MARRIAGE, DIVORCE AND SUCCESSION LAWS IN KENYA: IS INTEGRATION OR UNIFICATION POSSIBLE?

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INTRODUCTION

It gives me great pleasure to contribute to this liber amicorum for my colleague and friend James Read. I wish him a happy retirement though I suspect that his hunger for research and discovery into African law will continue. I met Jim some 36 years ago when I joined the School of Oriental and African Studies as a research officer in African law attached to the Restatement of African Law Project of which Tony Allott was the Director.¹ Like me, Jim was then a young student of African law, being taught and coached by the pioneer of the subject, Tony Allott. Again, like me, Jim also specialized in East Africa and in the early 1960s we exchanged notes and ideas and collaborated on research into the customary and other laws of Uganda, Kenya and Tanzania. Naturally Jim took a special interest in my Restatement of African Law in Kenya and I am forever grateful for his encouragement and enthusiasm during the research and afterwards, when the Kenya Government decided to go further than the Restatement and integrate its marriage, divorce and succession laws. This article tells the story of the establishment of the two Kenya Commissions on the subject and asks whether such unification or integration is possible. Jim tried to answer the question in his commentary on the Marriage and Divorce Report² when he said:

"'Apart from the polygamy issue, the general report of the Marriage Commission is the centre of a score of other controversies. It has been said that the Government which adopts any report on such an issue will be a brave one'.

The Reporter, October 6th, 1967

These words appeared, of course, before the Report of the Commission was written. The fears they express are quite valid: reform of family law presents not merely technical problems but a complex of daunting obstacles in the form of deeply held religious beliefs, widely divergent views as to the proper course of social development combined with great lack of specific knowledge about current social patterns, emotional attitudes and other human factors.

Yet here is a Report which the Kenya Government would do well to adopt: it is a document of outstanding importance in the development of East African law, which will demand careful study by those concerned with law reform in Commonwealth Africa and even further afield. The basic choices which it makes are convincing and practical; the procedures envisaged for the implementation of the Report are humane in the recognition that a painful process of transition and adaptation is already under way and that the task for the law-maker is to move with it and, where practicable, to precede it. There are certainly detailed elements in the proposed implementation which should be reconsidered; and in some respects

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the Commissioners appear ready to move rather more quickly than social change would appear to justify. But in its essentials, this is a welcome and viable scheme for reform."

**THE COMMISSIONS AND THEIR TERMS OF REFERENCE**

In 1967, the Government of Kenya set up two Commissions,\(^3\) one on the Law of Marriage and Divorce\(^4\) and the other on the Law of Succession\(^5\) with the following terms of reference:

**Law of Marriage and Divorce:**
- to consider the existing laws relating to marriage, divorce and matters relating thereto;
- to make recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform law of marriage and divorce applicable to all persons in Kenya, which will replace the existing law on the subject comprising customary law, Islamic law, Hindu law and the relevant Acts of Parliament and to prepare a draft of the new law;
- to pay particular attention to the status of women in relation to marriage and divorce in a free democratic society.

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

**REASONS FOR SETTING UP COMMISSIONS**

The reasons which prompted the Government to set up the Commissions were given by the then Attorney-General, Mr Charles Njonjo, as follows:

"Law of Marriage and Divorce:

When I announced the appointment of a Commission on the law of succession two weeks ago, I indicated that the subject of succession is closely connected with the law relating to marriage, divorce and the status of women and that I would announce the Government’s proposals with regard to these latter questions. The Government has now decided that the establishment of a Commission on the law of marriage and divorce with the terms of reference that I have just read out, is the most effective method of ensuring that our country will have a law which will meet the peoples’ requirements. We are fortunate to have secured the services of Mr Justice Spry of the Court of Appeal for Eastern Africa to be the Chairman of this all important Commission. As you can see, the other members were carefully selected to represent the various religious and ethnic groups of Kenya and other interested sections of the community.

\(^3\) The writer was a Member and the Secretary of both Commissions. The Chairman of the Marriage Commission was the Hon. Lord Justice Spry (Court of Appeal for East Africa) and of the Succession Commission the Hon. Humphrey Slade, Speaker of the National Assembly of Kenya.


Mr Cotran, a Member and Secretary of this Commission, is also a member and Secretary of the Commission on the law of succession, and will carry out the necessary liaison and co-ordinate the work of the two related Commissions.

At present there are a variety of marriage laws affecting the various communities of Kenya in different ways. Marriage under the Marriage Act, the principal enactment dealing with marriage, is open to all persons irrespective of race or religion. The African Christian Marriage and Divorce Act provides a simple procedure for the marriage of Christian Africans and for the conversion of a customary marriage into a statutory monogamous marriage. The law of divorce and matrimonial causes relating to persons who marry under these two Acts is contained in the Matrimonial Causes Act which is generally based on English law. The law of marriage and divorce governing Hindus is contained in the Hindu Marriage and Divorce Act and Muslims are governed by the Islamic law of marriage and divorce by virtue of the Mohammedan Marriage, Divorce and Succession Act. In addition there are the customary laws of marriage and divorce which govern a large part of the African population who do not get married under the statutory law.

The different statutes and laws make different provisions with regard to such vital matters as age requirements, the giving of consent, registration of marriages and the grounds for divorce. And when one considers the different customary laws, there are even more variations and no system of registration.

The existence within Kenya of this variety of marriage laws creates numerous problems of conflict and administration. Whilst our Constitution permits differentiation in treatment of sections of the community in regard to legislation dealing with marriage, divorce, and other matters of personal law, that is not to say that such radical distinctions as exist at the present time in Kenya are desirable if we are to integrate the various communities in the interests of building one nation. Uniformity in marriage legislation, is, moreover, becoming more pressing at a time when marriages between the various communities are taking place with increasing frequency.

The law of marriage is a subject which touches the everyday life of all our people. In order that the Commissioners may produce recommendations acceptable to all, it is essential that they should receive the views of all sections of the community. I would therefore make a special appeal to all those individuals and organisations who wish to air their views to come forward and give evidence to the Commission or to submit their views in writing.

Law of Succession:

The intention of comprehensively reforming the laws of succession has been in the Government’s mind for some time. At present there are a variety of succession laws affecting the various communities of Kenya in different ways. The two main enactments dealing with succession are applied Indian Acts, viz. the Indian Succession Act, 1865, and the Probate and Administration Act, 1881. The former Act does not apply to Hindus, Muslims or Buddhists, and in practice only governs the estates of Europeans. The succession to the estate of deceased Hindus is governed by the Hindu Succession Act, which applies Hindu law, and Hindus are enabled to make wills by the Hindu Wills Act of 1870 of India. Muslims are governed by the Mohammedan Marriage, Divorce and Succession Act, which applies Mohammedan law to the estates of deceased Mohammedans who were married in accordance with Mohammedan law. The vast majority of the population of Kenya, on the other hand, that is to say the African population, is governed by customary law, although it is now possible under the Africans' Wills Act 1961 for Africans to make wills.

The existence within Kenya of this variety of succession laws creates numerous problems of conflict and administration. In addition the Government feels it is imperative that a common law of succession should be introduced which is applicable to all persons in Kenya without distinction. A uniform law of succession is after all an essential prerequisite to sound economic development. Furthermore
in the circumstances of Kenya, the success of our land registration programme depends to a large extent upon the introduction of a uniform law of succession.

Preliminary studies in this direction have already been undertaken. Some years ago the Hon. Mr Humphrey Slade, the Chairman of the new Commission, produced at the request of Government a draft unified Succession Bill. Mr Cotran, a Member and Secretary of the new Commission, has also made intensive studies of the various customary laws of Kenya. He was seconded to the Kenya Government by the University of London between 1961 and 1963 and with the assistance of the Kenya Law Panels produced detailed restatements of the customary laws of the various ethnic groups of Kenya. The work done by Mr Slade and Mr Cotran should facilitate greatly the task of the present Commission.

The Government is fully conscious that the reform of the laws of succession on such an intensive scale is a revolutionary step, but is confident that a uniform law of succession is necessary and is part of the nation building programme of Kenya.

The Government realizes that the law of succession cannot be isolated from other branches of the law, principally the law relating to marriage, divorce and the status of women. Consequently, proposals relating to these other subjects will be announced shortly.

It is clear then that there was a variety of reasons for setting up the two Commissions: political, especially in relation to ending tribalism, encouraging unity and nation building; economic and social, especially for encouraging the land consolidation and registration programme and ending fragmentation of land-holding; and legal and constitutional, to end discrimination in relation to women and conflict in the administration of the four-fold system of law—statutory, customary, Hindu and Islamic—both in relation to the laws of marriage and divorce and the laws of succession.

THE UNSATISFACTORY FEATURES OF THE EXISTING LAWS

In their Reports both Commissions looked in detail at the unsatisfactory features or defects in the four-fold system of marriage and divorce and succession laws:

Marriage and divorce

"Unsatisfactory features of the law

47. Much of the existing statute law has its roots in English law, which, being founded on the canon law where marriage and divorce are concerned, only recognized as marriage the voluntary union for life of one man with one woman to the exclusion of all others. The result is that although the law recognizes polygamous marriages, both Islamic and customary, they have tended to be treated as inferior to the monogamous marriage. This appears from decisions of the courts and from the fact that the African Christian Marriage and Divorce Act provides for the conversion of customary into statutory marriages and the Marriage Act appears to contemplate the conversion of Islamic as well as customary marriages into marriages under the Act. Moreover, the Mohammedan Marriage, Divorce and Succession Act appears to contemplate the conversion of customary into Islamic marriages. In none of these cases is there any provision for the opposite process. We regard this as most unsatisfactory: the purpose of a marriage ceremony is to bring into being the marital status and we think that all forms of marriage allowed by law should be equally effective in law.

48. It is also noteworthy that the English law of divorce, upon which the Kenya law is based, has itself been subject to severe criticisms in recent years and proposals for changes in England are under consideration.

49. There is also what may be termed an internal conflict of laws. The spheres of statute law and personal law are not clearly defined and the extent to which a person
can change his personal law on a change of religion is uncertain. There is also doubt how far Africans who marry under religious or civil law retain rights and remain subject to obligations under customary law. There are also problems that arise on the intermarriage of persons from different tribes, communities or religions.

50. We are told that it is not uncommon for Africans who have contracted marriages under the Marriage Act, or the African Christian Marriage and Divorce Act, and while those marriages subsist, to take other wives under customary law. This is a criminal offence but so far as we are aware, prosecutions are never instituted. This state of affairs is undesirable, as it tends to bring the law into disrespect. The position as to civil rights and obligations under customary law is obscure.

51. Doubts had been expressed as to which of the constituent elements of a customary marriage are essential to the validity of the marriage and at what point the marriage is complete. We think it of the greatest importance that there should, as far as possible, be certainty in all matters of marital status.

52. The traditional African view of marriage was that it was less a union of individuals than a union of families. Moreover, in the past, the unity and numerical strength of the clan were of paramount importance. Today, people move about far more than formerly, mixed communities are growing and, while tribal loyalties continue, there is now a new allegiance to the State. These changes have made some of the former practices inappropriate or inconvenient.

53. We should briefly mention here the subject of dowry, with which we shall have to deal more fully later. For the present purpose, it will be sufficient to say that there are allegations that the practice of requiring dowry, which has a deep significance in African society, is being commercialized. Also, there are wide differences between tribal laws on the subject and this tends to lead to uncertainty.

54. It would be wrong to generalize on the status of women under customary law as there are considerable differences between the customs of the various tribes and even within the tribes. It is perhaps sufficient for the present purpose to say that there are some features in the customary laws of some tribes which we regard as derogating from the dignity and status to which women are entitled: to give three examples, we are told that in one tribe a girl may be compelled by her parents to marry against her will, in some tribes a widow has no choice but to join the household of a brother or other relation of her late husband, and in some tribes a widow is precluded from remarrying.

55. On the breakdown of a marriage, also, women in some communities are in a position greatly inferior, as regards obtaining relief, to that of their husbands.

56. We consider it unsatisfactory, also, that the right to maintenance of women who are divorced or separated from their husbands should vary as greatly as it does according to the community or religion of the parties. This is anomalous from the point of view of the individual and, so far as destitution has to be relieved out of public funds, unfair on those sections of the community that contribute to those funds but accept also the liability to pay maintenance.

57. We believe also that the fact that customary marriages are not registered leads to difficulty in proving such marriages, particularly when matrimonial proceedings are taken in an area other than that in which the parties were married.

58. Finally, we would remark that we have observed many defects of detail in the drafting of the statutes relating to marriage and divorce. It would not be profitable to detail these, since, as will appear, we think that what is required is not the patching of the present law but a completely fresh approach.

Succession

"Criticisms of Existing Laws"

(a) General Defects

37. The paramount criticism that could be advanced against the existing laws is the very co-existence within one territorial legal jurisdiction of a multiplicity of
laws dealing with the same subject matter of inheritance, but affecting the various communities of Kenya in different ways. Apart from policy considerations, principally whether one country should have a number of different laws affecting its people in diverse ways depending on their race or religion, such a system necessarily brings about numerous problems connected with the conflicts between these different laws.

38. These ‘internal’ conflicts rarely arose in the past since the different communities and tribes of Kenya, lived, for the most part, separately and also because the different laws of succession were applied in different courts. Now, however, with the gradual inter-mixture of the Kenya peoples, both on an inter-tribal and inter-communal basis, with urbanization and inter-marriage, with land registration and with the integration of the system of courts, it is quite clear that conflicts in the law of succession will arise more and more frequently, so long as the present multiplicity continues.

39. But quite apart from this general criticism, we have observed many serious defects in each branch of the existing laws.

(b) Defects in the Statutory Law

40. The Indian Acts of 1865 and 1881 are now of considerable age and they have been superseded by more modern legislation in India. In their application to Kenya, the Acts apply as they were on 27th November, 1907, i.e. including amendments made to the original Acts in India up to that date, but none thereafter. The amendments which have been made by Kenya legislation since then have been very few and formal.

41. It is consequently very difficult to establish with certainty the text of the Indian Acts as it applies in Kenya, and this in turn makes the application of text books and judicial decisions on the Acts uncertain, since these can only be relevant if it can be ascertained that they deal with precisely the same text of the Acts as that which applies in Kenya.

42. As pointed out earlier, the practice in Kenya is to apply the 1865 Act to Europeans. In effect, the provisions regarding intestate succession of Europeans in the Indian Act differ considerably from the English law in this regard, in particular with respect to the amount which the widow receives on the death intestate of her husband, and those differences have been accentuated by modern English legislation, notably the Administration of Estates Act, 1925, and the Inheritance (Family Provision) Act, 1938, as amended by the Intestates’ Estates Act, 1952. None of these Acts apply in Kenya.

43. Under the Indian Succession Act, 1865, as applied to Kenya, a person has an unlimited freedom of disposition by will, so that he may give all his property to an outsider, thus completely depriving his dependants. There is nothing similar to the provisions contained in the Inheritance (Family Provision) Act, 1938, of England whereby the court has power to vary, within defined limits, the will of any testator who had failed to make reasonable provision for the maintenance of his family dependants.

44. Although the provisions of the 1865 Act relating to wills have, since 1961 applied to Africans, we are informed that very few wills by Africans have come to light. It has been suggested that this is due either to lack of effective publicity or that the formalities required under the 1865 Act are too onerous and that a more simple form of making wills is required in rural African conditions.

(c) Defects in the Hindu Law

45. The paramount difficulty in the application of the Hindu law under the Hindu Succession Act is uncertainty. As pointed out earlier, s. 2 of the Act defines Hindu law as the ‘law relating to succession adopted by any school or sub-school of Hindu law’. The better view is that this refers to the ancient Hindu law contained in the śūtris, and does not include the modern reforms to the Hindu law contained in recent Indian legislation, notably the Hindu Succession Act, 1956. As regards
ascertainment of the ancient law, s. 5 of the Hindu Succession Act provides that a ‘court may ascertain the Hindu law or any custom by any means which it thinks fit, and in any case of doubt or uncertainty may decide as the principles of justice, equity and good conscience may dictate’. It is significant that the Kenya law in regard to the subjects of marriage and divorce of Hindus has, unlike the law of succession, kept up with modern Indian legislation on the subject.

(d) Defects in the Islamic Law

46. The principal defect in the Islamic law of succession as applied in Kenya by s. 4 of the Mohammedan Marriage, Divorce and Succession Act is the way it links succession by Islamic law to the condition of marriage under that law. It is clear from s. 4 that the Islamic law of succession is only applicable,

(a) where the deceased had contracted a marriage in accordance with Islamic law; or

(b) where he was the child of a Muslim marriage.

47. We are told that this requirement of marriage according to Islamic law is invariably ignored in Muslim areas especially in the Coast Province and that the courts of Kadhis invariably apply Islamic law to the estate of a deceased Muslim irrespective of the form of his marriage.

48. Further, on one interpretation of s. 4, the Islamic law of succession may be applied to a deceased non-Muslim provided he contracted a Muslim marriage or he was the child of such a marriage.

49. Another serious problem arises from the rule in Islamic law that a non-Muslim cannot inherit from a Muslim, and the consequent conflict between customary law and Islamic law on the death of a convert to Islam. The problem arises chiefly amongst the Digo, Duruma and Giriama of the coast, but to a lesser extent also amongst other Islamized tribes in Kenya. In Ali Ganyuma v. Ali Mohamed,6 the Court of Appeal for Eastern Africa in 1927 held that in the case of Africans converted to Islam, s. 4 prevails to the exclusion of customary law. During the course of our public meetings, we heard repeated complaints of persons with many children who might convert to Islam in their old age with the result that on their death some distant cousin who happens to be a Muslim might come and claim all the property to the total exclusion of the non-Muslim children.7

50. Finally, the Islamic law of succession in Kenya is applied in its pure religious form and does not take into account the modern reforms that have been introduced in several Islamic countries in the Middle East, North Africa and Asia.

(e) Defects in the Customary Laws

51. Until recently, no written records of the various customary laws of Kenya existed which led to uncertainty and difficulty in ascertainment. Mr Cotran’s restatements go a long way towards curing this defect, but it will take some time before these restatements receive judicial approval in decided cases.

52. But apart from this question of form, we have observed serious defects in the content of the customary laws relating to inheritance.

53. First, in regard to testamentary succession, although most customary laws recognize the making of oral death-bed declarations, the purpose of these is normally to nominate an administrative successor rather than apportion shares. If the testator does apportion shares, the general rule is that he must not depart from the broad principles which would have applied on intestacy.

54. Secondly, the rights of women, whether wives or daughters, to share in the inheritance, are either very limited or non-existent.

55. Thirdly, the division of the property in a polygamous family is normally based on a division between the ‘houses’ of each wife and her children, irrespective of

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6 11 K.L.R. 30.
the number of children in each 'house'. This undoubtedly leads to inequality and friction where, for example, one 'house' has one son only, getting an equal share with a 'house' that has many children.

56. Fourthly, customary laws were designed to cater for the traditional types of property such as land and cattle. Today, it is difficult to apply the customary laws to the modern property like houses, modern furniture, etc. nor to property that cannot pass without proof of title such as registered land, bank accounts and deposits, stocks and shares, insurance policies, motor vehicles, etc.

57. Finally, and probably the most serious defect in the customary law today, is the system of administration of estates. Customary laws usually provide that on the father's death, his eldest son, or if a minor, his brother, acts as trustee or administrator of the property for the rest of the family. Under the traditional system, this person carried out his duties under supervision and control of the family and clan elders. In many areas today, however, the influence and authority of these elders is waning. We have been told in many of the public meetings we held that the customary trustee or administrator is no longer subject to the authority of the elders, nor are tribal sanctions any longer enforceable. We were urged that in order to safeguard the rights of the legitimate beneficiaries, a stricter control of all administration by the courts or Government officials, was now essential.”

**THE COMMISSIONS’ RECOMMENDATIONS**

The recommendations made by the two Commissions are summarized below. On the question of uniformity, both Commissions felt that they could not, at that stage of development in Kenya, recommend a uniform Act of national application to the total exclusion of the personal law, that is customary law and Islamic law. Instead, the Commissioners recommended that the national Act should be uniform as to matters considered of national importance and allow for the application of customary and religious laws under certain conditions and circumstances.

Here is a summary of the principal recommendations:

**Marriage and divorce**

(1) Although the different forms of marriage—civil, customary, religious—were all retained, the incidents of marriage were made uniform. All marriages must be registered.

(2) Marriage should be consensual for all and there is a minimum age of 18 for men and 16 for girls. Bride price to continue to be paid, but not to be an essential requirement of marriage, nor its return an essential requirement of divorce.

(3) Parties must opt at the time of marriage for monogamy or polygamy.

(4) Where parties opt for polygamy, a wife still has the right to object to a subsequent wife on certain defined grounds—which objection shall be heard and decided by a Marriage Tribunal.

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8 For a detailed commentary on the two Reports and its Recommendations, see (1969) 5 East African Law Journal which contains comments by the late Professor J.N.D. Anderson (with reference to the Muslim community); Professor J.D.M. Derrett (with reference to Hindu law); Professor O. Kahn-Freund; Professor Arthur Schiller; Justice N.A. Olleennu; Professor James Read (cited above, n. 2) and Mr Peter Le Pelley.

(5) The institutions of the “levirate” or “widow-inheritance”, obliging the widow to live with a brother or other relative of her husband after his death should be abolished.

(6) All divorce will be preceded by conciliation and arbitration before a Marriage Tribunal. If these fail, divorce can only be granted by a Court and is based on the idea of “irretrievable breakdown” rather than “fault”.

(7) A Court has the widest possible powers to grant maintenance to wives and children and/or divide property as between husband and wife on divorce.

Succession

(8) All persons may make wills, subject to a Court’s power after death to give a share to a dependant. Women may make wills. A Muslim may make a will simply declaring that his property shall “devolve by Muslim law”.

(9) On intestacy, a widow gets a life interest in her husband’s property. The “house system” is abolished. Subject to the application of the Muslim law of intestacy and of customary law to livestock and unregistered land in certain areas of Kenya, the new uniform law of intestacy should apply to Muslims, and persons subject to customary law.

(10) Daughters should share equally with sons.

(11) A strict control of the process of administration of estates by Government Officers and the Courts is recommended.

History of Reports since 1968

Some 20 per cent of the population of Kenya is Muslim. They objected vehemently to the establishment of the two Commissions and its recommendations. They argued that any tampering with Islamic law would be contrary to their religion and to the Kenya Constitution. The Commissions rejected these arguments. Both reports had appended to them Draft Bills to put effect to their Recommendations, but they both had a rough passage in the Kenya Parliament.

Marriage and divorce

Three attempts were made to enact the Bill drafted by the Commission, the last one being in 1979. They all failed on the principal grounds that the Act was too “Western” and gave too many rights to women. In the debate which took place in Parliament in 1979 the Government was accused of “throwing our customs to the dogs”. Subsequent to the debate, the Bill was amended to incorporate some of the criticisms, but that was not introduced in Parliament.

In 1982, the Government of Kenya set up a permanent Law Reform Commission “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

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9 Marriage and Divorce Commission Report, paras. 20–23 and Succession Commission Report, paras. 19–23 and paras. 65–69. One Member of the Law of Succession Commission actually dissented on this matter. He was of the view that any new law on intestate succession should not be applied to Muslims (Succession Report, para. 70).

the law, the repeal of obsolete and unnecessary enactments and generally its
simplification and modernisation”.

It was hoped that the Law Reform Commission would at least make a start with
marriage and divorce and look at the whole matter again in the light of the
Parliament's attitude to the Report of the Commission on the law of marriage and
divorce, but in fact nothing happened until October 1993 when the Attorney-General
appointed a “Task Force” to review the laws relating to women in Kenya.

The terms of reference of the Task Force were very wide and covered the position
of women in matters other than marriage and divorce:

(a) to review all existing laws, regulations, practices, customs and policies which have
the effect or purpose of impairing or nullifying the recognition, enjoyment or
exercise by women, irrespective of their marital status, on a basis of equality of
men and women, of human rights in the civil, political, economic, social, cultural
or any other field;
(b) to make recommendations to modify, amend or abolish existing laws, regulations,
practices, customs or policies which constitute discrimination against women;
(c) to consider and recommend a comprehensive bill which will render unlawful any
discrimination on the basis of sex and promote equality of opportunity between
all persons; and
(d) to make such further recommendations incidental to the foregoing that it may
deem necessary.

One very interesting feature of this Task Force is the predominance of women in its
composition. It is chaired by the Hon. Justice Effie Owuor. There are 20 members
of which 16 are women. Of four ex-officio members, three are women and the three
secretaries are again all women. This is welcome news and a great step forward;
but whether their eventual Recommendations and Draft Bill will be acceptable to
the heavily male-dominated National Assembly of Kenya is another matter.

**Succession**

It was in this field that the Muslim opposition was highly vocal, both from a legal
and political viewpoint. Indeed when the Commission went to visit the Muslim island
of Lamu, there was almost a riot and the Commissioners flew straight back to
Nairobi. After publication of the Report, the Muslim community sent one delegation
after the other to the President to object. An attempt to introduce the Bill drafted
by the Commission in Parliament in 1970 failed, principally due to Muslim opposition.
However, the second attempt in 1972 was successful and Parliament passed the Law
of Succession Act on the lines drafted by the Commission. The Act specified that
it would come into force by a date to be gazetted by the Minister, but he did not
do so until some nine years later, on 1 July, 1981. Another Muslim furore then

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12 Several “Task Forces” were appointed to deal with different branches of the laws and appear
to be an adjunct to the work of the Law Reform Commission. A “Child Law Task Force” has
already reported and presented a Children Bill.
13 This is a great number of women compared with the Marriage Commission of 1967 which
had only three women and 12 men and the Succession Commission which only had one woman
and ten men.
followed with yet another high-powered Muslim delegation going to see the President to protest. The President directed the Attorney-General to consult the Muslim community to find a solution. None was found, with the result that (on paper at least) all the provisions of the Law of Succession Act applied to Muslims for some nine years, from 1 July, 1981 until 1990, when the Law of Succession Act was disapplied to Muslims in relation to testate and intestate succession (but not in relation to the administration of the estates of Muslims). Instead Muslim law has been applied again since then.\(^\text{15}\)

Thus from 1 January, 1991, the Muslim women of Kenya were back to where they had been under Islamic law, especially in relation to a widow only inheriting one-eighth of her deceased husband’s estate and daughters inheriting half the share of sons. Any will made by a Muslim must conform to the Muslim rule of not leaving more than one-third of the deceased’s property, and this to non-heirs only.

It is to be hoped, however, that the law Task Force on Women will produce recommendations which will relieve these disabilities for Muslim women as well as the disabilities in the fields of marriage and divorce and other fields for all Kenyan women.\(^\text{16}\)

**Conclusion**

I return to the question posed in the title of this article: is integration of the marriage, divorce and succession laws in a country like Kenya, with a diversity of ethnic, personal and religious laws, possible? Jim Read’s prophecy was yes, the law-maker must give a lead.\(^\text{17}\) However, as the Swahili saying goes, *pole pole*, slowly, slowly. Slow it has been, now some 30 years after the Reports, but the march goes on and integration may yet come about.

\(^{15}\) From 1 January, 1991, under the Statute Law (Miscellaneous Amendments) (No. 2) Act, 1990, which amended ss. 2, 3(1), 48 and 50 of the Law of Succession Act. One redeeming feature is that the laws relating to administration of estates do apply to Muslim estates and that succession to a Muslim estate is no longer linked to marriage.

\(^{16}\) At the time of writing in November 1966, the Task Force is still to report, over three years after its appointment, and is apparently without funds to continue its work.

\(^{17}\) Text to n. 2, above.