities. This aspect is discussed and illustrated in section 5.2.5 of this Chapter.

[28] *In the Matter of the Estate of Mutio Ikonyo* (Deceased) Machakos High Court probate and administration cause number 203 of 1996.

[29] Mwera, J. This was despite the LSA already being in force at the time and the fact that it does not discriminate on any gender. See also *Mukindia Kimuru and another v Margaret Kanario* Nyeri Court of Appeal civil appeal 19 of 1999, in which a daughter was excluded from inheriting her father's estate due to the FJS reliance on ACL.

[30] The particular customary law only recognised an unmarried daughter as one who could inherit from her deceased's father's estate.

[31] The FJS noted: 'She is a Mkamba by tribe and she knows the Kamba customary law that only unmarried daughters or those divorced (and dowry returned) can claim to inherit.' Mwera, J.

[32] Musyoka WM (2014) 271, notes: 'The decision of the court was plainly wrong. With respect, the judge did not base his conclusions on any case law, or statutory provision, or cite any treatise on the subject.'

matter.'[33] As noted above, this study concurs with this assertion, but only to the extent in which customary laws of succession have the effect of causing an injustice to parties (beneficiaries) particularly regarding women and their right to inheritance. In this regard, it is submitted that at times subjugation of women in inheritance is what is as perceived by those not privy to all facts of a matter. The study offers a hypothesis where there are 2 daughters and 1 son. The 2 daughters are the eldest, one married, another not. Their brother (son) is the youngest. In division of the father's property, the daughters elect not to get a share of the property and that it all be left to the younger brother. In such case, there is no discrimination as being a beneficiary is a choice, and one can opt out of a benefit. Therefore, this study contends that in as much as the LSA is advanced as the only avenue in succession matters that offers protection to beneficiaries [women], ACL can also afford the same, and if it does not, it can be reformed or developed to achieve the desired effect.[34] Accordingly, such reform will negate the notion that customary laws are inherently gender discriminatory.[35] Feasibly, owing to this recognition, the FJS in *Henry Mukora Mwangi v Charles Gichina Mwangi*,[36] upheld customary land trusts which protected women to whom land was held in trust over statutory law. The decision of the court herein, made it a key case in illustrating the position of the FJS in the enduring tension between statutory law and customary law in Kenya.[37] This study, therefore, supports the FJS being guided by ACL in some respects.[38]

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[33] See Musyoka WM (2016) 22 [own emphasis].

[34] This is in line with one of the earlier noted characteristics of ACL which is its evolutionary nature, and further supported by the Historical School of thought as discussed in Chapter Two.

[35] This characteristic of ACL has been noted earlier in this Chapter.

[36] *Henry Mukora Mwangi v Charles Gichina Mwangi* [2013] eKLR.

[37] Decision arrived at by Karanja W, Kiage PO and M'inoti K, JJA.

[38] See as discussed above.

5.2.2 Application of ACL based on FJS knowledge of customs

At times, decisions or orders may stem from the FJS being misinformed on what the applicable customary rules are as pertains a certain community.[39] In this regard, it has been observed that in some instances, the FJS applies its own principles for ascertaining what constitutes rules of customary law and further attempts to formulate these principles in legal English; which leads to a complete distortion of the customary rules or principles as applied in a particular community.[40] It is submitted that this acts as an impediment to the recognition of ACL as a distinct body of law and consequently, inhibits the harmonious interaction between ACL and the FJS, which was identified as a significant problem by this study.

In addition, there are instances in which the FJS despite knowing of the existence of a certain customary practice, fails to uphold it because it is not documented in restatements. It is submitted that this is a wrong approach as one key characteristic of customary law is its unwritten nature.[41] Further, the foregoing view is grounded on the notion advanced by the Historical School which posits that if a State seeks to fix legal doctrine in a comprehensive contextual system [in this case 'Restatements'], the natural process of change within social rules [ACL] will weaken.[42] It is for this reason that the Historical School does not advocate for the codification of customs, in addition to the attendant ossification of customs.[43] In this

[39] This pre-empts this study at this stage, to envisage a recommendation for this study namely, to encourage the teaching of ACL to members of the FJS. See Onyango P (2013) 4 for similar observations.

[40] See Allott AN (1984) 'What is to be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950' *Journal of African Law* 28(1/2) The Construction and Transformation of African Customary Law 56-71, 60.

[41] This is a key characteristic of ACL, as earlier noted in Chapter One.

[42] See view by Savigny as noted in section 2.4 of Chapter Two.

[43] In this context, it is observed that codification of customs is advanced by some as a means of enhancing predictability in decision-making and reducing the flexibility and negotiability inherent in customary law. See Harper E (2011) 'Engaging with Customary Justice Systems' in Ubink J and McInerney T (eds) *Customary Justice: Perspectives on Legal Empowerment*, 33. Legal and Governance Reform: Lessons Learned No. 3/2011

context, it is observed that codification has been rejected by states as far as historical records can reflect, and where attempted, they have been met with limited success due to the dynamism of TJS and/or customary laws.[44] Therefore, it is submitted that to subject parties to only codified customs when before the FJS, deals them an injustice.[45] This was seen in *Joyce Atemo v Mary Ipali Imujaro,*[46] in which the FJS at first instance held that the appellant herein (Joyce), was not a legitimate wife validly of the deceased (Alfred Imujaro Para) under Teso customs, hence she could not obtain grant of letters of administration to his estate.[47] The appellant had cohabited with the deceased and dowry of Kshs.10 000 was paid by elders in line with Teso customary law before the burial of the deceased.[48] The FJS at appeal stated that this validated her union to the deceased, an inference which they drew from the witnesses for the appellant. From the witnesses' evidence, under Teso customary law, the cohabitation of a man and woman without initial formalisation of the union, could be converted into a valid marriage upon the death of either spouse upon the payment and acceptance of dowry by the woman's relatives.[49] The learned trial judge, therefore, erred in holding that the appellant was not a

International Development Law Organization (IDLO), who notes that those who support codification of customary laws base their views on the probability of appeals brought before the formal courts from customary justice systems. In such instances, they argue that the formal courts will be better placed at adjudicating such appeals if the customary laws are in written form due to ease of reference. Further that such appeals can only be referred to the formal courts only if there exists a link between the two systems, that is, formal and customary.

[44] See Harper E (2011) 33.

[45] Th is probably one of the reasons which leads many States to reject codification of customary laws as earlier noted.

[46] *Joyce Atemo v Mary Ipali Imujaro* [2003] KLR 435.

[47] The FJS in the first instance, declared the respondent as the sole legitimate widow to the deceased and accordingly entitled to his estate to the exclusion of Joyce.

[48] Under Teso customary law, a marriage union is formalised by the payment of dowry. This is similar to most communities in Kenya, where dowry payment is one of the requirements for validating a customary marriage. See discussion in Chapter Four.

[49] This was drawn from the witnesses, which the FJS at appeal noted that '[t]he witnesses for the appellant were of this position, spoke about it, and nobody contradicted them on that issue.' Omolo, Shah and Waki JJA.

widow of the deceased for reason of the custom which validated her marriage being unwritten.[50] This goes against the view advanced by the Historical School in support of the recognition of customs in decision-making, based on the fact that the people who apply specific customs in regulating their matters have better knowledge of the laws that guide them.[51] In the words of the FJS at appeal:

> The learned judge's reason for holding that the appellant was not a wife appears to be that though she (the judge) herself knows that a marriage can be formalised by elders before burial yet she (the judge) could not find that position in Eugene Cotran's *Restatement of African Customary Law* dealing with the Teso. It appears that the learned judge's position on the matter was that what is not contained in Cotran's *Restatement* cannot be a valid customary law.

The FJS emphatically rejected the above proposition as one which the country should adopt stating that '[i]t cannot and must not be taken that what is not recorded in any of Cotran's cannot form part of the customary laws of the various communities in Kenya. We very much doubt whether Cotran himself would make or support any such claim.'[52]

In the above context, this study aligns with the thoughts of the FJS at appeal, noting that Kenyan law should never adopt an approach to which the only recognised customary rules and/or practices are those found in the Restatements. Accordingly, this is in recognition of the living nature of ACL, which is evolutionary and reflective of the customs and traditions of a particular people. This view is supported by the Historical School which advances similar sentiments, notably that communities go through predictable stages and that their laws reflect the

[50] According to Omolo, Shah and Waki JJA, she became a widow of the deceased, when her clan accepted the dowry (Kshs.10 000) paid by the deceased's clan before the deceased's burial.

[51] See discussion in section 2.4 of Chapter Two.

[52] Omolo, Shah and Waki JJA.

community's stage of development. This denotes a recognition of the evolutionary nature of customs.[53] In this context, the FJS in *Atemo v Imujaro*[54] further cautioned against treatment of Cotran's *Restatement* as binding on every issue in Kenya.[55] The FJS reiterated that 'customary law is dynamic and the law as stated in the *Restatements* might not be the correct position in present day.'[56] This caution supports one of the arguments of this study which is against codification of customs. This argument is premised on observations that codification has the effect of freezing the growth of customs and imparting an incorrect position, particularly if such codification is done with no room for revision.[57] Thus, it is submitted that restatements should not be binding when determining matters to which ACL is applicable, without looking into the current custom as practised or how the customary rule has evolved since the *Restatement* was documented.[58]

5.2.3 Reliance on Restatements

Restatement of customary law has been defined as 'the exercise of making an authoritative but non-binding representation of customary law on a particular topic by bringing together and

[53] See discussion on the Historical School in section 2.4 of Chapter Two.

[54] *Joyce Atemo v Mary Ipali Imujaro* [2003] KLR 435.

[55] Omolo, Shah and Waki JJA. This same sentiment was much earlier espoused in 1968 by the Attorney-General of Kenya (then), the Hon Charles Njonjo in the Foreword to Eugene Cotrans's Restatement of African Law-Kenya Vol. I, wherein he pointed out that the restatement had no statutory effect and that it should only serve as a guide in the administration of ACL. The Attorney-General made this remarks on the strong believe that the codification of ACL as done, could not lead to positive results as ACL was in a state of fluctuation. Sentiments as noted in the book review by Niekerk BJV (1969) 'Restatement of African Law – Kenya Vol 1 by Eugene Cotran' *The Comparative and International Journal of Southern Africa* 2 (1) 173-174, 173.

[56] The caution resulted from the judgment of the FJS in *Mwathi v Mwathi and another* (1995)-1998) 1 EA 229, in which statements of Kikuyu customs as documented in Eugene Cotran's *Restatement of African Law:2 Kenya II The Law of Succession*, regarding distribution of an intestate's estate were held to be binding on the matter before the Court of Appeal. The FJS was right in declaring so, as it has been highlighted that ACL can change in line with societal circumstances and needs. See discussion in Chapters One, Two and Three.

[57] See discussion in Chapter Two.

[58] Reference here is made to the Restatements by Eugene Cotran, as cited in the Chapter.

rearranging previous expressions of customary law in a more logical and comprehensive way.'[59] In this context, the need by most African states, Kenya included, to employ restatements stems from the unwritten nature of ACL which results in uncertainty.[60] Restatements, therefore, seek to end this uncertainty by elucidating the content and nature of ACL for clearer understanding.[61] In Kenya, Restatements of Africa Law were compiled by Cotran E,[62] and were envisaged to be used by the FJS as 'persuasive guides to the law but having no legislative force.'[63] In this regard, the FJS at times, relies on restatements of ACL in

[59] Allott AN and Cotran E (1971) 'A Background paper on Restatement of Laws in Africa: The need, value and value of such restatement' in Allott AN (ed) Integration of Customary and Modern Legal Systems in Africa: A Conference held at Ibadan 24-29 August 1964, 18-20 in Ubink J (2011) Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia, 5 available at https://openaccess.leidenuniv.nl/bitstream/handle/1887/18589/Ubink%2C%20J.M.%2C%20Stating%20the%20Customary%2C%20IDLO%2C%202001.pdf?sequence=1 (accessed 24 November 2018).

[60] In this regard, Harper E (2011) 34 notes that there are other approaches adopted by States in documenting ACL due to the limited success seen when legal codes are used in documenting customary laws. The author gives the example of the increasingly popular use of self-statements or ascertainments of customary law by states. The author defines these mechanisms as written documents which define key customary law principles that are used by communities in their dispute resolution. There are two positive aspects emanating from such mechanisms. First, they do not describe the customary law principles in fixed terms as to negate any flexibility in terms of their revision. Secondly, there are no set procedures for ascertainments, which allows the process to be participatory and principles adopted therein are documented owing to group consensus. However, ascertainments have been noted to carry the risk of reflecting discriminatory attitudes from the versions of customary law adopted which may entrench or formalize such norms, therefore affecting the fusion of the TJS and FJS. For a detailed discussion see Harper E (2011) Engaging with Customary Justice Systems in Ubink J and McInerney T (eds) *Customary Justice: Perspectives on Legal Empowerment*, 33. Legal and Governance Reform: Lessons Learned No. 3/2011 International Development Law Organization (IDLO).

[61] In this regard, Allott AN observes that the purpose of Restatements was to put into the hands of superior court judges who lacked clear statements of the principles of customary law, where they could be obtained, especially in the areas of personal law, succession, land and torts. See Allott AN (1984) 68.

[62] Eugene Cotran was a Research Officer with the Restatement Project and was seconded to Kenya to record customary laws as applied by the various communities in Kenya. He was further to make recommendations as to how such laws could be incorporated into written law. See Twining W 'The Restatement of African Customary Law: A Comment' (1963) 1 (2) *Journal of Modern African Studies* 221-228, 222.

[63] Restatements of African Law in Kenya stemmed from a project of the London School of Oriental and African Studies in 1959, following a grant from the Nuffield Foundation whose aim was to fund an idea of recording and restating ACL in 16 countries in Africa, Kenya being an example. The project aimed at recording restatements in the laws relating to marriage, family, succession and land tenure. Kenya was the first territory to request assistance from the project, which request was guided by the London Conference on the Future of Law in Africa in 1959-60. See Twining W (1963) 221-2, 224.

making orders,[64] which restatements have been hailed for their 'precision, comprehensiveness and lucidity.'[65]

Conversely, caution should be exercised when relying on the Restatements as sometimes restatements may fail to reflect the true position or practice of the communities in present day.[66] This is despite the vision of those advancing for the publication of restatements on ACL in Kenya that such restatements would enable the FJS to 'take note of the changes in the customary law which have taken place naturally and independently of any formal law-making procedure.'[67] In this context, Kamau W notes that:

> …the version of customary law recognized by the courts is based on static and rule-oriented concepts of custom, spelled out in *Restatements* of customary law (Cotran, 1968), which are reinforced and reproduced through the doctrine of precedent thereby acquiring the status of quasi-codes.[68]

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[64] Reliance on restatements can be credited to the fact that restatements by E Cotran enabled 'civil customary laws of Kenya to find their way into courtroom manuals, in time becoming de facto if not de jure codes of law.' See Shadle BL (1999) 'Changing Traditions to Meet Current Altering Conditions': Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-1960 *Journal of African History* 40 (3) 411-431, 430.

[65] See Twining W (1963) 226. Niekerk BJV (1969) in her review of Cotran's Restatement of African Law in Kenya, echoed similar sentiments, noting that the Restatement covers ±90% of Kenya's population, which devoted detailed summaries of marriage laws of the various ethnic groupings in Kenya and that the terminology used therein is 'acceptable to jurist and layman a like.' See Niekerk BJV (1969) 'Restatement of African Law – Kenya Vol 1 by Eugene Coran' *The Comparative and International Journal of Southern Africa* 2 (1) 173-174, 173-4.

[66] This is attributable to the evolutionary nature of ACL, which creates a distinction between official and living customary law. See discussion in Chapters One and Two on the nature of ACL. Further, the earlier noted change in Kenya, on how bride wealth is now paid in monetary value to the exclusion of livestock, is an example of the evolutionary nature of ACL with changing times. See discussion in Chapter Four section 4.2.1.

[67] See Twining W (1963) 224.

[68] Kamau W 'Law, Pluralism and the Family in Kenya: Beyond Bifurcation of Formal Law and Custom' (2009) 23 (2) *International Journal of Law, Policy and the Family*, 133- 144, 138. She further notes: 'The reliance on Restatements is because customary law was assumed to be timeless and static, and to consist of fixed rules that could be applied by the native courts in disputes involving Africans. She further notes that restatements result in 'ossification of judicial customary law, in a manner that does not take into account the dynamism of people's practices.' Kamau W (2009) 138.

However, the FJS does not entirely rely on the position or rules spelt out in Cotran's Restatements in making its decisions.[69] In this regard, various cases indicate that the FJS departs from the Restatements where it feels that they are unsuitable for application in Kenya.[70] This position was reflected in the FJS as early as the 1970s in *Re Kibiego*,[71] in which the FJS held that a widow is the most suitable person to obtain representation to her deceased's husband estate.[72] This was in contrast to the position of the Restatements by Cotran, which reported that under Nandi customary law, the family elders will always appoint the eldest son of the deceased as administrator.[73] The brief facts of the case were that the deceased died intestate, being survived by a widow and minor children. The widow then applied for grant of letters of administration and the question for determination in the FJS was whether the widow of an African of the Nandi tribe may apply for the grant of letters of administration. This is despite the customs of her community dictating that the eldest son of a deceased is always appointed administrator to the estate. The FJS issued the grant to the widow, noting that:

> Whatever Cotran's source of Nandi law may be, I am of the opinion that in today's Kenya, in the absence of a valid reason such as grave unsuitability, a widow of whatever race living in the country, is entitled to apply to the court for the grant of letters of administration, more so when the children, as in the instant case, are minors. A widow is the most suitable person to obtain representation to her deceased husband's estate. In the normal course of events she is the person who would rightfully, properly and honestly safeguard the assets of the estate for

[69] This is reflective of the fact that the FJS does not entirely observe the ideas as advanced by the Historical School, such as the idea that history and tradition should be embraced in law making as law stems from the natives of any society. See the views of Savigny as discussed in section 2.4 of Chapter Two.

[70] See Cotran E (1968) 230.

[71] *Re Kibiego* [1972] EA 179 probate case 15 of 1972 High Court of Kenya at Nairobi.

[72] Madan J.

[73] See Cotran E Restatement of African Law – Kenya Vol II, 116.

> herself and her children. It would be going back to medieval conception to cling to a tribal custom by refusing her grant which is obviously unsuited to the progressive society of Kenya in this year of grace. *A legal system ought to be able to march with the changing conditions fitting itself into the aspirations of the people which it is supposed to safeguard and serve.*[74]

It is submitted that the FJS in making the above decision, recognised that customs and traditions have to be in harmony with progressing society. Further that, in doing so, the FJS upheld the one of the views advanced by the Historical School which recognises that culture is based on various stages of social development. In specific is the fourth stage of social development which entails modification of fundamental customs and traditions, so as to bring law in harmony with the progressing society, as identified by Sir Henry Maine.[75] Accordingly, the FJS exercises caution in applying unfavourable customary rules of succession, and strives to uphold customs that have evolved and which reflect the true nature of customary succession practices within the various communities in Kenya.[76] Thereby, the FJS ensures the protection of intestate estates and the rights of the heirs and/ or beneficiaries of a deceased.[77]

In contrast to the foregoing position where the FJS departs from the rules as contained in Cotran's Restatements, the FJS upholds the position therein where the rules still apply to customs of the communities in present day. For example, in a recent case,[78] the FJS applied the

[74] Madan, J [own emphasis].

[75] See discussion in Chapter Two section 2.4.

[76] However, this is not always achieved as will be shown in the discussion in section 5.2.5 of this Chapter.

[77] As earlier noted, protection of intestate estates through their stricter control by the FJS was one key recommendation of the 1968 Commission on the Law of Succession. See Cotran E (1987) 231. In this regard, this study also advocates for the continued supervisory role of the FJS in TJS matters, as will be discussed in Chapter Six.

[78] Judgement delivered on 27 February 2017.

Restatement of African Law of Marriage and Divorce,[79] to determine whether a woman was a wife under Masai customary law for purposes of succession. This was in *Loise Selenkia v Grace Naneu Andrew and another*,[80] where the FJS referred to the above Restatement to determine whether a Masai customary marriage existed between the deceased (one Selenkia Ole Mpapi) and Grace Naneu Andrew.[81] Grace was seeking confirmation as a second wife to the deceased, so as to benefit from his intestate estate. The deceased had initially been married to the objector herein (Loise), which marriage was still subsisting at the time of his death. The FJS by reference to the Restatement,[82] outlined the process of Masai customary marriage as first, formation of marriage negotiations; secondly negotiating the formation of marriage with different groups, [noting that in some instances, negotiations begin when the parties are young]; thirdly identification of the girl to whom butter is smeared on the forehead by the boy's parents;[83] fourthly the boy's parents provide honey as a gift to the girl's parents;[84] and lastly, marriage consideration (dowry) is paid either by livestock or non-livestock gifts as agreed during the negotiations.[85] The FJS noted that the deceased had met the outlined requirements, and paid dowry of cattle, goats and Kshs 15,000 to the parents of Grace. The FJS thus confirmed the existence of a Masai customary marriage between the deceased and Grace, and further relied on section 3(5) of the LSA, to confirm that Grace was rightful beneficiary to the

[79] Cotran E (1968) Restatement of African Law of Marriage and Divorce.

[80] *Loise Selenkia v Grace Naneu Andrew and another* succession cause 231 of 2007 [2017] eKLR.

[81] Grace was the 1st respondent in the matter. Grace had to prove the existent of a customary marriage between her and the deceased so as to be a beneficiary of the deceased's estate under section 3(5) of the LSA. The 2nd respondent was Emmanuel Memusi.

[82] Chapter 15, 155.

[83] This is referred to as *esirata*. See Chapter 15, 155.

[84] The gift of honey is referred to as *ensiret-enkoshoke*. See Chapter 15, 155.

[85] Livestock gifts are referred to as *isayieta* and consist of cattle, goats and sheep. The Restatement notes that this dowry can be paid before or after the marriage. See Chapter 15, 155.

deceased's estate.[86] The FJS, therefore, issued the grant of letters of administration intestate, to the two widows of the deceased — Loise and Grace.[87]

The reliance on customary rules as contained in the Restatements was noted in the earlier cited cases of *Monica Jesang Katam v Jackson Chepkwony & another,*[88] *Hotensiah Wanjiku Yawe v Public Trustee,*[89] *In the Matter of the Estate of Humphrey Edward Githuru Kamuyu (deceased),*[90] and *In the Matter of the Estate of Sila Kibiwott Rono.*[91] In these cases, the FJS upheld the position of the customary rules as stated in the Restatements in arriving at its decisions, since the Restatements reflected the prevailing position and/or practice as carried out in the various Kenyan communities. Accordingly, the usefulness of Cotran's Restatements in Kenya cannot be undermined. They have proved to be most invaluable to the FJS since their introduction in Kenya in ascertaining customary rules and/or practices. For this reason, they have steadily been relied on by the FJS in decision-making to date. Therefore, the study still advocates for their use to the extent in which they report the correct position as pertains to customary laws of the various communities in Kenya. This is attributed to the fact
that for the most part, the Restatements give the correct position on certain aspects of ACL of the various communities in Kenya, other than in the cases where customs have changed due to

[86] Because as noted earlier, s 3(5) of the LSA, Chap 160 Laws of Kenya, recognises 'wives' in plural unions as beneficiaries to a deceased's estate.

[87] By order of Muigai MW, J. See also *Ndele Ole Kimiti v Motesia Ole Kores* civil appeal Number 75 of 1973 in which the FJS considered what constituted a Masai customary law marriage.

[88] *Monica Jesang Katam v Jackson Chepkwony & another* [2011] eKLR.

[89] *Hotensiah Wanjiku Yawe v Public Trustee* Court of Appeal of East Africa (as it then was) Civil Appeal Number 13 of 1976.

[90] *In the Matter of the Estate of Humphrey Edward Githuru Kamuyu* (deceased) Nairobi High Court Succession Cause Number 2322 of 1995 (Visram J).

[91] *In the Matter of the Estate of Sila Kibiwott Rono* Eldoret High Court probate and administration number 130 of 2000 (Nambuye RN, J).

socio-economic and other reasons. In this way, the Restatements do not present themselves as codes which would negate any effort to revise or reform African customary law. This assertion is based on similar views by Allott AN, who notes that the Restatements were intended only to be guides, *prima facie* evidence of the customary law, and not codes.[92] To this extent, the author notes that restatements are equivalent to the expert testimony of witnesses upon which the courts had formerly relied.[93] He further observes that they were not codes for two reasons: first, because they would freeze the law at a certain stage of its development; and secondly, it was hard to achieve a sufficiently comprehensive and accurate statement of the law which would justify the exclusion of all other evidence about what the law was-the main object of a code.[94]

5.2.4 Reliance on expert witnesses

The preceding thematic sections have highlighted the fact that the FJS errs at times in making its decisions, by upholding certain ACL principles and/or rules, either codified in Restatements or unwritten. In this context, the unwritten nature of ACL necessitates that it be proved in the FJS for it to be applied.[95] It is required that a party calls oral evidence or refers to any recognised treatise or other publication on the relevant customary law, where such party desires to provide evidence on the application of customary law.[96] This is because the unwritten nature of ACL

[92] See Allott AN (1984) 68.

[93] See Allott AN (1984) 68.

[94] See Allott AN (1984) 68.

[95] See Musyoka WM (2016) 333.

[96] As provided for by Rule 64, Probate and Administration Rules under the Schedule to the LSA. In this regard, Musyoka WM notes that the role of Rule 64 is to provide proof of customary law and not to cater for the introduction of customary law to situations covered by the Act. See Musyoka WM (2016) 333.

requires that it be proved as matter of evidence.[97] An important aspect to note, is that the witnesses called in to adduce evidence on the existence of a particular custom, need not be experts or even Africans.[98] All that witnesses should demonstrate is that they have in-depth knowledge of the relevant customary law.[99] This position was concisely articulated by Newbold VP,[100] when he stated:

> When it is alleged that by any particular African customary law a result follows different from that which would follow under the ordinary Law of Kenya, then the existence of that African customary law has, unless it has become of such notoriety that judicial notice may be taken of it under section 60 of the Evidence Act 1963…to be proved by the person invoking it in precisely the same way that a person invoking customary law rights has to prove the custom. In proving such African customary law opinion evidence is admissible under section 51 of the Evidence Act, 1963, and in accordance with section 60 (2) of that Act, it may also be proved by the production of a book or document. Once proved, the FJS must be guided by it in accordance with regulation 4 of the Kenya the Kenya (Jurisdiction of Courts and Pending Proceedings) Regulations, 1963.[101]

Accordingly, proof of ACL can be employed in determining several succession aspects such as whether one is a legitimate wife under customary law and whether persons claiming to be

[97] Section 51 of the Evidence Act Chapter 80 of the Laws of Kenya, and the Civil Procedure Act Chapter 21 Laws of Kenya, provide the statutory basis for this requirement.

[98] See Musyoka WM (2016) 331.

[99] See Musyoka WM (2016) 331 for a further discussion.

[100] In *Ernest Kinyanjui Kimani v Muiru Gikanga and another* (1965) EA 735 (Newbold VP and Crabbe JA, Duffus JA dissenting).

[101] Chapter Three noted that this regulation was the predecessor to the current s 3(2) Judicature Act, Chap 8 Laws of Kenya.

dependants of a deceased are rightfully so.[102] The use of witnesses by an applicant can play a major role in one's case, especially in ascertaining certain customs and circumstances.[103] For instance, In *Re Estate of DMM (Deceased)*,[104] the applicant (one Angela Makau) was protesting the confirmation of letters of administration of the deceased's estate to the respondent Fransisca Nzuvi.[105] The applicant testified to being married to the deceased under Kamba customary law, dowry being paid and having four children with the deceased.[106] The respondents also testified to being married to the deceased and called on a witness to show that the applicant lived at her maternal home and was divorced from the deceased.[107] The issue was whether the applicant was married to the deceased, and whether she and her children were entitled to inherit from the deceased's estate.[108] The FJS in making its determination, relied on Restatements of Cotran,[109] which outlined the essentials of a valid Kamba customary marriage, and on precedent which

[102] These aspects were highlighted in Chapter Four as some of the main issues which arise in succession disputes in Kenya.

[103] However, at times, summoned witnesses can act as a disadvantage, especially when the FJS views their evidence as coached, as shown *In the Matter of Estate of James Mberi Kenyatta* succession cause 2269 of 1998, where the FJS held that the fact that a party approached a witness to testify that the traditional ceremony took place evidenced a possibility of the ceremony not having taken place.

[104] In *Re Estate of DMM (Deceased) Francisca Syombua Nzuvi & Yvone Taabu Muli v Angela Mue Makau* High Court succession number 131 of 2017 [2018] eKLR.

[105] The applicant claimed that the respondent was her co-wife. She testified that she was alive when the other co-wives, Fransisca and Rose Kalekye were married to the deceased. Rose was the second wife while Fransisca was the third wife. Paras 6-7.

[106] She testified that her dowry was paid in the year 1976 in accordance with Kamba customary law. Para 8.

[107] PW1 told the court that the petitioner had been taken back to her maternal home 42 years back, where she established a home as a single mother. Para 19.

[108] She produced a letter from the District Commissioner introducing her as the first wife to the deceased and that he had sired her four children. The other two wives had produced as evidence a letter from the area chief excluding her as a wife of the deceased and only supporting the other two wives as those of the deceased. Paras 9 and 10.

[109] Marriage and Divorce (1968) which outlined the essentials of a valid Kamba customary marriage as including: capacity, consent, slaughter of a billy goat, cohabitation and marriage consideration. On the latter aspect of dowry, emphasis was placed on the payment of 3 traditional goats (*Mbui sya Ntheo*) by the groom. This was highlighted by Mwera JW, J in *Re Estate of Stephen Kimuyu Ngeki* [1998] eKLR.

provided that first, the onus of proving a customary marriage is on the party who claims; second that the standard of proof is on a balance of probabilities;[110] and lastly that the evidence as to the formalities required for a customary law marriage must be proved to the above standard.[111] The FJS held that the applicant had not satisfied the above elements,[112] and, therefore, not entitled to any portion of the deceased estate.[113]

The use of witnesses in proving ACL is further demonstrated by a recent case in Kenya where witnesses were called to ascertain Kikuyu customary law. The case was captured in the dailies, which reported that two retired Presbyterian Church clergymen and a senior chief would testify as Kikuyu customary law experts in a property dispute involving an 80-year-old widow and her son against her four daughters. The four daughters were challenging the award by the FJS of their late father's wealth valued at KSh500 million, to their mother and their brother 35 years ago. Their challenge was further based on the fact that their father Peter Mondo, died intestate

[110] As considered in all civil actions.

[111] Per Kneller J in *Njoki v Mathara and Others* civil appeal number 71 of 1989. It is worthy of note, however, that in some instances, some ceremonies and ritual for customary marriages may not have been fulfilled before a deceased's death but the FJS does not always allow room for such to affect the presumption or validity of a marriage, as held in *Anna Munini and Another v Margaret Nzambi* civil case number 751 of 1977.

[112] No marriage consideration was paid, she did not discharge the burden of proving the existence of a valid Kamba customary marriage between herself and the deceased and further that during the burial neither her nor her children featured as being part of the family. The protestor also failed to produce any documentary evidence to confirm the siring of her children by the deceased and that no witness testified to this. In addition, she did not prove that the deceased was maintaining her and her children prior to his death. paras 67-71. Further the protestor's testimony was called into question when she did not produce a witness such as relatives or clan members, whom she testified had knowledge to her marriage to the deceased.

[113] Kariuki C, J. Judment delivered on 9 May 2018. See also *Gachigi v Kamau* [2003] 1 EA 69, in which oral evidence was relied upon in finding that the objector, claiming to be a customary law widow of the deceased, was found not to be and that her and her children were thus, not entitled to administer his estate. (Tunoi, Bosire, and Owuor JJA).

in 1978. Hence, they wanted the matter re-determined by the FJS, so as to be included in the distribution of their father's vast estate.[114]

This study submits that the FJS in the above cases (as well as others in which witnesses are called to verify ACL as discussed, as well as others in which ACL is upheld), may have been directed by precedent. In this regard, the study notes the words of the FJS in the case of *Sheikh Mushaq Hassan v Nathan Mwangi Kamau Transporters and 5 others*,[115] where it stated in part: 'If a judge is required to apply a custom, it is often safe to summon to his assistance one or more competent assessors from the tribe or community of the parties to the action… before making critical comments on a custom.'[116] Consequently, this study submits that it concurs with the reliance of witnesses by the FJS as often times, there are no records of ACL.[117] Further

[114] See 'Three wise men' counsel in Sh 500M Succession Dispute Daily Nation Wednesday March 9 2016 available at https://www.nation.co.ke/news/Three-wise-men-counsel-in-Sh500m-succession-feud/1056-3108706-312hhh/index.html (accessed 16 October 2018).

[115] *Sheikh Mushaq Hassan v Nathan Mwangi Kamau Transporters and 5 others* civil appeal number 123 of 1985 [1986] eKLR. The case resulted from an application for payment of damages under the lost years doctrine, due to negligent causation of death. The Court *inter alia* addressed the care of parents by children based on African and Hindu customary laws. It stated:

> With regard to Africans, the courts in Kenya exercise their respective jurisdictions inter alia to the extent the circumstances of Kenya and its inhabitants permit and subject to the qualifications those circumstances render necessary. The trial judge's contemptuous remarks about the custom of the people is contrary to section 3(1) of the Judicature Act, Cap 8 and therefore to be regretted and disapproved. The custom could not possibly be said to be repugnant to justice and morality. The customs is well within the tenets of the great religions of Hinduism, Christianity and Islam. It is a custom the practice of which appeals to ordinary people in Kenya, is not malevolent and the trial judge's view that it is 'outrageous and pernicious' is not well founded and must be rejected. I would say a judge should be very slow to criticize any particular custom of people. There always is a purpose for the practice of a custom. Human beings do not partake for too long in customs which are not beneficial to them. If a judge is required to apply a custom, it is often safe to summon to its assistance one of more competent assessors from the tribe or community of the parties to the action – see section 87 of the Civil Procedure Act – before making critical comments on a custom. It is clear from the relevant part of his judgment that the trial judge does not fully understand the substance and application of the material custom.

[116] Nyarangi JA.

[117] Earlier discussions in this Chapter noted that the Restatements by Cotran which are relied on by the FJS, do not contain the customary practices of all communities in Kenya.

that, when ACL evolves or develops, witnesses are required to shed light on these new developments or reforms.[118]

5.2.5 General recognition of African Customary Law

This theme analyses two common instances in which ACL is upheld by the FJS, when making orders concerning the administration and/or distribution of a deceased's estate. These instances occur when first, ACL is applied to estates of persons dying after the enactment of the LSA,[119] and secondly, when ACL is applied to property in areas not exempt by secs 32 and 33, as discussed earlier in the Chapter.[120] These instances can occur concurrently within a matter, as illustrated *In the Matter of the Estate of Sila Kibiwott Rono*[121] and *In the Matter of the Estate of Chumo Arusei* [122] in which the FJS applied Nandi customary law to the estates of both deceased in the respective cases. [123] In both cases, Musyoka WM holds the view that the FJS misapplied ACL to the above cases, grounding his argument on the fact that both deceased died

[118] See *Sakina Sote Kaittany & Another v Mary Wamaitha*, Court of Appeal number 108 of 1995 where proof of a customary marriage was required.

[119] Yet the applicable law is that provided by the LSA, as noted earlier, *vide* section 2(1) of the LSA. This position has been perpetuated by the FJS in various cases. See *In the Matter of the Estate of Grace Nguhi Michobo (deceased*) Nairobi High Court case number 1978 of 2000; *In the matter of Kiiru Muhia 'A' (deceased)* Nairobi High Court Civil suit number 2487 (Rawal J) and *In the Matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura(deceased)* Nairobi High Court Succession Case Number 935 of 2003 (Kamau J).

[120] In the same context, Musyoka WM further notes that there is a trend by a section of the FJS, where s 40 LSA is disregarded and instead, ACL and principles as set out under s 28 LSA are applied. See Musyoka WM (2016) 123. Section 40(1) seeks to protect wives in customary marriages, by providing that in distribution of a deceased's property, wives should be considered as an additional unit to the number of children, and therefore, entitled to a share of the deceased's net intestate estate.

[121] *In the Matter of the Estate of Sila Kibiwott Rono* Eldoret High Court probate and administration number 130 of 2000 (Nambuye RN, J). See case discussion under section 5.2.1 of this Chapter.

[122] *In the Matter of the Estate of Chumo Arusei* Eldoret High Court probate & administration cause 26 of 1998 [2003] eKLR. Case discussed under section 5.3.1 of this Chapter.

[123] See case discussion under section 5.2.1 of this Chapter.

after the commencement of the LSA,[124] and that, therefore, the applicable law should have been the LSA.[125] In addition, he observes that their estates did not fall under the exempt areas as per s 32 of the LSA to merit the application of African customary rules on intestacy in determining the matters before the FJS.[126]

Reading from the provisions of the LSA,[127] this study agrees with the author's view as above. However, in aspiring to show the relevance of ACL in succession matters and why it should further be acknowledged by the FJS in succession matters, this study contends that by applying ACL in the above cases, no injustice was served. This position is rooted in the fact that the FJS also applied statutory provisions of the LSA alongside the respective Nandi customary laws, to arrive at equitable distribution of the estates.[128] In this context, this study garners more support for its argument that ACL should be upheld by the FJS in succession matters, as it informs most parties when deciding on matters succession. This assertion is further supported by the views advanced by the Historical School, which postulates that law can only be understood in terms of its social context, which is based on the concept of communities.[129] In this respect, it is argued that the FJS applied Nandi customary law based on the application of the noted customary rules as applied in the Nandi community.

[124] As noted earlier, the LSA commenced its operation on 1 July 1981. The late Rono died in 2000 while the late Arusei died in 1997.

[125] See Musyoka WM (2016) 21.

[126] See Musyoka WM (2016) 21.

[127] See sections 2(1), 32 and 33.

[128] As noted in section 5.2.1, the FJS although stating to be guided by the Nandi customary law in the above cases, still made distribution orders of the deceased's estates in further consideration of provisions of the LSA. See also *Mary Rono v Jane Rono and another* civil appeal 66 of 2002 [2005] eKLR.

[129] See views as discussed in Chapter two section 2.4.1 and as noted by Abraham G (2014) 17.

However, in as much as this study calls for the FJS to uphold ACL rules or practices,[130] it does not support rules end result of which is to disenfranchise dependants (women) when upheld by the FJS.[131] In this regard, South Africa forms a good example in highlighting the discrimination which was occasioned on women, by virtue of application of the rule of male primogeniture in inheritance.[132] This practice was highlighted in the *Bhe* case (*Bhe v Magistrate Khayelitsha; Shibi v Sitole; SA Human Rights Commission v President of the Republic of South Africa),*[133] and has since been declared invalid. Further, current studies and research now show that it is slowly diminishing in application. However, despite the court's pronunciation of the practice as invalid, the effects of the order are being felt and/or witnessed well over 10 years after its declaration as unconstitutional by the courts. Consequently, the case has led to numerous debates, key among them being the appropriateness of the abolition of the rule. Some have argued that instead of ruling the practice unconstitutional, the best way would have been for the courts to order or encourage development and/or reform of the law so as to allow a smooth transition amongst communities, who still heavily rely and depend on ACL in determining succession and other matters related to their personal laws.[134]

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[130] In this context, Kamau W notes that '[i]n Kenya, it is often difficult to distinguish between customary law and customary practices, due to the ever-evolving nature of customary practices, which makes it difficult to ascertain the content of customary law at any given time.' See Kamau W (2011) 7.

[131] This is in line with article 27 of the Constitution 2010, which provides for equality and freedom from discrimination. In particular, see subsection (3) which states that '[w]omen and men have the right to equal treatment, including the right to equal opportunities in political, economic, *cultural* and social spheres' [own emphasis].

[132] The rule entails the inheritance of an estate by the eldest legitimate son of a deceased, to the exclusion of all other siblings.

[133] *Bhe v Magistrate Khayelitsha; Shibi v Sitole; SA Human Rights Commission v President of the Republic of South Africa* 2005 1 BCLR 1 (CC).

[134] See Van Niekerk GJ 'Succession, Living Indigenous Law and Ubuntu in the Constitutional Court' (2005) 26(3) *Obiter*, 474-487, for a general discussion.

From the foregoing discussion, it is imperative to note that some previous decisions by the FJS in Kenya have in some instances led the courts to be viewed as the drive that perpetuates and embeds discriminatory practices as found in ACL, particularly during the dispensation of the 1963 (Independence) Constitution.[135] In this regard, the FJS was faulted as being an 'enabler' of this discriminatory position,[136] which does not recognise the inheritance by women of their deceased's father's estate.[137] It is submitted that the application of ACL in this context has biased consequences to female beneficiaries of the deceased.[138] In this regard, the limit to women's inheritance through application of ACL in succession has broached the subject of women discrimination in inheritance in Kenya for the longest time. This has led to numerous debates, with majority of the sentiments pointing to the discriminatory nature of ACL when it comes to inheritance by women.[139] The case of *Mukindia Kimuru and another v Margaret*

[135] As earlier noted, this study is opposed to application of ACL in instances where the said customary rules subject any party to discrimination of whichever kind, which position is in line with article 27 of the Constitution 2010, as earlier highlighted. In this context, a contrast of the provisions of the 1963 and 2010 Constitutions will be highlighted further in this Chapter, in relation to women's inheritance.

[136] This supposition is made by this study based on evidentiary support of cases, such as illustrated *In the Matter of the Estate of Mutio Ikonyo (Deceased)* Machakos High Court probate and administration number 203 of 1996, in which the FJS held that a married daughter was not entitled to inherit from her father's estate, being guided by Kamba customary law. Musyoka WM argues that the position stems from the fact that the FJS misapplies or is indifferent to some provisions of the LSA, in particular s 2(1) which underlines that the LSA shall apply to estates of persons dying after 1 July 1981 and ss 32 and 33 LSA which exempt areas and circumstances to which ACL is applicable. See Musyoka WM (2016) 24.

[137] This stems from the fact that most communities in Kenya are patrilineal with the Digo and Duruma being matrilineal, as noted in Chapter Four.

[138] Other than inheritance issues, application of ACL by the FJS can subject women to pain in dealing with burial aspects of their deceased husband. The often-cited case of SM Otieno (*Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* civil case 4873 of 1986 (1987) eKLR, is instructive in this regard, in which Mary Wambui Otieno (deceased's wife) was denied the right to bury her husband at their urban home which they shared as the FJS ruled that the deceased, a prominent lawyer, be buried in his rural home and by his brothers according to Luo customs. The FJS believed despite living a 'westernised' lifestyle and having made a will in accordance with statutory law, the law that was applicable to him was that of his native tribe-Luo customary law. There exists a myriad of literature on the analysis of this case. See for example, Ojwang JB and Mugambi JNK *SM Otieno Case: Death and Burial in Modern Kenya* (1989) for an extensive discussion. See also Gordon A 'Gender, Ethnicity, and Class in Kenya: "Burying Otieno" Revisited' in *Postcolonial, Emergent, and Indigenous Feminisms* (1995) 20 (4) 883-912 and Stamp P 'Burying Otieno: 'The Politics of Gender and Ethnicity in Kenya' in *Women, Family, State, and Economy in Africa* (1991)16 (4) 808-845.

[139] See Kameri-Mbote P '*The Law of Succession in Kenya: Gender Perspectives in Property Management and Control*' (1995), for a general discussion.

Kanario,[140] is illustrative in this regard, where a daughter was excluded from inheriting her father's estate.[141] It should be noted from the onset that this decision by the FJS was made by reliance on provisions in the independence Constitution.[142] The facts of the case were as follows. The deceased died in 1979, following which a dispute arose between the respondent and the appellants as to whether she possessed a right to inherit the deceased's property. The respondent was the deceased's daughter (adopted) while the appellants were the adoptive father and his sons. The FJS while relying on Kimeru customary law, and section 82 of the independence Constitution held that the respondent was not entitled to a share of the estate.[143] The FJS stated:

> The Kimeru Customary Law recognises the patrilineal system for inheritance of land. Women do not inherit land on their father's side: they play a part in the family or clan in which they marry…I have set out the position as regards inheritance of land by daughters. Generally they cannot inherit land. Such customary law sounds discriminatory but the Constitution of Kenya permits such limited discrimination. Section 82(1) of the Constitution provides as follows: "Subject to subsection (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect. Subsection (4) of Section 82 of the Constitution provides: (4) Subsection (1) shall not apply in any law so far as that law makes provision:
>
> (b) With respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law

[140] *Mukindia Kimuru and another v Margaret Kanario* Nyeri Court of Appeal civil appeal 19 of 1999.

[141] See also *Mwathi v Mwathi and another [*1995-98] 1 EA 229, in which the FJS (Court of Appeal) applied Kikuyu customary law to disinherit married daughters of their father's estate.

[142] Now repealed by the Constitution 2010 as earlier noted in the study.

[143] Gicheru, Shah and Owuor, JJA.

(c) For the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.

As I read and understand the above-mentioned subsections of section 82 of the Constitution I am bound to say and I do say that exclusion of daughters from inheritance of land is 'sanctioned' by the Constitution when a court is applying customary law in regard to devolution of property on death of the owner of that property.[144]

Evidently, the above decision by the FJS was discriminatory and quite disappointing considering that the former independence Constitution effected the unfair outcome of the matter, as its provisions that were relied upon were inherently discriminatory.[145] It is argued that reliance on these provisions by the FJS indicates that the pertinent fact of disinheriting the deceased's daughters was not considered by the FJS. Conversely, the FJS in other instances, took into consideration the negative impact such discriminatory constitutional provisions and/or customary rules would have on the beneficiaries and consequently, disregarded them in making its orders.[146] In doing so, the FJS considered such discriminatory customary law rules

[144] Shah JA.

[145] This study submits this view on the basis that a country's constitution, being the supreme law of the land, should afford protection to its citizens and not the contrary. In this context, the FJS (Rawal J) in *Re Estate of Lerionka Ole Ntutu (Deceased)* [2008] eKLR, noted that 'Constitution of any country of the world should not represent a mere body or skeleton without a soul or spirit of its own. Thus in my opinion… the Constitution was and cannot have been made so as to deprive any person of their social or legal right only on the basis of the sex. Finding otherwise would be derogatory to human dignity and equality amongst sex universally applied. I shall add that taking the view otherwise shall definitely create imbalance and absurd situation.'

[146] In this context, Harper E argues that the reason for the existence of such customary norms should be investigated before condemning communities to facilitating gender discrimination. She gives the example of Somalia where the rationale that is applied is that allowing women to inherit would 'dilute the group's collective strength and defensive power.' Although she notes that such perceptions are not necessarily justifiable or to be supported, the reason for their application such as social security, may reign supreme, without which women may be subject to vulnerability in an insecure community. For a further discussion see Harper E (2011) Engaging with Customary Justice Systems in Ubink J and McInerney T (eds) *Customary Justice: Perspectives on Legal Empowerment*, 33. Legal and Governance Reform: Lessons Learned No. 3/2011 International Development Law Organization (IDLO), 34-5.

repugnant to justice and morality, in an effort to safeguard the rights of the girl child and/or women.[147] This position was espoused by the FJS in *Re Estate of Lerionka Ole Ntutu (Deceased)*,[148] in which the FJS held that any customs that seek to discriminate against the girl child are repugnant and should not be upheld.[149] In this matter, the deceased died intestate leaving behind several wives and children. The sons proposed to distribute the estate in accordance with Masai customary succession law which excluded daughters from inheriting their father's estate. The daughters hence objected to this manner of distribution of the deceased's intestate estate. The issue before the FJS, therefore, was whether the applicable law in respect of the estate was Masai customary law or the LSA, regarding the daughters of the deceased. The FJS noted that the provisions of the LSA do not discriminate between female and male children of the deceased, and that children included sons and daughters.[150] The FJS further noted that as per all Kenyan customary laws, married daughters were not entitled to inherit the estate of their deceased father,[151] but that with the advent of the LSA, differential

[147] In *John Gitata Mwangi v Jonathan Njuguna Mwangi and* others Nairobi Court of Appeal civil appeal number 213 of 1997, Bosire JA dissenting, stated that personal laws and customary practices are relevant in determining issues regarding the estate of a deceased African unless such laws and practices are disqualified due to repugnancy.

[148] *Re Estate of Lerionka Ole Ntutu (Deceased)* [2008] eKLR.

[149] Rawal, J.

[150] See s 3(2) LSA which defines a child without any discrimination on account of gender.

[151] Rawal J, however noted that '…[m]ost of the customary laws (predominantly Kikuyu customary law), recognized an unmarried daughter as a son and allowed her equal rights along her brothers to inherit. This as the background of our custom and social values, which at the prevalent period of time was probably socially just.'

treatment between the married and unmarried daughters was abolished.[152] The FJS, therefore, found that the deceased's daughters were entitled to inherit from his estate.[153]

Of important note in the above *Ntutu* case, is that the FJS in the spirit of avoiding discrimination on the deceased's daughters, disregarded section 82 of the former Constitution which would have occasioned injustice on the daughters of the deceased when applied as seen in the earlier discussed case of *Mukindia Kimuru and another v Margaret Kanario.*[154] The FJS addressed this situation by relying on parallel provisions of the same Constitution,[155] and on international treaties which Kenya has ratified such as the Convention on the Elimination of All forms of Discrimination against Women (CEDAW), in arriving at its decision.[156] In this context, the

[152] Rawal J noted: 'In my considered view, the Act as a whole has not discriminated between the male and female children and I have not been shown that the Commissioners while drafting the Act had this differentiation in their mind and hence section 2(2) and section 29(a) of the Act.'

[153] Rawal. J. This decision connotes the divergent attitude among members of the FJS which this study applauds, as it ensures equality amongst all beneficiaries irrespective of gender. It also supports the study's view that ACL should not be upheld in instances where it discriminates on beneficiaries.

[154] *Mukindia Kimuru and another v Margaret Kanario* Nyeri Court of Appeal civil appeal 19 of 1999. In this context, this study noted earlier that the current Constitution 2010, through its art 2(4), limits the application of customary law that is inconsistent with its provisions and renders such customs void, to the extent of their inconsistency. See discussion in Chapters One and Three. Thus, ACL cannot be applied now to undermine the provisions of the Bill of Rights in the Constitution, as observed by Kamau W (2011) 11.

[155] Notably s 82 (3) which provided:

> In this section the expression "discriminatory" means 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 connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. [own emphasis].

Of note is that the above provision had not always been the same with regard to discrimination on grounds of sex. 'Or sex' was inserted by a constitutional amendment — Act Number 9 of 1997.

[156] See Article 1 of CEDAW relied upon. The other instruments relied upon were the (a) Universal Declaration of Human Rights (1948), (b) Covenant on Civil and Political Rights, (c) Covenant on Economic, Social and Cultural Rights and (d) African Charter of Human Rights and People's Rights (Banjul Charter) 1981.

case of *Mary Rono v Jane Rono and another,*[157] is also enlightening in showing instances in which the FJS takes into consideration the wishes of the parties and of written law indicating that girls should also inherit. In this case, the FJS held that women are entitled to inherit. In arriving at this decision, the FJS relied on international instruments, stating that '[a]s a member of the international community, Kenya subscribes to international customary laws and has ratified various international covenants and treaties.'[158] This pronouncement by the FJS is important as it illustrates the position the FJS took on customary international law and international agreements applicable to Kenya. In this regard, the FJS noted thus:

> I have gone at some length into international law provisions to underscore the view I take in this matter that the central issue relating to discrimination which this appeal raises, cannot be fully addressed by reference to domestic legislation alone. The relevant international laws which Kenya has ratified, will also inform my decision.[159]

Reliance on international instruments by the FJS as above-noted, has led to the observation that there is an emergent body of jurisprudence by the FJS which espouses the view that ACL should not be applied where it offends certain principles.[160] Such principles include those enshrined in international human rights instruments, with the most notable being the principle against gender discrimination.[161] The FJS promotes this position based on the fact that

[157] *Mary Rono v Jane Rono and another* civil appeal 66 of 2002 [2005] eKLR.

[158] Waki, J. He further stated: 'In particular, it subscribes to the international Bill of Rights, which is the 1948 Universal Declaration of Human Rights (UDHR) and two international human rights covenants: the Covenant on economic, social and cultural rights and the Covenant on civil and political Rights …the Convention on the Elimination of All Forms of Discrimination Against Women…and in the African context, Kenya subscribes to the African Charter of Human and Peoples' Rights, otherwise known as the Banjul Charter (1981), which it ratified in 1992 without reservations.'

[159] Waki, JA.

[160] See Kamau W (2011) 17.

[161] Efforts by the FJS to discount gender discrimination is highly regarded. In this context, Kamau W notes that members of the FJS (judges) who endorse discrimination along the lines of gender, have received gender training

international law forms part of the laws of Kenya.[162] The matter of *Ejidioh Njiru Mbinga v Mary Muthoni Mbinga and another*[163] clearly illustrates this. In this case, customary laws that allowed discrimination against married daughters in inheritance, to the effect that they should not inherit their father's estate, was overridden by the FJS. The FJS arrived at this decision by relying on the repugnancy clause in the Judicature Act, as well as international treaties to which Kenya is a signatory.[164]

From the foregoing discussion, this study opines that it is prudent of the FJS to be guided by international treatises in matters before it, due to the gains realised when they are relied upon as seen in the above cases.[165] Further, it is submitted that omission to do so (when it seems logical to rely on them), may lead to the credibility of FJS decisions being questioned, especially when its final orders are laden with prejudice, as seen in *In the Matter of the Estate*

under the Jurisprudence of Equality Program. She further notes that in some instances, the FJS has on occasion, relied upon international treatises before they formed part of the domestic legislation in Kenya. She observes this while citing the case of *Re Estate of Musyoka (deceased)* (2005) to illustrate this position. In this matter, Kamba customary law was relied upon to exclude a woman from inheritance. The FJS applied the UDHR, CEDAW, and the Additional Protocol to the African Charter on Human and Peoples' Rights and found the customary rule contrary to provisions of the LSA on gender equality and discriminatory on the grounds of gender as perceived under international instruments. See Kamau W (2011) 18.

[162] See Kamau W (2011) 17. This is sanctioned by art 2(5) of the Kenya Constitution 2010, which states that '[t]he general rules of international law shall form part of the law of Kenya' and further article 2(6) which provides that '[a]ny treaty or convention ratified by Kenyans shall form part of the law of Kenya under this Constitution.'

[163] *Ejidioh Njiru Mbinga v Mary Muthoni Mbinga and another* [2006] eKLR.

[164] The treaties relied upon were the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Universal Declaration of Human Rights (1948).

[165] See *Re Estate of Lerionka Ole Ntutu (Deceased)* [2008] eKLR, *Mary Rono v Jane Rono and another* civil appeal 66 of 2002 [2005] eKLR and *Ejidioh Njiru Mbinga v Mary Muthoni Mbinga and another* [2006] eKLR.

of Mutio Ikonyo (Deceased),[166] to which Musyoka WM observes that the FJS did not cite any treaties on the matter in arriving at its decision.[167]

However, it is worthy of note that in some instances, the bid to eliminate discriminatory customary practices is hampered by the FJS itself.[168] This can occur where there exists dissonance amongst members of the FJS leading to unfavourable orders to beneficiaries. This, for instance, arises when only one member of the FJS dissents to upholding such discriminatory customary laws.[169] One of the noteworthy cases which impacted negatively on a beneficiary is that of *Wambugi w/o Gatimu v Stephen Nyaga Kimani*,[170] where a segment of the FJS[171] found that the custom which barred women from inheritance was discriminatory and hence repugnant to ordinary notions of justice.[172] However, the other segment was inclined to uphold the customary practice which disentitled married women from inheriting under Embu customary law.[173]

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[166] *In the Matter of the Estate of Mutio Ikonyo (Deceased)* Machakos High Court probate and administration cause number 203 of 1996.

[167] His detailed observation on matter was that '[t]he decision of the court was plainly wrong. With respect, the judge did not base his conclusions on any case law, or statutory provision, or cite any treatise on the subject.' Musyoka WM (2014) 271.

[168] Yet, it has been noted that such is eradicated by use of legislation which proscribes such practices or introduces specific rights for vulnerable groups. See Harper E (2011) 34. In this study, this has been noted to be proscribed by art 159(3) of the Constitution 2010, the Judicature Act Chap 8, Laws of Kenya, which embodies the repugnancy clause in its s 3(2) and through provisions of international instruments as upheld by the FJS in decision making.

[169] Meaning that the majority view carries the day.

[170] *Wambugi w/o Gatimu v Stephen Nyaga Kimani* (1992) 2 KAR 292.

[171] As noted from the facts of the case. The brief facts of the case are that two brothers jointly purchased land but they subsequently died. A dispute then arose as to whether under Embu customary law, a married daughter, of one of the deceased brothers was permitted to inherit the land. The FJS at appeal upheld the custom, as noted above.

[172] Hancox CJ (dissenting).

[173] Kwach and Masime JJA.

In the above case, this study argues that the inconsistency of the FJS in disregarding the discriminatory customary norm led the beneficiary to be prejudiced. If the FJS had considered legislation and/or international instruments as considered in some of the above-noted cases, the beneficiary would have been protected from the discriminatory customary rule on inheritance.[174] However, this study notes that despite there being legislation designed to protect such practices from being upheld, the only effect such legislation may have is to suppress the practice which may continue being applied as it is deeply entrenched within communities,[175] leaving the vulnerable groups more exposed to discriminatory practices.[176] This reason leads the study to advance the view that ACL should be guided toward self-reform rather than imposition of laws without looking at the rationale held by communities for such practices.[177] Accordingly, with self-reform, communities learn of the importance of reforming their norms to align with acceptable standards as advanced by the FJS. In this regard, it is argued that formal legislation or common law is also not without fault, as it is subjected to reform as well. Therefore, it is submitted that in the same way English law is afforded the opportunity to evolve on its own, the same should be extended to customary rules.

Therefore, despite some African customary rules being discriminatory as shown above, it is worth noting that such rules have been varied to align with principles of fairness and equality

[174] Reference is made here to the Law of Succession Act, Chap 160, Laws of Kenya, which is gender neutral and the Judicature Act Chap 8, Laws of Kenya, which limits the application of a repugnant norm in its s 3(2).

[175] This is notable in the earlier cited South African case of *Bhe v Magistrate Khayelitsha; Shibi v Sitole; SA Human Rights Commission v President of the Republic of South Africa,* 2005 1 BCLR 1 (CC), where male primogeniture despite being ruled invalid by the FJS, continued being practised by the community.

[176] See observation by Harper E (2011) 34.

[177] The rationales may be based on either social, economic or security aspects as observed by Harper E (2011) 34.

as envisaged by the Constitution 2010, Law of Succession Act,[178] and international instruments.[179] This indicates a shift towards the development and/or reform of such customary rules, which can be attributed to the flexible characteristic of customary law,[180] which negates it from being perceived as a pre-determined and static body of law.[181] In this regard, there has been a change in communities' views about inheritance by women, indicating a change in the discriminatory culture towards women.[182] This change can be interpreted as an attempt to lessen the rift occasioned by ACL going counter to equality principles.[183] This has been observed by researchers who state that customary justice systems can transform themselves to recognise and enforce constitutional rights such as women's land rights, as there exists deeply entrenched biases against women.[184] Kamau W also notes the gains made by a change in perception of gender discriminatory ACL rules. She notes that research shows a growing acceptance that an unmarried woman can inherit from her father.[185] This can be attributed to

[178] Chap 160, Laws of Kenya.

[179] As noted in earlier discussions of this Chapter.

[180] As noted in Chapters One and Two. Further, it has been observed that there is some indication of changes in customary norms and practices over time to accommodate new realities. See Kamau W (2011) 28.

[181] This is because the content of ACL is constantly changing, as noted earlier in this study in Chapters One and Two. In this regard Ochich GO notes that '[l]ike all other social phenomena, customary law is a function of the social dynamics in the society in which it operates, and it is unreasonably pessimistic to assume that customary law is incapable of adjusting to changing emerging trends.' See Ochich GO (2011) 112.

[182] This is evident from research done in Murang'a, Kenya as noted by McKenzie, F 'Gender and Land Rights in Murang'a District, Kenya' (1990) 22 *Journal of Peasant Studies* cited in Kamau W (2011) 28.

[183] As earlier noted from the analysis of some cases in this Chapter, customary succession laws generally give preference to male claimants either explicitly or in their effect. See similar observations by Woodman GR (2011) 12, as earlier noted in this Chapter, who asserts that this is one of the characteristics of customary law.

[184] See Espinosa D and Santos F 'Enhancing Customary Justice Systems in the Mau Forest, Kenya: A Strategy for Strengthening Women's Land Rights' available at https://namati.org/resources/enhancing-customary-justice-systems-in-the-mau-forest-kenya-a-strategy-for-strengthening-womens-land-rights/ (accessed 16 October 2018).

[185] See Kamau W (2011) 28. She notes an example of taking care of one's father in his old age (by a woman), as an instance which can lead to such consideration for inheritance. The denial of women (married and unmarried) has been identified as one of the key injustices to women when African customary laws of succession are applied.

great improvements with men's attitudes towards women rights, which men are growing to respect.[186] This in turn, heightens women's confidence in ACL and they often seek to improve knowledge of their rights with regard to land.[187]

5.3 CHAPTER SUMMARY

This Chapter sought to highlight the interaction between ACL and the FJS, by identifying factors that enhance and/or impede the recognition of ACL by the FJS in succession matters. With regard to the application of ACL by the FJS, it was noted that the LSA limits the application of ACL to only those instances prescribed therein,[188] which acts as an impediment to the application and enforcement of ACL. However, the examination of courts' jurisprudence indicated that the FJS at times applies ACL beyond the instances prescribed by the LSA.[189] Conclusively, this denotes a disjuncture between theory and practice, and consequently, has an influence on the interaction between ACL and the FJS in matters succession. Other than the inherent disjuncture, this aspect further revealed that the FJS is alive to the fact that ACL in

[186] As observed by Espinosa D and Santos F in their study. The study also found that because of the male recognition of women's rights, the men made modest improvements in physical and social accessibility of the local justice system for women. See Espinosa D and Santos F 'Enhancing Customary Justice Systems in the Mau Forest, Kenya: A Strategy for Strengthening Women's Land Rights' available at https://namati.org/resources/enhancing-customary-justice-systems-in-the-mau-forest-kenya-a-strategy-for-strengthening-womens-land-rights/ (accessed 16 October 2018).

[187] Further, the resulting interest in women empowering themselves with knowledge regarding their land rights, is laudable, as often ignorance of the law is women's downfall. This was highlighted by an article in the dailies, which observed that women particularly from poor backgrounds, and with minimal education, have their rights denied by their siblings and/or relatives. See Manyuira W 'Ignorance of the Law is Women's Undoing' *Daily Nation* Thursday June 29, 2017.

[188] See discussion in section 5.2.5 which highlights ss 2(1), 32 and 33 as making provision for this, and further the discussion under section 4.4.2 in Chapter Four which highlights provisions in the LSA which embody certain aspects and/or principles peculiar to ACL, thus recognising the application of ACL in succession matters.

[189] In this regard, the discussion in this Chapter noted that the FJS does not adhere strictly to the provisions in the LSA, as at times, the FJS overlooks the Act's provisions and upholds ACL in making decisions on succession matters. See discussion in section 5.2.5.

succession matters is still quite relevant and thus cannot be dismissed as a relic of the past.[190] This was concluded from the fact that the FJS upholds ACL in making its orders and/or determinations in succession matters, which position is still prevalent.[191] This situation distinctly indicates the persistent interaction between ACL and the FJS, which in turn firmly establishes that ACL is still relevant in succession matters as it is upheld and/or influences the FJS in arriving at succession decisions.[192] Further, this recognition is evidenced by sentiments of judges, who hold that customs and traditions are time tested and based on wisdom and experience and should not be dismissed simply as being repugnant to justice and morality, unless there are sound reasons for such decisions.[193] In addition, other judges hold the view that there is a purpose for every custom and that a judge should be slow to criticise any particular custom of a people.[194] These views are in line with the Historical School, which posits that true law stems from the customs of a people and that they should not be proscribed,

[190] This assertion is based on the fact that this study has noted that ACL is still applied as the personal law of first instance by most indigenous Kenyans in making decisions that affect their lives. For instance in marriage, succession and burial as noted in Chapter One. Hence, the recognition, application and upholding of ACL is of vital consideration by the FJS as it is still forms a primary point of reference by most individuals in Kenya, when dealing with succession matters. This is despite the existence of the LSA as noted in this Chapter.

[191] As shown by the various cases discussed in this Chapter. See for instance *Loise Selenkia v Grace Naneu Andrew and another* succession cause 231 of 2007 [2017] eKLR.

[192] This is despite the LSA being clear as to which circumstances ACL can be applied in determination of succession matters as it (LSA) provides that it is the only instrument which governs law of succession in Kenya.

[193] This was emphasised in *Kamete Ene Ateti Marine v Mosupai ole Ateti*, civil appeal number 224 of 1995 where the judge noted that however tempting it may be to brush aside customs and traditions, the same should be done after being deliberated upon and determined judicially, as customs and traditions are time tested and based on wisdom and experience. The exact words of the FJS (Amin J) were:

> The learned trial judge in my view was in error to hold that the Masai customary law is repugnant to justice and morality. These are time tested customs and traditions which are based on wisdom and experience and are not to be brushed aside lightly however tempting it might be to do so unless it is done for sound reasons which are deliberated and determined upon judicially. The English common law likewise in fact and in deed is a form of customary law, based on precedent.

[194] Highlighted in *Wambugi w/o Gatimu v Stephen Nyaga Kimani* (1992) 2 KAR 292.

as to do so would be denying customary law its flexibility.[195] Rather, ACL should be left to conform to current realities and socio-economic changes in its own time.[196]

From the preceding context, the subsequent analysis of the five thematic areas undertaken in this Chapter resulted in the identification of four impediments to the enforcement of ACL by the FJS.[197] These are noted as first, the provisions in the LSA that limit the application of ACL to only those instances prescribed by it.[198] Secondly, the dissonance in the FJS due to the divergent views on the application of African customary law.[199] Thirdly, the reliance on codified customs (Restatements) by the FJS which at times do not represent the true nature of certain aspects of African customary law.[200] This was deduced from the fact that the Restatements lack information on some customary rules of some communities in Kenya,[201]

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[195] These views have been observed in other jurisdictions as well, for example in South Africa in the case of *Shilubana*, where the Constitutional court stated inter alia that '[c]ustomary law must be permitted to develop, and the enquiry must be rooted in the contemporary practices of the communities in question…' See *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008).

[196] See Diala A 'The Concept of Living Customary Law: A Critique' *Journal of Legal Pluralism and Unofficial Law* (2017) 49 (2)143-165 generally.

[197] The thematic areas also revealed that the FJS extends its acknowledgment of ACL beyond the circumstances sanctioned by the LSA. This was evidenced by courts' jurisprudence discussed as illustrative to the themes.

[198] See ss 2(1), 32 and 33 of the Law of Succession Act, Chap 160, Laws of Kenya.

[199] This chapter noted that despite the upholding of ACL in succession matters before it, the FJS also curtailed the application of the same customary rules. This position identified the other segment of the FJS which disregards the application of ACL, and led to an evaluation of why the FJS takes such a stance.

[200] Further, this view is advanced in consideration of the fact that some customary practices and/or rules of the various communities in Kenya have developed in tune with socio-economic circumstances. This is in line with the Historical School which notes the ability of customs to change due to their flexibility. For example, in customary marriages, Chapter Four noted that dowry requirements are not strictly followed nowadays, as payment may be made in monetary terms and not necessarily livestock. Further, that in succession, there has been a change in communities' views about girl child inheritance and they can now inherit. These views invariably are not to be found in the Restatements as no revision of them has been done since their documentation. Hence, this study partly opposes reliance on the Restatements; as despite their usefulness as a point of reference regarding ACL as practised in Kenya, they tend to ossify the said customs.

[201] See *Joyce Atemo v Mary Ipali Imujaro* [2003] KLR 435, which highlighted this plight.

hence indicating the existence of a gap on customary laws of some communities in Kenya.[202] Lastly, is the need to prove ACL, for instance, by reliance on expert witnesses.[203] In such instances where witnesses are relied upon, an impediment is created as at times no witness is available, and when available, there is need to prove African customary law.[204] This is a challenge on parties and can cause unfair outcomes when not proven as noted in *In Re Estate of DMM (Deceased),*[205] in which the applicant failed to prove that she was a customary wife to the deceased and that the deceased had sired her children. Consequently, the FJS held that she and her children were not entitled to inherit any share of the deceased's estate.

In line with the identified impediments noted above, the study also identified a further impediment in Chapter Three, namely the repugnancy clause.[206] In this regard, this study identifies five impediments to the application and enforcement of ACL by the FJS. Consequently, these impediments inform the following Chapter, which will focus on proposing an approach that can be applied by the FJS in addressing these impediments. This approach is proposed owing to the dissonance between the various legal systems, that is, ACL and the FJS, for which it is argued that such discord should be abated so as to allow a harmonious interaction between the two systems.[207] Hence, it is envisaged that the proposed approach will contribute

[202] From the jurisprudence analysed, this study noted that the FJS heavily relies on the Restatements of African Law by Cotran E. In this regard, the study asserts that the author's works are literally the backbone upon which the FJS ascertains the various customary rules/practices as found in Kenya and subsequently upholds them.

[203] See discussion in section 5.2.4 of the Chapter.

[204] As discussed in the Chapter in section 5.2.4.

[205] In *Re Estate of DMM (Deceased) Francisca Syombua Nzuvi & Yvone Taabu Muli v Angela Mue Makau* High Court succession number 131 of 2017 [2018] eKLR.

[206] See discussion under section 3.3.3 of Chapter Three.

[207] In this regard, it has been observed that legal pluralism plays an influential role in people's normative behaviour in social fields, and that its influence should never be understated, given that many individuals subject to customary law regularly observe it alongside state law. See Moore SF Law as a Process: An Anthropological

to a congruous interface between the two systems, by promoting the enhanced application and enforcement of ACL by the FJS, particularly in succession matters.[208]

Approach (1978) in Diala A 'The Concept of Living Customary Law: A Critique' *Journal of Legal Pluralism and Unofficial Law* (2017) 49 (2)143-165, 159.

[208] Of worthy note is that this view is not only limited to succession, but also to other areas regulated by statutory law alongside ACL in Kenya, such as marriage.

CHAPTER SIX

PROPOSAL FOR ENHANCING THE INTEGRATION OF CUSTOMARY SUCCESSION DECISIONS WITHIN THE FORMAL JUSTICE SYSTEM IN KENYA

6.1 INTRODUCTION

This Chapter is informed by the factors that enhance and/or impede the application and enforcement of customary succession decisions by the FJS as identified in the preceding chapter as well as in Chapters Three and Four. These impediments were identified as the limitation on the application of ACL through the repugnancy clause,[1] statutory provisions that proscribe the application of ACL in some matters,[2] the dissonance in the FJS due to divergent views on the application of ACL,[3] reliance on codified customs (Restatements) by the formal justice system (FJS) which at times do not reflect the modern changes that have arisen regarding ACL and its attendant rules and/or practices,[4] and the need to prove African customary law.[5] To address these impediments, this Chapter proposes the use of a guideline

[1] The repugnancy clause subjects ACL to a test of whether it is repugnant to justice and morality. If the formal justice system deems it to be repugnant, then it is disapplied.

[2] For instance, this restriction applies through s 33 of the Law of Succession Act, Chap. 160 Laws of Kenya, which limits the application of ACL to only those areas outlined in the particular section.

[3] In this regard, there exists divergent views amongst the FJS as to the application of ACL in succession matters; more so to matters beyond those prescribed in the Law of Succession Act, Chap 160.

[4] The Restatement of African Law by Eugene Cotran relied on by the FJS has not been revised since its compilation. Hence, its provisions do not reflect the changes in socio-economic conditions of the society. Further, it has gaps on some customary laws of some communities in Kenya, for example the Teso. This creates a gap between the local customary practices and judicial customary law. That is living versus official customary law.

[5] The need to prove ACL is riddled with various impediments such as the reliability of witnesses on customary rules and their ability to present the true position of the customary law in question, or their lack thereof. Despite giving testimonies on the customary rules, the same may not be guaranteed for reasons such as correctness and/or reliability.

which is aimed at further enhancing the interaction between the TJS and FJS with regard to the application and enforcement of customary succession decisions by the FJS.[6] This proposition is based on and supported by the views advanced by the Historical School theory,[7] which postulates that law emanates from the culture of a people and that a State should therefore be guided by customs in developing laws that govern its people.[8]

Accordingly, this Chapter seeks to answer the fifth research question of this study, which seeks to identify an approach that can be applied to enhance the interface between ACL and the FJS in Kenya. This follows from the earlier noted fact that in Kenya, only 36% of individuals take their succession matters to the FJS for determination.[9] Further, that in addition to statutory law, the FJS also applies customary laws of succession in determining matters before it.[10] Against this backdrop, this Chapter advances its proposed approach, namely the use of a guideline for enhancing the integration and enforcement of customary succession decisions within the FJS in Kenya. The guideline covers five sections. Section I provides the legal basis for the development of the guideline based on the situational analysis of the application of ACL in the FJS in Kenya, as well as its recognition by the Kenya Constitution 2010 and relevant national laws. Section II presents the objectives of the guideline, while Section III outlines principles

[6] The previous Chapter noted that the FJS upholds certain ACL rules on succession and Chapter Four highlighted instances in which the LSA embodies certain aspects of ACL. This study identified these instances and provisions, as factors that enhance the recognition, application and enforcement of ACL by the FJS.

[7] The Historical School theory is identified as the theoretical framework for this study, as discussed in Chapter Two.

[8] This is attributed to the ideologies of the Historical School theory which provide that a system of law can only be realistic if it keeps a breast with the economic, social and cultural development and requirements of the people.

[9] As reported in Kenya: Justice Sector Reforms to Enhance Access to Justice IDLO Quarterly Report January-March 2017, 10.

[10] This was noted from an analysis of courts jurisprudence.

that underpin the integration of ACL within the FJS. Section IV presents the expected outcomes from the application of the guideline, while Section V highlights various roles that can be played by identified stakeholders in integrating ACL within the FJS. Lastly, Section VI presents the implementation strategy of the proposed guideline.

Correspondingly, this study's proposition of further integration between the TJS and FJS in Kenya is supported by the views and findings of various authors and studies. For instance, Forsyth M (2007)[11] observes that the relationship between the state and non-state justice systems should be reformed so as to maximise the chances of the systems cooperating with each other, performing tasks they are best suited to their fullest potential and covering each others' weaknesses with their own strengths.[12] While a study by Karimi M, Rabar B, Pkalya R, Adan M & Masinde I (2004) of the Pokot, Turkana, Samburu and Marakwet communities of Kenya reported that the respondents in their study wanted the judiciary (FJS) to help enforce the rulings and verdicts of the traditional courts by linking TDRMs to the formal courts. To achieve this, it was noted that TJS should work with the FJS to develop a legal framework which would legitimise the TJS and its TDRM structure.[13]

Following the foregoing view and findings, it is submitted that the interaction between the FJS and TJS is encouraged, as sometimes the FJS can draw (and has drawn) positive norms from ACL, which can enhance efficiency in their interaction.[14] Consequently, it is envisaged that the

[11] Forsyth M 'A Typology of Relationships between State and Non-State Justice Systems' (2007) 39 (56) *The Journal of Legal Pluralism and Unofficial Law*, 67-112.

[12] See Forsyth M (2007) 108.

[13] See Karimi M, Rabar B, Pkalya R, Adan M & Masinde I (2004) Indigenous Democracy: Traditional Conflict Resolution Mechanisms ITDG-EA (2004) 11-86, 90.

[14] See, for example, the earlier noted requirement for parties in a customary marriage intending to divorce to go through conciliation first, as provided for by s 68 (1) of the Marriage Act 2014. Further, other examples in this

guideline will promote a harmonised interaction between the TJS and the FJS.[15] This view is premised on the fact that the interface between the two systems has been illustrated by this study from the analysis of courts' jurisprudence which indicates that the FJS upholds ACL in some instances and further through various provisions of ACL embodied in statutory law.[16] In this relation, this study noted that the FJS acknowledges and upholds customary laws on marriage and succession in making decisions and/or orders.[17] This situation indicates that ACL and statutory law act side by side,[18] leading the study to posit that ACL should form part of the process in the FJS where applicable.[19] In this logic, it is anticipated that the proposed guideline will foster a harmonised interaction between the TJS and FJS, which harmonisation will subsequently serve as a tool towards achieving substantive justice to those appearing before the FJS.[20] The call for a harmonised interaction between the two systems is based on two key realities. First, the majority of relationships between the TJS and FJS are not mutually supportive,[21] yet it has been observed that state law (FJS) in many countries today has a limited

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context include the concept of *Ubuntu* which stems from norms of ACL, which can be seen in the adaptation of various international instruments such as the UDHR which calls for love of others and a duty to live in harmony, or the best interest principle in children and the law, which stems from an obligation under ACL to do what is best for a child.

[15] An advantage noted to arise from the incorporation of TJS in the FJS. See Forsyth M (2007) in her discussion of incorporation of non-state justice systems in state systems.

[16] See for instance various provisions of the Law of Succession Act, Chap 160, which embody aspects of ACL, as discussed in section 4.4.2 of Chapter Four. An example is s 5(1) which recognises that a testator can make a valid will in accordance with his customary law.

[17] Refer to discussion in Chapter Five on the analysis of courts' jurisprudence.

[18] This was noted from the beginning of this study as an aspect that will remain constant due to the presence of legal pluralism in Kenya.

[19] This view is advanced owing to observations on the limitation of African Customary Law's applicability in contemporary areas of law such as Contract Law.

[20] Particularly where the parties are desirous of ACL to be considered by the FJS in determination of their succession matters.

[21] Refer to observations of Forsyth M (2007) 108 and the discussion in Chapters Three and Five.

role in settling disputes.[22] Secondly, ACL has the ability to reform with changing socio-economic circumstances.[23] It therefore follows that such dynamism should allow the FJS to take into account the context in which ACL is applied,[24] so as to determine whether it should be upheld or not. These views are supported by the Historical School theory, which posits that true law stems from the people and further that customs are flexible and can change to accommodate changing social contexts.[25] Consequently, it is for these reasons that this study advocates for the enhanced integration and enforcement of customary succession decisions within the FJS, through the use of the proposed guideline.

From the foregoing context, the guideline will address three main objectives. First, it will provide a legal framework in decision-making by the FJS to ensure consistency and certainty in the application and enforcement of ACL in succession matters. Secondly, the guideline will provide relevant and useful information to members of the FJS, court users, traditional leaders and other stakeholders in addressing the interaction between customary and formal succession laws. Lastly, the guideline can be used as a reference learning material in the training of legal practitioners, law students, traditional leaders and members of the community on matters of

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[22] See Forsyth M (2007) 71. Refer to similar observations in Chapter One, which highlighted the estimation that only 1 in 10 persons in Kenya take their disputes to formal courts of justice and further that only 36% of individuals take their succession matters to the FJS for determination.

[23] Such reforms along socio-economic lines are supported by the Historical School theory as discussed in Chapter Two.

[24] See Harper E (2011) 38.

[25] Refer to the discussion in Chapter Two.

succession to which ACL is applicable. These objectives are offered with the aim of fostering further integration of the TJS and FJS in Kenya.

Significantly, some scholars argue that the scope of ACL is well defined within the Kenyan legal system, particularly in succession matters and that therefore, no further intervention is required. Unquestionably, this study affirms that there exist provisions as to when ACL is applicable in general,[26] and further in succession matters.[27] However, this study notes that an inherent inconsistency subsists in the FJS as to when ACL is applied and upheld in succession matters. This is due to the fact that the FJS upholds ACL in matters beyond those prescribed by the LSA provisions.[28] This inconsistency, coupled with the other earlier identified impediments, prove problematic in the integration and enforcement of ACL by the FJS in matters of succession. Accordingly, these impediments lead this study to propose a guideline on the application and enforcement of ACL in Kenya and its subsequent utilisation by the FJS in determining matters where ACL is applicable.[29] Consequently, the next section of this chapter highlights various reasons why the proposed guideline approach is suited for Kenya and highlights the possible benefits that may accrue from its application. The last section will form the chapter summary.

[26] This was noted to be through s 3(2) of the Judicature Act Chap 8 Laws of Kenya and various provisions in the Law of Succession Act Chap 160 Laws of Kenya. Refer to the discussion in Chapters Three and Four respectively.

[27] Refer to the discussion in Chapters Four and Five on the provisions of the LSA that embody certain aspects of ACL as well as outlining instances and/ or circumstances to which ACL is applicable.

[28] See also the discussion in Chapters One and Three which highlighted that the FJS also applies ACL to criminal matters, which is beyond the scope provided for by s 3(2) of the Judicature Act which limits the application of ACL to civil matters only.

[29] Refer to Chapter One which noted an emerging jurisprudence in which the FJS is applying ACL in criminal matters.

6.2 JUSTIFICATIONS FOR THE PROPOSED GUIDELINE

This section discusses various aspects as highlighted and discussed by this study, which support the need for enhanced integration between the TJS and FJS in Kenya. In this regard, it was noted that such integration can only be possible by further incorporating and upholding ACL within the formal system, as TJS are strongly anchored in African Customary Law.[30] Therefore, a solution that is fit for purpose is necessary, of which this study identifies as the use of a guideline. Consequently, the following subsections highlight the reasons why this study considers that a guideline is suitable in achieving the much needed integration between the two systems.

6.2.1 Constitution 2010, various domestic legislation and International Laws

As noted earlier in Chapter One, the Kenya Constitution promotes the use of TJS through its art 159(2)*(c)*.[31] It was noted that this recognition elevates the relevance of ACL within Kenya's legal system and highlights the crucial role TJS play in promoting access to justice in Kenya.[32]In this context, it is worthy to reiterate that ACL is recognised as a source of law in Kenya.[33] Further, it was highlighted that various formal laws explicitly recognise the workings of TJS. For instance, it was noted that s 68 of the Marriage Act 2014 calls for the use of conciliation for parties seeking to divorce before recourse is had to the FJS.[34] In addition, s

[30] This was earlier noted in Chapter One, which highlighted that TJS apply ACL in the regulation of matters before them.

[31] In this regard, it was further highlighted that the Constitution does not limit the application of TJS to any area of law, denoting a wide approval of TJS by the State.

[32] Refer to the discussions in Chapters One, Three and Five.

[33] See s 3(2) of the Judicature Act Chap 8 Laws of Kenya.

[34] Refer to Chapter Four section 4.2.1.

69(2) of this Act is also instructive in this regard.[35] It provides that '[t]he Cabinet Secretary may, *in consultation with the communities make regulations for the implementation of this section*.'[36] This provision in the Marriage Act lends credence to the proposed guideline, as it indicates that the drafters of legislation acknowledge the need to have community participation in the development and implementation of laws that affect them.[37] In this regard, it will be subsequently shown that this is another justification for the proposed guideline, which advocates for and highlights the importance of communities' participation, as well as that of other key stakeholders such as traditional leaders, in its revision and implementation.[38]

Additionally, in relation to legislation, it was highlighted that the Law of Succession Act[39] embodies various aspects of ACL that are applicable in determining succession matters in the FJS, as well as prescribing circumstances to which ACL is applicable in determining succession disputes.[40] Other identified laws that enhance the use of TJS were identified to include the Community Land Act,[41] Magistrates' Courts Act,[42] and the Judicature Act.[43] With regard to international laws, it was highlighted that the FJS is guided by provisions in such

[35] See Marriage Act, 2014.

[36] [own emphasis]. Read together with s 69(1)(a)-(f) of the Marriage Act, 2014 which provides for the grounds to which a customary marriage can be dissolved.

[37] In this context, the guideline serves both academic and practical value, and can be used by legislators as a tool for reform of ACL.

[38] See section 6.2.4 in this Chapter and further discussion in Chapter Seven under section 7.2.1.

[39] Chap 160, Laws of Kenya.

[40] Refer to the discussion in Chapter Four section 4.5.2 and Chapter Five generally.

[41] No. 27 of 2016, Laws of Kenya. See s 39(1).

[42] No. 26 of 2015, Laws of Kenya. See s 7(3).

[43] Chap 8 Laws of Kenya. See s 3(2).

instruments, in ensuring justice especially in matters to which gender discrimination in inheritance is to be abated. In this regard, an example was cited of the Convention on the Elimination of All forms of Discrimination against Women (CEDAW). [44]

6.2.2 State and Judicial policies

In addition to the constitutional and legislative recognition of TJS, this study noted that various interventions by the FJS have been attempted to address the integration of TJS within the FJS. In this regard, it was noted that the FJS seeks to re-affirm the fundamental place of ACL in its legal system by encouraging the use of TJS,[45] through its strategic development plans as well as in its service delivery agenda.[46] Further, it was highlighted that the State and FJS have appointed an Alternative Justice Systems Taskforce with the aim of reducing case backlog.[47] This is through one of the mandates of the Taskforce, which is to develop a policy to mainstream into the FJS informal and other mechanisms used to access justice in Kenya. This was highlighted as a means in which an efficient and appropriate approach would be identified in the integration of indigenous jurisprudence within the FJS.[48] In addition, the FJS has developed a resource tool which outlines the procedure and documents to be used in probate

[44] Refer to the discussion in Chapter Five section 5.2.5.

[45] In this context, Chapter One noted that the FJS refers disputes to the TJS, for instance a land marital dispute to the *Njuri Ncheke*, as highlighted in *Lubaru M'Imanyara v Daniel Murungi* [2013].eKLR and *Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others* [2012] eKLR.

[46] As noted in Chapter One, there are significant improvements noted on these aspects through the Judiciary Transformation Framework (JTF) 2012-2016. This led to the development of a service delivery agenda themed Sustaining Judiciary Transformation (SJT) for Service Delivery 2017-2021.

[47] Other responsibilities of the Taskforce as noted in Chapter One include to: undertake a situational analysis of any existing reports, manuals, guidelines, practice notes, legal provisions on mainstreaming AJS; consolidate best practices from selected TJS of selected communities; highlight challenges and effects of inter-linkage between TJS and the FJS; consult with key stakeholders and recommend a linkage between traditional and informal justice systems and the FJS; and develop a National Model for Court-Annexed Traditional Justice Resolution Mechanisms for possible adoption.

[48] Refer to the discussion in Chapter One.

and administration matters.[49] The State plays its part in this endeavour, by enabling the appointment of the Taskforces which work towards the achievement of the set mandates.

From the foregoing, it is submitted that the proposed guideline is complementary to the State and judicial policies as it aims to enhance the integration of TJS within the FJS. Further, the guideline aims to reduce case backlog in the FJS, by promoting the resolution of matters in an efficient and timely manner. To recap, this study noted that case backlog is one of the major problems that affects the FJS in its delivery of justice.[50] Hence, it is envisaged that the reduction in case backlog can be achieved because of the harmonious interaction between the two systems.

6.2.3 Reform and development of African Customary Law

It is observed that in order to adopt a plausible customary reform strategy, social changes must be considered by any approach applied by a State.[51] This is also recognised by the Historical School theory chosen for this study, which advances that law or an institution in any given society, can only be understood in terms of its social context, which context is based in the concept of communities.[52] In this regard, this study commended this view as it allows the growth of law to be interpreted based on the forces which has brought it about,[53] and consequently, express the perceptions or cultural outlook of a society. Consequently, it is

[49] This was developed under the guardianship of the Family Division of the High Court of Kenya.

[50] Refer to Chapter One for a list of other challenges facing the FJS in the dispensation of efficient and timely justice.

[51] See Harper E (2011) 35.

[52] Refer to the discussion in Chapter Two.

[53] Refer to Chapter Two for similar observations, which noted that this feature of the Historical School allows one to establish how marriage and succession laws in Kenya came to be.

envisaged that the guideline will aid the reform and/or development of ACL in line with prevailing socio-economic contexts and circumstances.[54] This perception is attributed to the fact that TJS are also informed by the FJS in decision making. For example, in changing attitudes towards women inheritance, TJS are invariably influenced by the FJS which does not uphold discriminatory aspects of TJS and by modern societal insights on equality, hence the change in perceptions by the TJS. In this regard, TJS will operate within acceptable standards by the FJS and Constitution 2010, by avoiding entrenching discriminatory rules such as the non-recognition of women in inheritance. This consideration by the TJS can further reduce appeals in the FJS on grounds of discrimination, especially in succession matters where distribution of a deceased's estate fails to consider female beneficiaries. This will in turn reduce case backlog in the FJS, which was noted in Chapter One as one of the reasons why this study proposes the enforcement of customary decisions by the FJS. In this context, the guideline will achieve this consideration by serving as a guide when provisions of a particular custom and/or practice as applied by the various communities in Kenya, can be enforced by the FJS. The ability of the guideline to not be conclusive is of utmost importance as the danger of ossification of customary rules is abated, which this study has noted to be effected when Restatements are considered. [55] This will be attained by outlining the principles that have to be met in making TJS decisions, in order for them to be upheld by the FJS. For instance, the guideline will present the equality principle which necessitates that distribution of an estate should be done in fair

[54] Such reforms along evolving socio-economic circumstances are supported by the Historical School theory as discussed in Chapter Two.

[55]This was noted in Chapter Two as the reason why the Historical School rejects codification of customs, and further evidenced in Chapter Five, which highlighted instances in which out-dated customs were considered by the FJS in decision making. For instance, reliance on the Restatements by Cotran in the Case of *Mukindia Kimuru*, does not portray the current view on inheritance by unmarried women in the Meru community. They can now inherit although some families still do not recognise inheritance of women but as with all laws, change must be given time. Such change relates to a change in mindset of communities to embrace the aspect of inheritance by women. In this regard see the *Bhe* case where male primogeniture took over 10 years to cease being practised within communities in South Africa, as noted in Chapter Five.

terms.[56] Accordingly, if TJS succession decisions adhere to such principles and other standards as outlined by the Constitution 2010, the FJS will have a justified basis for upholding ACL as it will have developed along the acceptable standards.[57] Therefore, reformulation of ACL will be realised as the proposed guideline will give a pertinent account of the modern administration of ACL by the FJS.[58] Further, reform of ACL will be achieved as the FJS will take into account the context in which ACL is applied.[59] In this respect, the FJS has observed that customary laws should be tailored to suit contemporary social and economic conditions and that '*…customary law development should keep abreast of positive modern trends so as to make it possible for courts to be guided by it.*'[60] This requirement augurs well with Kenya as any customary rules developed with regard to socio-economic changes will likely factor in advances made on key or defining circumstances. Therefore, by being cognisant of the prevailing socio-economic changes, the guideline will achieve two objectives. First, it will allow ACL to remain dynamic and legitimate as it will allow the revision of ACL along prevailing circumstances in society, particularly in matters of succession. Secondly, the

[56] This entails a consideration of historical and future factors that relate to reasons of the mode of distribution of a deceased's estate to the heirs and/or beneficiaries.

[57] It was noted in Chapter Five of this study that some members of the FJS would avoid expressly stating that they were guided by ACL in arriving at their decisions. It is this study's view that if ACL enshrined principles of equality, the FJS would not be at odds in trying to justify its reliance on the same or expressly stating its reliance on ACL, as its norms would be in line with constitutional principles.

[58] As earlier noted, the guideline will achieve this by indicating the requirements of the FJS in applying ACL. It is to be noted that a similar concern on whether the restatements would not give a true account of how ACL was administered by the FJS, was raised as early as the 1960s when restatements were recommended for Kenya. This concern emanated from some observers, who claimed that research of ACL by foreign-trained lawyers could never be 'pure', as any recordings would be born out of foreign attitudes and language (English). It was believed that foreign lawyers were trained to think in ways alien to Africa, thus negating any accuracy of the exercise of recording customary laws into restatements. See Twining W (1963) 228. In this regard, this study submits that such concern will be abated as the implementation of the guideline by the FJS will result from a guideline development exercise that includes the participation of various key stakeholders in the integration of ACL within the FJS. This will be discussed in detail in the guideline as presented in Chapter Seven.

[59] See Harper E (2011) 38.

[60] This was recognised by the Kenyan FJS as early as the 1980s as shown in Chapter Five in *Sheikh Mushaq Hassan v Nathan Mwangi Kamau Transporters and 5 others* civil appeal number 123 of 1985 [1986] eKLR.

guideline will protect the TJS from members of the FJS who are quick to dismiss the relevance of ACL in modern day society. In the latter context, this study has noted sentiments of some members of the FJS in support of the recognition and application of ACL.[61] This study submits that such views by some members of the FJS are not without substantive reason, as the study has shown the significance of ACL as a constituent in the FJS in Kenya.[62] Therefore, the views of the FJS evidently augur well with this study's proposition to enhance the integration of ACL within the FJS, and further lend credence to the proposed guideline which will allow for the reformulation and/or development of ACL; particularly in the area of succession. Ultimately, the enforcement of TJS decisions within the FJS will be achieved. Accordingly, it is submitted that the proposed guideline will enhance the integration of ACL within the FJS and ensure further recognition, application and enforcement of TJS decisions by the FJS.

6.2.4 Inclusion of various key stakeholders

The Historical School posits that communities play a significant role in understanding legal concepts or institutions as applicable within a social context.[63] In this regard, the development and application of ACL in Kenya can only be understood by interpreting the changes within the various communities which changes (socio-economic), lead to the prevailing application

[61] See, for instance, the earlier cited case of *Sheikh Mushaq Hassan v Nathan Mwangi Kamau Transporters and others* [1986] eKLR, where the Court of Appeal (Nyarangi JA), with reference to a decision made by a trial judge, noted in part that:

> [t]he trial judge, with respect, *misapprehended the application of the custom and condemned it with unjudicial haste.* In my judgment, the judge's views of the custom referred to are a misdirection. The trial judge had no evidence for his erroneous conclusions and, I dare say, his contempt for the custom affected his assessment of the award [own emphasis].

[62] For instance, customary laws on marriage and succession aid in resolving matters to which validity of a customary marriage is questioned and subsequently, in ascertaining the heirs and/or dependants of a deceased for purposes of succession. Refer to the discussion in Chapters Four and Five.

[63] In this regard, see observation by Abraham G (2014) 117.

of customary rules.[64] This interpretation enables the FJS to apply ACL as practised by the communities, as it identifies the living customary laws of the communities.[65] Furthermore, the application of ACL by the FJS is possible as the customary rules express the culture of the various communities and/or the Kenyan society.[66] By making this assertion, this study adopts a wider definition of the word 'community', to denote individuals with common aspects such as norms and values.[67] In this respect, this study argues that the various stakeholders in the Kenyan society such as traditional leaders and clergy men comprise the community. This is based on the fact that they apply ACL in the regulation of most of their personal matters, as well as share in the common goals or values advanced by ACL such as conciliation.[68] Hence, this study adopts a wider definition of 'community' to include the various actors and/or stakeholders who can work together to achieve the integration of ACL within the FJS. This is premised on the observation that one of the impediments to the integration of ACL within the FJS is the failure to involve key stakeholders in the process.[69]

[64] See the observation in Chapter Two by Pillai PSA (2005) 6, who notes that the Historical School 'interprets the changes in the growth of law and explain the forces which have brought them about,' by looking at communities.

[65] The recognition of living customary laws of communities in Kenya is of utmost importance, as it has been noted by this study that one key feature of ACL is its ability to evolve or reform in line with socio-economic changes.

[66] This view is supported by the Historical School which advances that customs as applied in any given society express the cultural outlook of the society. See the discussion in section 2.4 of Chapter Two.

[67] The narrower definition of a community as '[a] group of people living in the same place or having a particular characteristic in common' would limit the term being applied as intended by this study. See the definition as noted in https://www.lexico.com/en/definition/community (accessed 10 May 2019).

[68] Conciliation was noted as an advantage of TJS in Chapter One. This recognition was further noted to be incorporated in statutory law through s 68(1) of the Marriage Act, which calls for conciliation before parties can seek divorce in the FJS.

[69] See Levy JT 'Three Modes of Incorporating Indigenous Law' in Kymlicka W and Norman W (eds) *Citizenship in Diverse Societies* (2000) 297-325.

Consequently, the inclusion of key players in any development or reform exercise is crucial. This view is premised on the fact that the guideline is envisaged to be used as a reference point for anyone wishing to understand how ACL is integrated within the FJS.[70] It is submitted that this is a prudent measure as this study has noted that although ACL is recognised through normative recognition by the State, its integration within the FJS is still limited.[71] In this regard, it is envisaged that in revising and implementing the guideline, key stakeholders will be included.[72] The inclusion of various members in the development exercise of ACL will abate the danger of adopting versions of customary laws which, for instance, reflect discriminatory attitudes, yet the same have been reformed, leading to entrenchment or formalisation of such norms.[73] This problem of entrenchment of obsolete customary norms may be attributed to the views of various authors who observe that such challenges arise from the adoption of top-down approaches as opposed to bottom-up approaches. Further, it has been observed that bottom-up approaches have cultural legitimacy when adopted in customary law development or reform. In this light, Harper E (2011) notes that if proper safeguards are in place, such as having a participatory process and a mechanism for endorsing the principles adopted, better knowledge of customary law and its reform can be advanced to communities who will in turn strive to be part of the reform thereof.[74] Thus, if the formulated guideline by this study permits for a

[70] For instance, understanding may be sought as to the principles that need to be met to enable the recognition and application of ACL, and the subsequent enforcement of decisions stemming from the TJS.

[71] This is noted from various findings which report the need for TJS and TDRMs to be linked with the FJS in the dispensation of justice. See the findings and recommendations of the study by Karimi M, Rabar B, Pkalya R, Adan M & Masinde I (2004).

[72] Stakeholders envisaged by this study include traditional leaders and/or elders, members of the FJS, members of Parliament, members of the public, clergy men and women, opinion leaders, and/or lawyers.

[73] This is one of the dangers of using ascertainments similar to that identified of restatements, which carry the risk of ossifying customary norms and consequently fails to reflect the current practice or rules amongst communities.

[74] See Harper E (2011) 34. In the above context, the study noted that ACL is all encompassing as it regulates most spheres of peoples' lives in Kenya and is employed by ruralites and urbanites alike.

revision and implementation exercise which allows the participation of key stakeholders, the resultant guideline will be more beneficial in the integration of ACL within the FJS in Kenya. This stems from the fact that when people are equipped with knowledge about their rights and alternative paths to justice, they are positioned to motivate change in their customary norms and hence affect the perceptions of the FJS with regard to customary laws.[75]

From the above perspective, a question can be posed as to what role some stakeholders play, such as the traditional leaders in the TJS. [76] This study's view is that such leaders can play the function of advising the FJS on customary law matters pertaining to their communities. This was recognised by the FJS in the earlier cited case of *Sheikh Mushaq Hassan v Nathan Mwangi Kamau Transporters and 5 others*,[77] wherein the FJS (Court of Appeal) stated:

> …In the course of developing a jurisprudence which ultimately will have a Kenyan identity…[*t]he elders who are custodians of African customary law* assisted by the intelligentsia…owe to themselves and to their communities (a duty) to ensure that *customary law keeps abreast of positive modern trends so as to make it possible for courts to be guided by it*.'[78]

From the foregoing context, it is submitted that this advisory role is already played by such leaders,[79] and that they can further serve as potential agents of reform as they have the incentive

[75] See Harper E (2011) 40.

[76] This question was also raised in South Africa following recommendations on the adoption of Customary Courts by the state, in the report of the South African Law Commission (SALC). See Report on Traditional Courts and the Judicial Function of Traditional Leaders (2003).

[77] *Sheikh Mushaq Hassan v Nathan Mwangi Kamau Transporters and 5 others* civil appeal number 123 of 1985 [1986] eKLR.

[78] [own emphasis].

[79] Refer to the discussion in Chapter Five section 5.2.4 on the reliance of expert witnesses by the FJS in ascertaining ACL.

to continue being responsive to changing community needs and expectations.[80] Therefore, their role as key stakeholders in the endeavour to improve the quality of ACL adjudication or the enhancement of ACL integration and enforcement within the FJS, cannot be overlooked.[81]

Further, the guideline is couched in simple and intelligible language, which allows it to be of utility to various stakeholders.[82] The need for intelligible language is because the guideline is not only aimed to be understood and applied by the jurists and FJS, but is envisaged to cater for the layman or scholar with a need to understand the customary laws of succession as they apply in Kenya and their subsequent interaction with the FJS.[83] In this regard, this study has noted that this stems from the prevalence of legal pluralism in Kenya, as well as in most States where customary laws are applied alongside statutory laws. In this respect, the LSA as discussed in this study, is a reminder of this situation, wherein the study noted that despite the LSA striving to be of universal application, it exempts some areas and circumstances to the application of ACL and further that the LSA embodies certain aspects that are peculiar to ACL, illustrating that ACL is applied alongside statutory law. [84] To this end, this study concluded that ACL cannot be ignored as its application is not only limited to the instances and areas

[80] See observation by Harper E (2011) 35.

[81] See Harper E (2011) 35. However, of worthy note is that caution must be applied as some of the views of some elders are quite antiquated and may not be objective. This may be tackled by the other stakeholders who can give a critical assessment of what is presented by the leaders, indicating the importance of having various stakeholders in the guideline revision and implementation sexercise.

[82] This is also noted as a key merit of the Restatements of African Law by Cotran E in Kenya. See Niekerk BJV (1969) 173. In this regard, it was noted in Chapter One that the use of 'alien juridical languages' is a substantial challenge that drags the resolution of legal disputes in the Kenya FJS. Refer to Ambani OJ & Ahaya O (2015) 57.

[83] However, this study contends that this aim to appeal well to both laymen (TJS) and the FJS can lead to various challenges with no ways of resolving them, such as the use of legal terms which are not understood by the laymen. A similar challenge was noted of the Restatements by Cotran to which Twining W observed that '[t]he desire to please both scholars and practical men may lead to some awkward dilemmas, which could be difficult, if not impossible, to resolve; nevertheless, the Project must be regarded as a venture of major significance.' See Twining W (1963) 221.

[84] Refer to the discussion in Chapters Four and Five.

exempted by the LSA, but also other instances as noted from the courts' (FJS) jurisprudence.[85] This invariably indicates that ACL continues to flourish and as a consequence, impacts on the general livelihoods of the people in Kenya.[86]

6.2.5 Enhanced supervisory role by the FJS

It is observed that the lack of a supervisory role by the FJS in the application of ACL by the TJS, is partly responsible for the limited development with regard to its application by the FJS.[87] However, it is argued that the foregoing view may ostensibly limit the autonomy of the TJS. Nonetheless, it has been argued that failure to have a supervisory role leads to instances in which injustice is occasioned when ACL is upheld by the FJS.[88] For example, this was noted in Chapter Five which highlighted that in some instances, customary rules that exclude women from inheriting the estate of their deceased father were upheld by the FJS.[89] However, the Chapter further noted a change in the attitude of the FJS in this regard.[90] Consequently, the

[85] See Chapters Four and Five.

[86] This study has noted that ACL regulates matters in marriage, succession and property, which have an implication on the economic and social development of Kenya.

[87] See Kiplangat JS (2016) 152-176 who espouses the need for a supervisory role of the TJS by the FJS.

[88] In support of this view, Cotran E (1987) observes that the Probate and Administration Rules in the LSA (which are applied by the FJS), ensure that there is control and protection of the administration of African intestate estates. See Cotran E (1987) 231.

[89] Refer for instance to *Mukindia Kimuru and another v Margaret Kanario* Nyeri Court of Appeal civil appeal 19 of 1999.

[90] Refer to *Re Estate of Lerionka Ole Ntutu (Deceased)* [2008] eKLR, *Mary Rono v Jane Rono and another* civil appeal 66 of 2002 [2005] eKLR, *Ejidioh Njiru Mbinga v Mary Muthoni Mbinga and another* [2006] eKLR and *Wambugi w/o Gatimu v Stephen Nyaga Kimani* (1992) 2 KAR 292.

critical consideration of the quality of justice dispensed by the TJS is imperative so as to avoid this injustice.[91]

It is anticipated that such injustice will be avoided as the FJS will continue to play a supervisory role by regulating the workings of the TJS particularly in succession matters.[92] This assertion is premised on the fact that the FJS already plays this role, as illustrated from the cases in which TJS decisions are not upheld for want of justice.[93] In addition, such supervisory role will provide an avenue for formal regulation of TJS by the state as parties can have room for appeal in the FJS from TJS decisions which they deem unsatisfactory, perhaps on grounds of gender discrimination.[94] Therefore, the supervisory role of the FJS will ensure that TJS decisions are made in line with various constitutional principles such as equality. Consequently, this study advocates for the FJS to have a supervisory role on TJS decisions owing to its (FJS) ability to modify ACL and dispense justice.[95]

In addition, owing to the need for parties to align their customs with the Bill of Rights, which requires that any customary rule that is to be applied should conform to human rights standards,

[91] In this regard, it has been observed that despite the ability of customary courts to dispense matters quickly and swiftly, it is questionable as to the quality of justice they dispense. See sentiments as espoused by Boko in Forsyth M (2007) 105, who further notes that 'justice rushed may also be justice denied…'.

[92] Focus on succession is in line with this study's scope. Further that, individuals still largely abide by their customary rules and/or practices in marriage and succession. For example, in succession matters in consideration on the mode of distribution of the net intestate estate of the deceased, distribution may not follow the principles as set out in the LSA, but is agreed upon by the beneficiaries in accordance with customary laws applicable to them, say for instance Kikuyu customary law.

[93] Refer to discussion in Chapter Five.

[94] However, as was noted earlier, this raises the situation of forum shopping where individuals opt for the FJS with the hope of a better outcome, which in turn may increase case backlog as some matters can be well determined in the TJS.

[95] In this regard, the FJS can retain some aspects of ACL which can be relied upon in decision making, and only those that lead to injustice are invalidated. This is important as parties opting to be governed by ACL will not regard that statute law had been imposed on them against their wishes. See Judicature Act s 3 (2) which provides that the courts shall be guided by ACL in all civil cases to which parties are subject to or guided by it.

then the parties will not be aggrieved, if the custom relied upon is disapplied to the extent of such non-adherence.[96] In this context, the guideline will also serve as information on the aspects of ACL that are not acceptable within the purview of the FJS, for instance, lack of conformity with human rights standards on non-discrimination on grounds of gender.[97] In this regard, it was shown that the FJS recognises and aligns with the provisions of various international instruments in making succession orders,[98] which promote gender equality in inheritance.[99] Accordingly, it is submitted that the FJS plays a supervisory role by extending the scope of laws from national laws to international ones, which can serve as determinants of the applicability of ACL within the FJS in Kenya. Further, the guideline will serve not only as a guiding tool to the FJS, but also to the general public. In this regard, it has been noted that despite the existence of legislation within the FJS proscribing discriminatory norms, the same may not be adhered to where such norms are deeply entrenched, and further where there is limited access to the FJS for people to know of the existing laws that protect them.[100]

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[96] This cautious and limited application of ACL rules is supported by substantive reasons such as the protection of abuses occasioned by gender discriminatory laws, particularly in succession.

[97] See Bakari AH 'Africa's Paradoxes of Legal Pluralism in Personal Laws: A Comparative Case Study of Tanzania and Kenya' (1991) *Afr. J. Int'l & Comp. L.* 545-557, generally.

[98] As noted in section 6.2.1 of this Chapter. This consideration is attributed to arts 2(5) and 2(6) of the Constitution 2010, as earlier noted in Chapter Five section 5.2.5.

[99] This was highlighted in Chapter Five section 5.2.5, where the same were applied by the FJS in *Mary Rono v Jane Rono and another* civil appeal 66 of 2002 [2005] eKLR and in *Re Estate of Lerionka Ole Ntutu* (Deceased) [2008] eKLR, in making its determinations.

[100] In Kenya, this is applicable to the marginalised communities such as those exempt by s 32 of the LSA. They still follow deeply entrenched discriminatory norms of customary law but some have argued that the communal ownership of land cannot be avoided in a way to give women individual inheritance to land, as the same is preserved for the community. It is perhaps for this reason that the Kenyan government recognised this perception towards communal land ownership, which concept is recognised by the Community Land Act (No. 27 of 2016), which provides that land can be dealt with by applying customary rules, as noted earlier.

6.2.6 Permits continued application of distinct customs by the various community groupings in Kenya

Further support for the proposed guideline is given by this study on the basis of the similarity of customary rules of marriage and succession among the various communities in Kenya. As noted in Chapter Four, despite the various communities found in Kenya and the diversity in their customs, there exist distinct similarities in their customary rules of marriage and succession.[101] In this context, the guideline will allow for an incisive reference on how these distinct customary rules can be applied and their decisions enforced by the FJS. This will ensure flexibility and continuity in the application and practice of the distinct customs amongst the various communities in Kenya.[102] The ability of the guideline to retain the uniqueness of each community's customary rules and/or practices is of utmost importance as an application of FJS principles on the background of imposed uniform customary laws amongst the various community groupings cannot work.[103] This is evidenced in the case of Tanzania, where codification was carried out with the consequence of imposing uniform customary norms to the different tribes in Tanzania. The resultant effect was a total disregard of the same as communities continued applying customary norms that they identified with. Therefore, the

[101] Refer to discussion in Chapter Four.

[102] In this regard, Kamau W notes that it would be tantamount to denying one their identity simply because of imposing the customs of another community to them. This would erode one's identity to belonging to a certain group. With regard to women in this context, Chapter Four noted the author's observation that there exists an advantage to women being able to identify their belonging to a certain community and their being bound (voluntarily) to the customs of their community. Refer to Kamau W (2011) 1.

[103] This is because even in the case of the Restatements by Cotran which document in-depth the various customary practices within the communities in Kenya, there will always be an internal contest within the sub-tribes of the community as to which customs should be adopted as the main one. This was witnessed in Tanzania when codification of the various tribes was done.

guideline will allow Kenyans to opt for the law that they prefer to govern them, in this case, ACL, due to its continued application in various matters such as marriage and succession.[104]

It is for the above reasons, that this study advocates for the use of a guideline towards the attainment of enhanced integration and enforcement of customary succession decisions within the FJS. Of worthy note, is that this study contends that the guideline approach proposed is by no means the only approach to which integration of ACL within the FJS in Kenya can be attempted in an effort to enhance the enforcement of decisions stemming from the TJS. [105] As noted, the guideline approach proposed by this study results from the various impediments identified upon analysis of literature and courts' jurisprudence on the FJS outlook towards ACL.[106] Accordingly, this study considers the approach fit for the circumstances in Kenya. This perception emanates from the view that by using the proposed guideline, the FJS can regulate, develop and transform the interface between the TJS and itself, in order to influence the dispensation of justice.[107] In this regard, as justice is the core objective of advancing the integration between the FJS and TJS, the same is likely unachievable if ACL is not made part of the solution. This is supported by the fact that ACL has exhibited resilience and in some

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[104] In this context, see the observations of Woodman GR(2011) 28, who argues that it is reasonable to envisage that for many years to come, the majority of people will opt for their customary laws to govern them.

[105] See the views of Harper E (2011) 40 where she outlines approaches such as self-regulation to formal recognition of customary justice systems, which occurs when customary groups develop regulations after defining their functions, structure and objectives and jurisdiction, and in some instances seek human rights training and lobby for state endorsement of their approach. As noted earlier in Chapter Five, the author also highlights the increasingly popular use of self-statements or ascertainments of customary law by States which are usually adopted as a result of the limited success seen when legal codes are used in documenting customary laws. See Harper E (2011) 34.

[106] Refer to discussions in Chapters Three and Five in which the impediments were identified.

[107] Particularly in succession matters. See similar observations by Harper E (2011) 40 on how states can engage with customary justice systems.

instances has shown that its application is beneficial to those it applies to.[108] However, as noted earlier, this study cautions that the resilience of ACL and its wide application should not simply be a valid ground for the FJS to engage with it. Its positive effects must be seen to be beneficial in its integration with the formal sector.[109] The proposed guideline is therefore advanced by this study as an approach that can effectually further the integration and enforcement of customary succession decisions as well as ACL in general, within the FJS in Kenya.

6.3 PROPOSED GUIDELINE

This section presents the proposed guideline by this study. To reiterate, the guideline covers five sections. Section I provides the legal basis for the development of the guideline based on the situational analysis of the application of ACL in the FJS in Kenya, as well as its recognition by the Kenya Constitution 2010 and relevant national laws. Section II presents the objectives of the guideline, while Section III outlines principles that underpin the integration of ACL within the FJS. Section IV presents the expected outcomes from the application of the guideline, while Section V highlights various roles that can be played by identified stakeholders in integrating ACL within the FJS. Lastly, Section VI presents the implementation strategy of the proposed guideline.

[108] For instance, its application in marriage and succession matters as discussed in Chapters Four and Five.

[109] See similar observations by Harper E (2011) 31-2.

A GUIDELINE FOR INTEGRATING AND ENFORCING CUSTOMARY SUCCESSION DECISIONS WITHIN THE FORMAL JUSTICE SYSTEM IN KENYA

January 2019

Acronyms and Abbreviations

ACL	African customary law
ACRWC	African Charter on the Rights and Welfare of the Child
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CPD	Continuous Professional Development
FJS	Formal justice system
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JTI	Judicial Training Institute
JTF	Judiciary Transformation Framework
KLRC	Kenya Law Reform Commission
LSA	Law of Succession Act
SALC	South African Law Commission
SJT	Sustaining Judiciary Transformation
TDRMs	Traditional dispute resolution mechanisms
TJS	Traditional justice system
UNCRC	United Nations Convention on the Rights of the Child
UDHR	Universal Declaration of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

Definition of Terms

African Customary law (ACL) – Refers to the rules of traditional customs which are discoverable by judicial inquiry and which are enforceable because they are acceptable as conforming to what ought to be the current values in society.

Applicability (Application) – Refers to the usefulness of ACL in the Kenyan society.

Formal Justice System (FJS) – Refers to the judiciary.

Judicial / Legal Enforcement – Interpretation of ACL as applied in traditional justice systems, by the FJS and application of the findings to arrive at a binding decision.

Relevance – Refers to the practical and social applicability of customary law in Kenya.

TDRMs – Refer to Traditional Dispute Resolution Mechanisms such as mediation and conciliation, which apply ACL in resolving or settling disputes in the traditional justice system.

Traditional Justice Systems (TJS) – Refer to the people-based and local approaches that communities innovate and utilise in resolving localised disputes to attain justice. In the various TJS approaches, the household is the first level in dispute resolution.

I. INTRODUCTION

1.1 African customary law (ACL) serves various significant functions, key among them being dispute resolution which has been observed through the workings of traditional justice systems (TJS) in which it is applied.[1] As a result, ACL has retained its significance within Kenyan communities, as most of them look to it as the primary source of dispute resolution,[2] and in the regulation of most spheres of their lives.[3]

1.2 The longevity of ACL in Kenya is signified by its resilience since the pre-colonial period to date.[4] This is highlighted by ACL retaining its recognition in the colonial and post-colonial period through its application by the FJS in decision-making. However, ACL was subordinated as a source of law,[5] and subjected to various limitations in its application.[6]

[1] In this regard, it has been noted that in many developing countries, customary systems (TJS) operating outside the state regime are often the dominant form of regulation and dispute resolution, covering up to 90% of the population in Africa. See Chirayath L, Sage C and Woolcock M 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems' (2005) 2. They cite the example of Sierra Leone where approximately 85% of the population is governed by customary law.

[2] This is attributed to the fact that ACL has an emphasis on reconciliation, compromise and group responsibility, all of which are manifest within the workings of the TJS.

[3] These areas include marriage, divorce, burial, succession and land matters.

[4] During the pre-colonial period, ACL thrived in application in TJS of various communities in Kenya, for example, the *Njuri-Ncheke* of the Meru; *Kokwet* of the Kipsigis; *Athuri Aitora* of the Kikuyu; *Kaya* of the Digo; *Kokwo* of the Pokot; *Ngaisikou Ekitoe* of the Turkana; *Oo-olpaiyan* of the Samburu, *Nzama* of the Kamba, and *Piny* of the Luo. These TJS are still used by communities to date.

[5] African customary law is ranked as the lowest source of law in a hierarchy of laws as provided for under s 3(2) of the Judicature Act, Chap 8, Laws of Kenya.

[6] For instance, through the repugnancy clause as contained in s 3(2) of the Judicature Act, Chapter 8 Laws of Kenya and further replicated in the Constitution 2010 art. 159 (3).

1.3 However, presently, ACL is elevated by the Kenya Constitution 2010, which calls for the promotion of culture through its Article 11 (1) which 'recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.'

1.4 Further, article 159 (2) (c) of the Constitution 2010 recognises the application of ACL and traditional dispute resolution mechanisms (TDRMs) by the formal justice system (FJS) by providing that 'In exercising judicial authority, the courts and tribunals shall be guided by the following principles – (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3) which provides that traditional dispute resolution mechanisms shall not be used in a way that – (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law.'

1.5 In addition, the recognition of ACL is enhanced through various pieces of national legislation which embody various provisions that recognise the applicability of ACL by the FJS. For instance, the Marriage Act 2014,[7] under its section 68(1) encourages the use of conciliation before parties seek divorce in the FJS. Moreover, the Community Land Act[8] explicitly recognises customary tenure which requires the use of ACL to resolve customary land disputes,[9] and the Judicature Act requires that the FJS be guided by ACL in civil matters.[10]

[7] No. 4 of 2014, Laws of Kenya.

[8] No. 27 of 2016, Laws of Kenya.

[9] Section 39 (1) provides: 'A registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land.'

[10] See section 3(2). However, with a rider that ACL should not be repugnant to justice and morality.

1.7 With regard to this guideline, the Law of Succession Act (LSA),[11] recognises that ACL can be applied by the FJS in making decisions in matters of succession, and by prescribing its application in certain circumstances.[12] Additionally, the Law of Succession Act (LSA)[13] embodies various provisions related to ACL that have a bearing on succession. These include the recognition that wives married under polygamous unions can benefit from their deceased's husbands' estates,[14] the limit on the testamentary freedom of a testator so as to ensure that his family is not deprived completely to the benefit of outsiders, by guarding against making of irresponsible wills by the testator,[15] and the recognition that a testator can dispose of his property by reference to any secular or religious law;[16] meaning that ACL is recognised in testate succession.[17] Conclusively, these provisions promote the application of ACL in succession matters.

1.8 The foregoing constitutional and statutory provisions seek to elevate the recognition and application of ACL by the FJS. Likewise, the consideration of these provisions allows the integration between ACL and the FJS. However, despite the foregoing recognition, the need to achieve integration between ACL and the FJS has proved elusive particularly in succession matters. This is because most matters are handled through the TJS, as it is estimated that only

[11] Chapter 160, Laws of Kenya.

[12] See secs 2(1) and 33.

[13] Chapter 160, Laws of Kenya.

[14] See s 3(5).

[15] The limit applies to a written will or a traditional oral will.

[16] See s 5(1).

[17] See s 9(1) which provides for oral / nuncupative wills.

36% of probate and administration cases are taken before the High Court for determination.[18] To aid this situation, the FJS has a resource tool which outlines the procedure and documents to be used in probate and administration matters.[19]

1.9 Further, the former Chief Justice appointed a Task Force on Informal (Alternative) Justice Systems,[20] with a mandate to develop a policy to mainstream into the FJS, the informal justice systems and other informal mechanisms used to access to justice in Kenya. Another key responsibility of the taskforce is to highlight challenges and effects of inter-linkage between the TJS and the FJS.[21]

1.10 In line with the last noted mandate of the taskforce, there are five identified impediments which hinder the interaction between the TJS and FJS and ultimately the enforcement of customary succession decisions stemming from the TJS.[22] The identified impediments are derived from a situational analysis done by this study, and include: (i) the limitation on the application of ACL through the repugnancy clause; (ii) statutory provisions that proscribe the application of ACL in some matters; (iii) the dissonance in the FJS due to

[18] See Kenya: Justice Sector Reforms to Enhance Access to Justice IDLO Quarterly Report January-March 2017, 10.

[19] This was developed under the guardianship of the Family Division of the High Court of Kenya.

[20] The Taskforce members were gazetted on 4 March 2016 and the Chief Justice then was Dr. Willy Mutunga.

[21] Other mandates of the Taskforce include to: undertake a situational analysis of any existing reports, manuals, guidelines, practice notes, legal provisions on mainstreaming AJS; consolidate best practices from selected TJS of selected communities; consult with key stakeholders and recommend a linkage between traditional and informal justice systems and the FJS; and develop a National Model for Court-Annexed Traditional Justice Resolution Mechanisms for possible adoption.

[22] These impediments are identified by this study which seeks to enhance the integration of ACL within the FJS in Kenya, particularly in succession matters.

divergent views on the application of ACL, (iv) reliance on codified customs (Restatements) by the FJS which at times do not reflect the modern changes that have arisen regarding ACL and its attendant rules and/or practices, and (v) the need to prove African customary law.

1.11 Some scholars have observed that there is an inconsistency in decision-making by the FJS in succession matters, regarding the application of ACL.[23] In this regard, there is great concern over the variation of decision-making with reference to ACL and the Law of Succession Act,[24] with the latter prescribing and proscribing instances in which ACL can be applied and upheld. In this context, the elevated use of ACL in resolving disputes amongst most Kenyan communities, especially in personal matters such as marriage and succession, requires a harmonised interaction between the FJS and ACL, to ensure that the FJS upholds decisions stemming from TJS.[25] Hence, integration of ACL within the FJS is important in harmonising the fusion between the TJS and the FJS.

1.12 Consequently, in order to give effect to the constitutional and statutory provisions, there is a great need to provide guidance on the integration of ACL within the FJS. In this regard, this guideline is proposed to aid in the integration by providing guidance to the FJS when applying ACL and considering to uphold TJS decisions in succession matters. It also seeks to inform other stakeholders on how best to ensure that ACL is upheld by the FJS,[26] by highlighting the interaction between ACL and formal law.

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[23] See for instance observations by Musyoka WM *Law of Succession* (2006), generally.

[24] Chap 160 Laws of Kenya.

[25] As long as ACL applied in decision-making in the TJS is not repugnant to justice and morality.

[26] In addition to the judiciary, other stakeholders include: traditional leaders, communities in Kenya and educational institutions.

2. OBJECTIVES OF THE GUIDELINE

This guideline is developed to:

2.1 Provide a framework to the FJS to ensure consistency and certainty in applying and enforcing decisions stemming from TJS in succession matters. This will ensure efficiency in the delivery of justice and promotion of confidence in the FJS.

2.2 Provide a benchmark for the FJS as well as Kenyan communities in their decisions pertaining to succession matters when ACL is applied. First, these decisions should adhere to constitutional, statutory and international provisions. Second, where these standards are not met, the FJS should look at the prevailing circumstances under which such decisions are made, in line with recognising the reform or development of ACL. This will also be based on prevailing socio-economic circumstances,[27] and will allow for 'living' customary law to be recognised by the FJS.[28]

2.3 Address the identified impediments that hinder the application and enforcement of TJS succession decisions in the FJS.

[27] This is in recognition of the fact that ACL, just like formal law, adapts to change. This flexibility is a key characteristic of ACL which makes it resilient in the face of legal pluralism in most African states.

[28] African Customary Law is divided into 'official' and 'living' customary laws. Official customary law is recognised in anthropological studies, court judgments, restatements, and in legal codes, while living customary law is the practices and customs of the people in their day-to-day lives. It is observed that 'the concept of living customary law is now readily accepted by courts, scholars, and legislation dealing with customary law and that recognition of this concept signifies the status of living customary law and its future as a part of African legal systems.' See Himonga C 'The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa' in Fenrich J, Galizzi P & Higgins TE (eds) *The Future of African Customary Law* (2011) 37.

2.4 Enhance the supervisory role of the FJS regarding TJS decisions on succession matters. This role will ensure formal regulation of the application and enforcement of ACL, by requiring that ACL meets constitutional values.[29]

2.5 Promote the understanding of various stakeholders including members of the FJS, legal practitioners, legal students and communities on the application and enforcement of ACL in succession matters.

2.6 Provide guidance in developing relevant education and training curricula for the FJS and other stakeholders on integration of ACL within the FJS, as the guideline can be used as reference material in providing relevant information on the interaction between ACL and succession matters in the FJS. The target groups for various curricular include: law students, members of the FJS, traditional leaders and communities.

3. PRINCIPLES UNDERPINNING THE INTEGRATION OF ACL IN THE FJS

The decision-making process in the FJS and TJS in succession matters shall be guided by the following principles which are derived from constitutional, statutory, regional and international provisions and/or best practices.

[29] See article 159(3) which sets out limitations on the application of ACL which provides that TDRMs shall not be used in a way that – (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law.

3.1 **Consistency**

Consistency in the decision-making process in instances where ACL is upheld by the FJS in succession matters, should reflect uniformity. This is in line with the consistency principle in law which requires that laws should be applied equally without unjustifiable differentiation.

3.2 **Equality**

In succession matters, the principle of equality should be adhered to to ensure the non-existence of gender discrimination in inheritance. Legal equality ensures that each beneficiary is treated equally. Of important note is that equality does not denote 'the same'. Hence, TJS decisions relating to inheritance and distribution of property should adhere to this principle based on fairness.[30] This is reinforced by the Bill of Rights in the Kenya Constitution 2010 under Article 27 which provides for equality.[31] This is further supported by various provisions in relevant legislation to succession matters.[32] The principle is further espoused in various regional and international instruments as shown below.

3.3 Adherence to national, regional and international laws

The Kenya Constitution 2010 embodies the Bill of Rights which provides pertinent principles applicable to succession matters such as the right to equality. Further, the LSA constitutes national laws and sets out how succession matters are to be regulated. In applying international law to succession matters, the FJS is guided by Articles 2(5) and (6) of the Kenya Constitution

[30] This can be gauged by the FJS following the considerations set out under s 28 of the LSA, which outlines historical and future considerations that affect the distribution of a deceased's estate.

[31] Article 27 (3) provides: 'Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, *cultural* and social spheres' [own emphasis].

[32] For instance, see the Law of Succession Act, Chap 160 Laws of Kenya.

2010. [33] In this context, TJS succession decisions that conform to the FJS requirements and values derived from national, regional and international laws, should be upheld. The relevant regional and international instruments include, but are not limited to:

3.3.1 African (Banjul) Charter on Human and People's Rights;[34]

3.3.2 African Charter on the Rights and Welfare of the Child (ACRWC) or Children's Charter;[35]

3.3.3 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);[36]

3.3.4 International Covenant on Civil and Political Rights (ICCPR);[37]

3.3.5 International Covenant on Economic, Social and Cultural Rights (ICESCR);[38]

3.3.6 Universal Declaration of Human Rights (UDHR);[39]

3.3.7 United Nations Convention on the Rights of the Child (UNCRC);[40] and

3.3.8 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[41]

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[33] Article 2 (5) provides: 'The general rules of international law shall form part of the law of Kenya.' While Article 2 (6) states that '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'

[34] Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

[35] Adopted in 1990, entered into force on 29th November 1999 OAU Doc. CAB/LEG/24.9/49.

[36] Adopted in 1979 by the UN General Assembly.

[37] Adopted by UNGA Resolution 2200 A (XXI) of 16th December 1966, entered into force on 23 March 1976 999 UNTS 171 (ICCPR).

[38] Adopted by the United Nations General Assembly on 16 December 1966 through GA. Resolution 2200A (XXI). Came in force from 3 January 1976.

[39] Adopted by the United Nations General Assembly at its third session on 10 December 1948.

[40] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577

[41] Adopted by the United Nations General Assembly on 13 December 2007. Doc. A/61/295.

4. EXPECTED OUTCOMES OF THE GUIDELINES

The Judiciary Transformation Framework (JTF) 2012-2016[42] envisaged four pillars of reform namely: (i) People focused delivery of service which focuses on *the promotion and facilitation of alternative forms of dispute resolution*; (ii) reduction of backlogs and the acceleration of case management; (iii) the introduction of simplified procedures to reduce costs; (iv) the establishment of new courts in under-serviced areas and mobile courts in remote locations; and (v) the expansion of legal aid schemes. In this regard, this guideline aims to address two of the reform pillars identified as (i) and (ii) above. This is in line with the interventions envisaged by the FJS in the next stage of its transformation after the JTF achieved various developments, such as improvement in service delivery and reduction in case backlog.[43] Hence, the subsequent interventions by the FJS are presented through a service delivery agenda for 2017-2021, themed Sustaining Judiciary Transformation (SJT) for Service Delivery.[44] Therefore, the application of this guideline in decision-making by the FJS in succession matters to which ACL is applied, will result in the following to individuals seeking the services of the FJS in determining their succession matters:

4.1 Accessibility to the FJS;

4.2 reduction of technicality of procedures and also backlog in the FJS; and

4.3 efficiency and consistency in decision-making in the FJS.

[42] The JTF was developed under the leadership of the Supreme Court.

[43] See developments of the judiciary through the JTF as highlighted in the service delivery agenda 2017-20121, Sustaining Judiciary Transformation (SJT) 1-70, 3.

[44] The SJT focuses on interventions that will enhance access to justice; clearance of case backlog; enhancement of transparency, accountability and integrity within the judiciary; implementation of the new Judicial Digital Strategy; and on leadership and governance. These key aspects form the main six chapters of the SJT.

5. STAKEHOLDERS AND THEIR ROLES

It is observed that the inclusion of key players in any development or reform exercise is crucial. In relation to ACL, it has been observed that one of the impediments to the integration of customary law within the FJS is the failure to involve key stakeholders in the process.[45] In this regard, the realisation of the objectives of the guideline will require involvement of various key stakeholders who will undertake different roles which will include legal and educational aspects. These include the legislature, judiciary, law commissions, taskforces, universities and legal training institutions, Government and NGOs and traditional leaders. The roles and responsibilities of each stakeholder with reference to the application and enforcement of ACL in succession matters are outlined as follows.

5.1 Legislature

The role of enacting and amending laws on succession will be undertaken by the legislature in order to enhance the application of ACL and enforcement of TJS decisions in the FJS. The process will involve a critical examination of the LSA of 1981 in order to identify provisions that need to be incorporated, amended or repealed.

5.2 Judiciary (FJS)

The FJS will play their major roles in the integration of ACL with formal law. These include: enforcement of laws developed by the legislature; development and gazettement of regulations and guidelines governing the integration of ACL within the FJS and supervision of the application and enforcement of ACL within the FJS.[46]

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[45] See Harper E (2011) Engaging with Customary Justice Systems in Ubink J and McInerney T (eds) *Customary Justice: Perspectives on Legal Empowerment*, 33. Legal and Governance Reform: Lessons Learned No. 3/2011 International Development Law Organization (IDLO).

[46] It is observed that the lack of supervisory by the FJS on the application of the TJS is partly responsible for the limited development with regard to the application of the FJS. See for instance Kiplangat JS (2016) 152-176 who

5.3 Law Commissions

The State should take a deliberate policy that allows a bottom-up approach in the recognition and enforcement of ACL in the FJS, which will ensure the ascertainment of the true content of ACL as is practised in modern-day Kenya. This is achievable, for example, by engaging with the Kenya Law Reform Commission (KLRC),[47] which can assist with the problem of integrating aspects of ACL in the Kenyan FJS.[48] The Commission can do so as it is mandated to promote legal and law reform. KLRC can also ensure public participation by allowing the public to send their proposals on how best ACL can be integrated within the FJS.[49] Through public participation, the findings of the commission can form a guide to matters of ACL in Kenya, similar to the Restatements and proposed guidelines. In this way, the guides might be deemed credible, due to public participation. This will lead to the development of ACL along prevailing socio- economic contexts, consistency in customary norms and practices and a wider application of the TJS in the FJS.

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espouses the need for a supervisory role of the TJS by the FJS. The foregoing view has been noted to ostensibly limit the autonomy of the TJS, but it has been argued that the failure to have a supervisory role leads to the instances in which injustice is occasioned when ACL is upheld by the FJS. Therefore, a critical consideration of the quality of justice dispensed by the TJS is imperative so as to avoid injustice. See Forsyth M (2007) 105.

[47] Initially known as the Law Reform Commission, established in 1982 through the enactment of the Law Reform Commission Act, Act No. 2 of 1982, Act No. 13 of 1988 (then), now Chapter 3 of the Laws of Kenya.

[48] This stems from the mandate of the KLRC which was constituted to 'keep under review all the law of Kenya to ensure its systematic development and reform, including in particular the integration, unification and codification of the law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments and generally its simplification and modernization.' See section 3 of the Law Reform Commission Act.

[49] This is one of the Commission's roles namely to consider any proposals for the reform of the law that may be made or referred to it. Such an approach worked well in South Africa through the 1903-5 South African Native Affairs Commission, which carried out investigations through interviews and questionnaires. The findings were published and now form 'a high place among the sources of customary law' in South Africa. See Kerr AJ 'The Nature and Future of Customary Law' (2009) *The South African Law Journal* 677-689, 688-9, who supported the idea of having a commission(s) to deal with changes related to customary law in South Africa.

5.4 Taskforces

The Taskforce on Alternative Justice Systems (AJS) notes the importance of stakeholder participation as one of its responsibility is to '[c]onvene stakeholders and practitioners in AJS in order to map out and understand the prevalence of use of AJS, its intersection with the judicial system and the progress made in infusing it with National and Constitutional values.' In this regard, the findings of the Taskforce will enhance the integration of ACL and TJS within the FJS, by involving various and relevant stakeholders in the process, in developing a policy to mainstream into the FJS informal and other mechanisms used to access justice in Kenya in order to reduce case backlog. This guideline highlights this mandate as a means in which an efficient and appropriate approach can be identified in the integration of indigenous jurisprudence within the FJS.

5.5 Universities and Legal Training Institutions

Universities that offer the law programme need to review their existing curricular for undergraduate and postgraduate programmes, to ensure the incorporation of ACL as a core course. This will ensure the acquisition of in-depth knowledge on how ACL interacts with formal law. Other legal training institutions such as the JTI need to organise short courses and seminars for members of the judiciary on customary succession laws and their interface with formal law and their integration within the FJS. Further, the Law Society of Kenya, can train legal practitioners in the area of ACL and its interface with formal law through its continuous professional development courses.

5.6 Non-governmental Organisations (NGOs)

NGOs will play a major role in planning, organising and implementing training programmes including seminars and workshops for traditional leaders and communities on the application

and enforcement of customary succession decisions within the context of the Kenya Constitution 2010, statutory and international laws. Further, the exercise will include a learning process in which the NGOs can obtain, analyse and document various qualities of ACL in succession, and disseminate the same to the public and FJS. This will ensure consistent knowledge of ACL as it applies in contemporary Kenya.[50]

5.7 Traditional Leaders

Traditional leaders can play the role of advising the FJS and other stakeholders on ACL rules and the attendant reforms as pertain to their communities.[51] Traditional leaders can further serve as potential agents of reform as they have the incentive to continue being responsive to changing community needs and expectations.[52] Traditional leaders can achieve this by undertaking short courses or seminars organised by the Government, Judiciary and other training institutions in the area of ACL and its related aspects.

In sum, partnership among the various identified stakeholders is an important aspect that can lead to creation of public awareness on the importance of integrating ACL into the FJS. In this regard, the judiciary and educational institutions will be expected to take a leading role in coordinating public awareness on integration, application and enforcement of ACL in the FJS.

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[50] These views support the proposed guideline and are as articulated in the study by Karimi M, Rabar B, Pkalya R, Adan M & Masinde I, Indigenous Democracy: Traditional Conflict Resolution Mechanisms ITDG-EA (2004) 11-86, 97.

[51] For a comparative note, see Report on Traditional Courts and the Judicial Function of Traditional Leaders (2003), wherein the role of traditional leaders was raised in South Africa, following recommendations on the adoption of Customary Courts by the State, in the report of the South African Law Commission (SALC) – now the South African Law Reform Commission (SALRC).

[52] See Harper E (2011) 35.

Therefore, the various roles played by key stakeholders and their subsequent coordination in the endeavour to enhance the integration of ACL within the FJS cannot be overlooked, as the partnership of the various stakeholders will ensure critical assessments of each other's roles in the integration exercise.

6. IMPLEMENTATION, MONITORING AND EVALAUTION

The implementation, monitoring and evaluation of this guideline will require the FJS to critically review the guideline through a multi-faceted approach involving members of the bench, legal practitioners, traditional leaders and the public. The review process will also require consideration of relevant constitutional values, statutory provisions, living customary law of various communities in Kenya relating to succession, and the findings and recommendations of taskforces and other studies with reference to TJS.[53] The review process by the FJS will result into the improvement of the guideline through amendments and incorporation of relevant information into various sections of the guideline. It is anticipated that following the review, the guideline will be gazetted and subsequently applied by the FJS within its people-focused delivery of justice which seeks to promote and facilitate alternative forms of dispute resolution by recognising indigenous jurisprudence and aspects thereof.

The guideline will require continuous monitoring by the FJS on its relevance and practicability in the application and enforcement of customary succession decisions. The monitoring process will also determine the effect of the guideline on the integration of ACL within the FJS. It is anticipated that the guideline will be based on the Judicial Strategic Plan which normally covers

[53] For instance the study by Karimi M, Rabar B, Pkalya R, Adan M & Masinde I (2004) 11–86.

a period of five years. Further, the guideline will require summative evaluation to determine its effectiveness and appropriateness in enhancing integration and enforcement of customary succession decisions in the FJS. The evaluation will also focus on the relevance and appropriateness of the guideline for training and education purposes for various target groups. The process of undertaking summative evaluation will therefore require a multi-faceted approach covering legal and educational aspects and the participation of key stakeholders with expertise in ACL. It will also require participation of experts in the evaluation process and especially in development of evaluation tools. Such participation will allow an objective assessment of the proposed guideline which can lead to its review and amendment for improvement and continuous application. This is in line with one of the responsibilities of the Taskforce on Alternative Justice Systems, which is mandated to undertake a situational analysis of any existing reports, manuals, *guidelines*, practice notes, legal provisions on mainstreaming alternative justice systems. [54]

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[54] [own emphasis].

6.4 CHAPTER SUMMARY

This Chapter accentuates that it was informed by the impediments that inhibit the application of ACL and subsequent enforcement of TJS decisions within the FJS in Kenya. To reiterate, these impediments were identified as the repugnancy clause, statutory provisions that proscribe the application of ACL in some matters, the dissonance in the FJS as to the application of ACL, reliance on codified customs (Restatements) by the FJS which at times do not represent the true nature of certain aspects of ACL, and the need to prove ACL. Based on these limitations, the chapter set forth to propose a guideline approach, which would enable a fused-based system between the TJS and FJS in the application of ACL. The guiding features in this fusion based system were highlighted by identifying the justifications for the proposed guideline. They were to the effect that first, the guideline is in tandem with constitutional provisions as well as those of various legislation in Kenya. Secondly, that the guideline is complementary to various Government and FJS policies. Thirdly, that the guideline allows for the reform and development of ACL. Fourthly, that the guideline advocates for the inclusion of key stakeholders in the integration exercise of ACL within the FJS. Fifthly, that the guideline allows for the continued supervisory role played by the FJS in regulating the application of ACL within the FJS. Lastly, that the guideline permits the continued application of distinct customs by the various community groupings in Kenya. In effect, these features indicated that the effectiveness of the guideline required a multi-faceted approach in its realisation. Consequently, from the identified justifications, this chapter presented the proposed guideline. The guideline covers five sections which provide the legal basis for the development of the guideline, namely the objectives of the guideline; principles underpinning the integration of ACL within the FJS; the expected outcomes of the guideline; the various roles that can be played by identified stakeholders in integrating ACL within the FJS; and the implementation strategy of the proposed guideline. Consequently, this Chapter concludes that the guideline will

offer aspects that give a more unified trend in dealing with customary succession decisions in the FJS to which ACL is applicable. It is submitted that this will be achieved as the guideline will improve the correlation between the TJS and FJS, thereby maximising the chances of the two systems cooperating with each other, and ultimately, achieving an optimum interaction in the dispensation of justice.

CHAPTER SEVEN

CONCLUSIONS AND RECOMMENDATIONS

7.1 CONCLUSIONS

This study sought to evaluate the interaction between the TJS and FJS in Kenya on succession matters by seeking to establish the extent to which the FJS is guided by ACL in making its determinations. To determine this, the study was guided by five research questions. The first explored the various customary rules on successions that inform TJS in various selected communities in Kenya. The second examined the legal position that ACL holds in the Kenyan legal system. The third probed the relevance and applicability of TJS decisions on succession in the FJS. The fourth examined the factors that enhance or impede the recognition of such TJS decisions by the FJS. The fifth prodded what approach can be applied to enhance the interface between TJS and the FJS in Kenya. These questions were addressed by the various chapters of this study as summarised below.

Chapter Two presented a theoretical framework that offered a basis to the arguments in the five research questions. Chapter Three dealt with the second research question with regard to the legal position that ACL holds in Kenya. The first research question was engaged in Chapter Four along with the fourth research question. The fourth research question which examined the factors that enhance or impede the recognition of TJS decisions by the FJS, was dealt with in Chapters Four and Five. The factors identified in Chapter Three, Four and Five culminated into the proposed approach of the use of a guideline that would facilitate further integration and enforcement of TJS decisions in the Kenyan FJS. Hence, Chapter Six dealt with the fifth research question.

Each of the preceding chapters has its own conclusions, and to avoid repetition, the same will not be highlighted herein. However, the subsequent general conclusions and observations are important in accentuating the findings of the foregoing chapters.

The study in Chapter One highlighted the limited interaction between ACL and the FJS, despite the wide use of ACL and TJS in regulating personal matters and resolving disputes in the country. It was noted that the Constitution 2010 seeks to elevate the integration between the two systems by recognising the application of TDRMs and culture as the foundation of the nation and cumulative civilization of the Kenyan people and nation.[1] Further, that the FJS seeks to realise the integration of ACL within its workings, by recognising indigenous jurisprudence. However, that the integration is presented with various limitations. In this regard, it was noted that this limitation was effected by the repugnancy clause,[2] and various statutory provisions which proscribe the application of ACL.[3] This was established to influence the general recognition, application and subsequent enforcement of ACL in the FJS. However, it was noted that this limitation was not only propagated by the various limits above-noted, but also stemmed from the nature of some of the customary rules and or practices as applied in the TJS.[4]

According to Chapter Two, it was established that the Historical School theory as advanced by Karl von Savigny is instructive in appreciating the background to the application of ACL by

[1] See art 11(1) Constitution 2010.

[2] See art 159(3) Constitution 2010 and s 3(2) Judicature Act, Chap 8 Laws of Kenya.

[3] See ss 2(2) and 32-3 of the Law of Succession Act, Chap 160 Laws of Kenya which proscribes the application of ACL in succession matters save to persons and areas which it identifies.

[4] See the noted common feature of gender discrimination in inheritance in most TJS among the various communities in Kenya as discussed in Chapter Five.

the FJS.[5] The Historical School theory was applied to showcase that true laws stems from the culture of a people, by virtue of their customs which regulate various spheres of their lives. In this perspective, it was noted that the Historical School proponents advanced that customs should be embraced in law making, as law stemmed from the natives.[6] It is this reasoning by the School's proponents that led this study to adopt the theory in support of the argument which advocates for the elevation of ACL in determining disputes, as it emanates from the people of Kenya.[7] In relation to this argument, it was shown that people's relations in Kenya are regulated by ACL alongside state law.[8] In this context, it was further noted that the State (FJS) also relies on ACL in making orders, implying that state law does not work in a vacuum but also operates alongside other rules (ACL) as pertain within the State. Therefore, by identifying this theory, the chapter sought to establish the relevance of integrating ACL within the FJS. Further, the theory supports why the utility of ACL should not be dismissed, as it can function within the FJS framework with a view to achieving the common goal of justice.

In Chapter Three the study employed a historical overview of the interaction between the TJS and FJS in Kenya. It discussed the application of ACL in the pre-colonial, colonial and post-colonial periods, as well as the perception of the FJS in relation to ACL. Subsequently, it was noted that the thriving usage of TJS was thwarted by the advent of colonialism, which position was further engrained upon the attainment of independence in Kenya. This position was propagated in several ways. First, TJS (native courts) were abolished, secondly, the application

[5] See discussion in Chapter Two.

[6] See views of Historical School proponents as discussed in Chapter Two.

[7] See Allott AN (1984) 60, where he espouses a similar view noting that the people are the true lawmakers as the law [ACL] stems from themselves.

[8] This was noted in the field of marriage and succession law as discussed in Chapter Four. It further denotes of legal pluralism in Kenya.

of ACL was limited to civil matters only, thirdly the application of ACL was subjected to the repugnancy clause and lastly, ACL was relegated as a source of law by being subordinated to the English (common) law.[9] These instances highlighted the indifferent attitude by the FJS towards the development of ACL and effectively responded to the second research question.

Chapter Four dealt with an analysis of the customary and legal framework that governs marriage and succession in Kenya. This analysis identified the Marriage Act,[10] and Law of Succession,[11] as those which regulate the aforementioned matters respectively. The Marriage Act was noted to recognise various marriages, in particular of customary nature, which was noted to have an influence on the conduct of succession in Kenya. On this recognition, the Chapter proceeded with an evaluation of customary laws of succession as applied under ACL due to the interaction with customary marriage rules. This analysis highlighted that property under customary succession can devolve through intestacy, distribution during one's lifetime and through testate succession, the latter being possible through nuncupative wills. The Chapter also evaluated the interaction between the LSA and ACL, noting that the LSA embodied various African customary principles. These principles were identified as some of the factors that enhance the recognition and enforcement of ACL by the FJS. This discussion effectively addressed the first and fourth research questions.

Chapter Five dealt with an evaluation of courts' jurisprudence on the interaction between the FJS and ACL in succession matters. This evaluation highlighted that there exist divergent

[9] Most of these factors illustrate the ability of the colonialists to substantially modify customary laws, so as to conform to their own ideas and institutions (FJS). See Allott (1984) 59.

[10] No. 4 of 2014, Laws of Kenya

[11] Chap 160, Laws of Kenya.

attitudes amongst courts as to the application of ACL in such matters. This stance resulted in incongruence in the enforcement of decisions stemming from the TJS, which position was demonstrated by the jurisprudence analysed therein. In noting this situation, the chapter sought to establish reasons that led to such inconsistency. It was found that there were various factors that enhanced and /or impeded the recognition of ACL by the FJS. In relation to the former, upholding of ACL by judges and statutory provisions that embodied ACL were found to be factors that favour the recognition of ACL,[12] while discriminatory customary rules of succession, unwritten nature of customs, reliance on restatements and the need for ACL to be proven before it can be upheld, were found to constitute the latter factor, thereby buttressing the inconsistency of the FJS in decision-making. In effect, these findings answered the fourth research question. The chapter also tackled the third research question by illuminating the relevance and applicability of decisions of the TJS in succession matters.[13]

Chapter Six offered a culmination of all the perspectives from the research questions and presented factors for consideration in developing a model framework that could be adopted by the FJS to enhance the recognition and enforcement of TJS decisions by the FJS. These factors were informed by the findings of various Chapters of this study. For instance, Chapter Two argued that customary law is the basis of most laws applied by the FJS as such laws are derived from the people. In this regard, this study established that ACL is recognised in Kenya, however, that there exist limitations in its recognition.[14] It is for this reason that this study sought to establish how recognition and enforcement of ACL by the FJS can be enhanced.

[12] See provisions of the Law of Succession Act which embody certain aspects of ACL as discussed in section 4.4.2 of Chapter Four.

[13] This presented itself from the analysis of the courts' jurisprudence.

[14] Limitations include the repugnancy clause and its proscription by provisions of various statutes.

Further, this endeavour was informed by the findings in Chapter Five, which identified factors that impede the recognition of TJS decisions by the FJS. To reiterate this, the impediments were noted as the repugnancy clause; the restriction of the LSA to instances in which ACL can be applied in succession matters; the gap in Restatements on some customary laws and the need to prove African customary law. It is from these identified factors that this study proposes the use of a guideline in applying and enforcing TJS decisions within the FJS so as to improve the limited harmonised interaction between the TJS and the FJS. It is considered that the proposed guideline will achieve this by ensuring development of ACL along prevailing socio-economic contexts, such as the fulfilment of necessary human rights standards required by the Constitution 2010, international instruments and the FJS in the application of ACL. Consequently, this will ensure consistency in the application of customary rules and practices and their subsequent enforcement by the FJS. Further, it is considered that the proposed guideline is supported by the theoretical framework applied to this study, namely the Historical School theory.

Based on the above Chapter summaries, this study arrives at a general conclusion that there is a need to enhance the application and enforcement of TJS decisions by the FJS through an approach (use of the proposed guideline) which integrates the best of both systems, in order to emerge with a harmonised approach in the achievement of justice.

7.2 RECOMMENDATIONS

Arising from the conclusions and findings of this study, the following are the recommendations that can be adopted to enhance the application and enforcement of customary succession decisions and ACL generally, by the FJS in Kenya. As a general recommendation, it was noted

that this study offers a guideline approach to be adopted to enable a harmonised integration of the TJS in the FJS. In addition to this general recommendation, specific recommendations that require the intervention of various stakeholders with the aim of developing ACL and the interaction between the TJS and FJS in Kenya are also offered below.

7.2.1 Legislature

The National Assembly should consider a wider recognition of aspects of ACL within the domain of new legislation. This will be instructive in ensuring that the current approach that sees an limited consideration of ACL is revolutionised. In this respect, such an approach will be informative in that a wider array of ACL aspects will be recognised, leading to a wider application of the same. Equally, an empirical study that questions the limited recognition of ACL in Kenya's domestic laws will enable the legislature to make informed decisions as to what aspects of ACL or TJS rules and practices may require recognition to be applied by the FJS.

Other technical departments that conduct research leading to the subsequent adoption of laws should inculcate the use of theory in the adoption of laws for the State. For instance, the Historical School theory underscores that true laws stem from the culture of a people, by virtue of their customs which regulate various spheres of their lives. Thus, an engagement that embraces customs in law-making will aid the fusion of ACL and TJS in the FJS. This will offer clarity in the way that FJS relies on ACL in making orders, and an eradication of the divergent attitudes of the FJS in the application of ACL that is created by the current legal regime.[15]

[15] As noted with the application of the LSA in succession matters in Kenya.

7.2.2 Judiciary

The judiciary (FJS) should engage more with ACL and the TJS so as to improve access to justice.[16] This stems from the fact that this study noted that the significance of ACL is recognised by the State through its normative recognition and its further consideration by the FJS in decision-making. This was noted in succession matters, where the FJS strove to be dynamic in applying customary rules of succession while avoiding to uphold rules that it deemed unfavourable to women beneficiaries.[17] In this way, the FJS adopts an approach that is human rights centred and which is applauded by this study. In this regard, it is further recommended that an evaluation of the decisions on succession from the pre-colonial, through the colonial to the post-colonial periods be carried out, to enable the FJS to reflect on steps taken to improve its engagement with ACL and statutory law in succession. This will enable a harmonised engagement between the TJS and FJS and ensure that the application of ACL is in conformity with values and principles espoused by the Kenya Constitution 2010.[18]

Further, to enhance access to the FJS by inhabitants, it is recommended that members of the FJS be trained in customary law rules and principles which encourage decisions of the FJS to consider community needs and conceptions of justice stemming from ACL.[19] This recommendation lies in the fact that at times, the FJS applies customary laws as best as it

[16] This is in line with its strategic plan through the Judiciary Transformation Framework (2012-2016) which seeks to facilitate and promote alternative forms of dispute resolution as noted in Chapter One. Further, engagement with TJS is becoming more common in most developing countries where legal pluralism is present, in an effort to improve justice through justice sector reforms.

[17] As noted from analysis of courts' jurisprudence in Chapter Five.

[18] Similar observations made by the South Africa Law Commission (SALC) – now the South African law Reform Commission (SALRC), when presenting the Customary Courts Bill (2003), as noted in Forsyth M (2010) 96.

[19] This is of necessity as evidenced in *Joyce Atemo v Mary Ipali Imujaro* [2003] KLR 435, where the FJS failed to make orders for non-knowledge of Teso customary laws since they were not documented. Training in customary laws beforehand would have mitigated such outcome. Similar recommendations on training have been advanced by Harper E (2011) 38 and Onyango P (2013) 5.

understands them without any insight on what the rules entail or when they are applicable, as shown by the cases discussed in Chapter Five. In this regard, it is observed that the 'revival of customary law as a legal discourse should not appear as resurrecting it from the dead laws but highlighting the very legal phenomena that are existing in reality and posing serious challenges to the existing juridical orders.'[20] Therefore, following training on ACL, there should be refresher courses for members of the FJS, where they are re-appraised of the developments in the field of succession in both customary and civil law. There is also the need to have a model that adequately questions the current stance of the LSA in terms of its application to matters before and after 1981. This will aid the congruent enforcement of decisions by the FJS that affect women in succession under customary law, enhance the recognition of ACL by the FJS (by applying ACL as current practised – that is, living customary law), discourage discriminatory codified customary rules of succession [as found in the Restatements], and buttress consistency in FJS decisions.

7.2.3 Involvement of other stakeholders

This subsection offers insights for recommendations of three stakeholders who are critical to the emergence of positive changes in succession under the TJS. These include Law Commissions, local authorities involved in the TJS and Civil Society Organisations.

7.2.3.1 Local authorities / TJS

There is persuasive scholarly literature from other jurisdictions that points to the need for traditional institutions that hand down judgments to be cognisant of the form a human rights

[20] See Onyango P (2013) 5.

approach takes, with regard to the decisions that are handed down.[21] Although Kenya does not have the formally recognised traditional courts, this study has shown that there are instances where elders or designated persons in a given community hand down judgments.[22] It is prudent that the person who presides over these forums as elders or advisors, embrace the application of the Bill of Rights in the Constitution to ensure that instances of discrimination in succession on grounds of gender, adducing of evidence to support or weaken the evidential inferences, and the subsequent decisions, embrace the parties who seek to benefit on the same legal footing.[23] This will go along in propagating Chanock's proposal of a bottom-up approach that aims at reforming and developing ACL from the grassroots.[24] Accordingly, customary fora like the elders among the *Njuri Ncheke* and other TJS, will play key roles in the development and reform of ACL.[25]

A further justification for the recognition of TJS, is that their structure and workings do not have to be uniform in Kenya. As is the current case, local TJS handle matters according to the needs and circumstances of the local people. It would be unfair to impose similar procedures to all areas of Kenya.[26] In addition, each area in Kenya identifies its own problems and defines

[21] Nanima RD 'A missing link in the Traditional Courts Bill 2017. Evidence obtained through human rights violations' (2018) 65 *South African Crime Quarterly* 23-31, 24. See also Mmusinyane B (2009) The Role of Traditional Authorities in Developing Customary Laws in Accordance with the Constitution: *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC) *PER/PELJ* 12(3) 136-161.

[22] This was noted in Chapter Three subsection 3.2.1.1, which highlighted the procedures in the TJS of the Meru and Kipsigis communities in Kenya.

[23] This is considering that the FJS deems their role relevant in the justice sector, as seen in instances where their evidence is considered in upholding ACL. See Chapter Five section 5.3.4.

[24] See Chanock 2005 in Forsyth M (2007) 71.

[25] This study noted that TJS institutions still play an active role in the dispensation of justice and that the FJS also looks to them for the delivery of justice. In this regard, see cases of *Lubaru M'Imanyara v Daniel Murungi* [2013]eKLR and *Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others* [2012] eKLR, where the FJS referred land marital disputes to *Njuri Ncheke*.

[26] This position, is supported by similar observations made by Forsyth M, who notes that 'it is not necessary for there to be a uniform relationship between the state and non-state justice systems throughout the jurisdiction, but

fitting solutions, in recognition of the fact that one form of TJS will not fit other areas in Kenya and that the presence of various forms of dispensing justice is therefore necessary to achieve community justice.[27] This observation serves to justify this study's proposal for a guideline on the integration of ACL and the subsequent strengthening of TJS as Kenya is comprised of various communities which apply ACL based on their heritage and circumstances, thereby negating the application of uniform TJS.[28]

7.2.3.2 Civil society organisations

Civil Society Organisations play a crucial role in ensuring that stakeholders are accountable to the masses they provide support or services to. In this regard, they place the latter in a position to act in accordance with the law. It follows that Kenya as a constitutional democracy requires that the executive, legislature and the judicial arm of government, as well as traditional leaders and other stakeholders, perform their work in a manner that upholds equality and non-discrimination in matters relating to succession. In this context, the Kenya Human Rights Commission and Kituo cha Sheria (Legal Advice Centre)[29] as such organisations, can effect change with regard to succession under ACL in a manner that requires that all stakeholders

different relationships may be formed depending on the various needs and resources in particular localities.' See Forsyth M (2007) 72.

[27] Similar observations were made in relation to Australia, by The Australian Human Rights and Equal Opportunity Commission (2003) as noted in Forsyth M (2007) 72. The relevance of Australia to this study is that the country also grapples with the need to incorporate or recognise customary laws of its inhabitants within the formal justice system as it is noted that TJS are still applied and in some cases, the preferred mode in the resolution and/or adjudication of disputes. See Forsyth M (2007) for a general discussion.

[28] The danger of imposing uniform customary laws was seen in Tanzania where codification of the customary laws was implemented. See Twining W (1963) 225.

[29] Kituo cha Sheria is an NGO that was established on 9 July 1973 and provides legal aid with the aim of empowering the poor and marginalised in Kenya. Its aim is to enhance equity and access to justice to all persons in Kenya.

deal with the issues arising from this study from the perspective of accountability to the constitutional human rights standards.

Subsequently, the effect of such accountability leads to the gradual development of interventions that place women at the centre of all approaches, which are developed with the principal intention of improving her ability to benefit from ACL. The executive, on the other hand, would develop policies that protect women, the legislature would enact and amend the relevant laws, while the FJS would interpret the laws in a purposive manner that improves the situation of the Kenyan woman.[30] In addition, the customary fora would engage more female participation and hand down decisions that do not enhance discriminatory tendencies against women.

7.3 FURTHER RESEARCH

There is a need for further research in an empirical form, which obtains data from various communities in Kenya and viewpoints of various stakeholders who deal with matters of succession to get informed perspectives. This will ensure a holistic approach to issues of succession, and achieve a harmonised integration between the TJS and FJS. Further, this would lead to the formulation of a draft policy, which would gradually lead to the formal roll-out of the guideline in a periodic manner, and their subsequent accession into legislation in the long term. This arises from the fact that ACL has been shown to adapt to socio-economic changes, provisions in the Bill of Rights and/or various pieces of legislation. Accordingly, it should form part of Kenya's law reform, which need was aptly observed in the words of Allott AN:

[30] See *Re Estate of Lerionka Ole Ntutu* (Deceased) [2008] eKLR, in which the FJS played this role.

> What is to be done with African customary law, …[i]s to study it more carefully and closely, extract from it what is of benefit, and seek to dovetail this with the imperatives of life in a society which grows steadily more complex and more closely orientated towards the world outside. [31]

Therefore, there is a need to undertake a comprehensive and empirical study on how ACL can be effectively integrated within the FJS, in order to enhance the interaction between the TJS and FJS in Kenya.

[31] This recommendation stems from an age-old realisation that what can be done with ACL cannot be readily answered. However, the merits identified of ACL must justify its continued recognition in justice sector reforms. See Allott AN (1984) 70.

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