

**A CRITIQUE OF THE CONSTITUTIONALITY OF SECTION 3(2) OF THE LAW OF
SUCCESSION ACT OF KENYA**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore
University Law School

By

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April 2020

(12936 words excluding footnotes and bibliography)

Dedication

I dedicate this dissertation to my late paternal great grandmothers Cecilia and Euphemia whose strong perseverance, kindness and courageousness not only inspired my dissertation topic but also laid the path for me and for future generations to come.

Declaration

I, OCHILO LOUISA AKOTH, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This research proposal has been submitted for examination with my approval as a University Supervisor.

Signed: _____

Dr Jennifer Gitahi.

Acknowledgment

I would like to take this opportunity to thank the Almighty God for his guidance and protection in my LLB.

The success and final outcome of this dissertation required a lot of guidance and assistance from many people. I am extremely privileged and eternally grateful to all of them.

I offer my sincerest thanks to my Supervisor Dr Jennifer Gitahi for her mentorship and guidance throughout the writing process

I would also like to thank my family and friends for their never-ending love and support.

List of Cases

1. *Willingstone Muchigi Kimari vs. Rahab Wanjiru Mugo Nairobi CACA No. 168 of 1990 (Gachuhi, Muli and Akiwumi JJA)*
2. *In the Matter of the Estate of Naomi Wanjiku Mwangi*, (2017), eKLR.
3. *In the Matter of the Estate of Cecilia Wanjiku Ndung'u (deceased)*, (2010), eKLR.
4. *In the Matter of the Estate of Ashford Njuguna Nduni (deceased)* No. 1589 of 1994
5. *In the Matter of the Estate of MAO (deceased)*, (2014), eKLR.
6. *In the Matter of the Estate of C M (Deceased)*, (1999), eKLR. *Prinsloo v Van Der Linde*, ILRC 173, Constitutional Court, South Africa, (1998)
7. *Isaiah Gichimu Waweru v Elijah Nganga Waweru*, (2015), eKLR
8. *In Re Estate of Mihunyo Gitimu (Deceased)*, (2017), eKLR
9. *In Re the Estate of Miriam Jepkios Ngetich* (2003), eKLR
10. *In Re Estate of the Late Ibrahim Gakuo Gachaga (Deceased)*, (2019), eKLR
11. *In Re Estate of Kamuyu Njiri*, (2019), eKLR
12. *Plessy v Ferguson (1896)*, *The Supreme Court United States of America*
13. *Brown v. Board of Education of Topeka (1954)*, *The Supreme Court United States of America* 347 U.S. 483
14. *NSA and another v the Cabinet Secretary for Ministry of Interior Coordination and National Government and another 2019*.
15. *Re McGrath (Infants) [1893] 1 Ch 143 at 148*
16. *Civil Appeal No.41 of 2017*, eKLR.

List of Abbreviations

1. CoK- Constitution of Kenya
2. Cap 160- Law of Succession Act Kenya
3. CoE- Committee of Experts
4. USA - United States of America

List of Legal Instruments

1. Constitution of Kenya, 2010
2. Law of Succession Act, cap 160 of the Laws of Kenya
3. United Nations Convention on the Rights of a Child
4. Children Act of Kenya 2001

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Abstract

The Law of Succession Act in section 3 (2) states that references in this Act to "child" or "children" in relation to a female person include, 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. The Constitution of Kenya, 2010 in Article 27 states that every person is equal before the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms. Article 53(2) of the Constitution states that a child's best interests are of paramount importance in every matter concerning the child. Section 3(2) of the Law of Succession Act seems to conflict with article 27 and article 53 (2) of the Constitution of Kenya 2010. The Succession Act differentiates between the definition of a child in relation to a man and to a woman. A child, in this case, is disinherited even though the woman may have recognized and accepted the child as their own and voluntarily assumed permanent parental responsibility. The court's jurisprudence, in this case, states that the child is a stranger to the estate. This definition omits children who may be under the care of women but are not their biological children. Therefore, the best interests of a child are not considered while looking at the definition of a child as per the Act. In addition to that equality of men and women is brought into question before the law as the same benefit provided to men is not given to women. The law is meant to protect all parties equally. Furthermore, there is discrimination of children who are informally adopted by women. The children who are informally adopted by women should not be disinherited and the law should give equal benefit to all genders. This study will, therefore, look into the interpretation of the sections mentioned in addition to how it conflicts with the Constitution with the aim to prove that the section is inconsistent with the rights enshrined in the Constitution and to that extent void.

CHAPTER 1: INTRODUCTION

1.1 Background

The structure of the family has evolved over time from what was traditionally considered a family to a wider definition. A family in most cases is considered to include a mother, a father and children. However, a family now includes extended family, single-parent families, polygamous families and many more. The Law of Succession Act in most cases captures the family in a wider scope. A family is much more than a nuclear family. However, in spite of the inclusivity of the Act, an aspect has been overlooked. Section 3 (2) of Cap 160 provides for the differentiated definition of a child according to a man and a woman. This differentiated definition means that a child informally adopted by a woman is not her child for the purposes of succession law.

According to the Constitution of Kenya, 2010 a child means an individual who has not attained the age of eighteen years.¹ However, in succession matters, the definition differs. Section 3 (2) of Cap 160 states that 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.² In this definition, a child according to a man is different from the definition of a child according to a woman.

The Act defines children in relation to men to include not only those borne to them but also those who they expressly recognize as their own and those they assume parental responsibility for. Children in relation to women include only those born to them. In the case where one voluntarily assumes the permanent responsibility of a child, it is referred to as informal adoption. This is where adoption is done without court involvement. It is provided for by various avenues of law such as common or statutory law. It goes by several names such as de facto parenthood, presumed parentage, and equitable adoption.³ Informal adoptions usually arise for those who have assumed a parental role over a child for some time. In the Kenyan context section, 3(2) of the Act allows only men to informally adopt children.

¹ Article 260, *Constitution of Kenya*, (2010).

² Section 3(2), *Law of Succession Act*, (Revised 2017).

³ Adam Stephenson, Arizona Juvenile Law Legal Research: Resources and Strategies, *Phoenix Law Review*, 2, 266–67 (2010), 193.

In the Matter of the Estate of Cecilia Wanjiku Ndung'u (deceased), 2010 the Judge Honourable, W.M Musyoka interpreted section 29 of the Act which provides for the meaning of a dependant. He stated that under Section 29 (b) only a child taken into the family by a male person and treated as his own will be regarded as a dependant of the male person. When a woman takes in a child and treats them as their own the same does not apply⁴.

In the matter of the estate of MAO (Deceased), 2014, the deceased was not married and did not bear any children. However, she adopted her deceased sister's child and took into her care eight other people who were also her relatives. The deceased died intestate and the child she had formally adopted was held to be the sole heir of her estate. The court held the other people taken into the deceased's were only under foster care or guardianship. This means that they cannot be considered her children. The only way any part of the estate may devolve to them is if there was a will where the deceased expressly distributed property to them. However, this was not the case, therefore the estate devolved only to the child she had formally adopted.⁵

In cases such as the ones mentioned above the court interpreted section 3(2) strictly as it is written in the Act and this means that any child or woman involved in such situations is at a disadvantage. The child is left vulnerable and the woman is considered legally unable to assume voluntary permanent parental responsibility for the child. The aforementioned section does not specify why this difference exists and in its application, it discriminates against children and the women involved in the same situation.

1.2 Problem Statement

Under the law, everyone has the right to equal treatment. This includes the right to equal opportunities in political, economic, cultural and social spheres.⁶ It is questionable whether Section 3 (2) of Cap 160 upholds this constitutional provision.

The Court of Appeal in *Willingstone Muchigi Kimari vs. Rahab Wanjiru Mugo Nairobi CACA No. 168 of 1990 (Gachuhi, Muli and Akiwumi JJA)* stated that a child informally adopted by a female deceased person is not a child for the purpose of the succession to the estate of such deceased person⁷. The standing of such a child is, therefore, unclear in law. This is contrary to

⁴ *In the Matter of the Estate of Cecilia Wanjiku Ndung'u (deceased)*, (2010) eKLR.

⁵ *In the Matter of the Estate of MAO (deceased)*, (2014), eKLR.

⁶ Article 27 (3), *Constitution of Kenya*, 2010.

⁷ Musyoka W, *Law of Succession Case Book*, Law Africa, Nairobi, 2010, 284.

Article 53 (2) of the Constitution of Kenya, 2010 which states that a child's best interests are of paramount importance in every matter concerning the child.

However, the courts in another case gave a different ruling in a similar situation. *In the Matter of the Estate of Naomi Wanjiku Mwangi (2017)*⁸, the deceased had married a woman in a customary union. The woman she married had a daughter, whom the deceased had taken her into the family as her own and for the purposes of succession, and her daughter was considered the deceased's child. The court upheld the customary law of the deceased's community (the Agikuyu), that provided for a woman to woman marriage and that children would become a part of the family in all aspects.

The variation in the court's interpretation of this provision leaves children in such positions vulnerable when it comes to succession. The court's discretion in such an instance should be regulated or guided to ensure that children are fully protected. In addition to that, the status of women in relation to taking children into their care is questioned. This is because the law does not recognize the legal capacity of women to do this and provides for only instances where men may do so.

Various questions arise such as what the rationale behind such law was and what would happen to children informally adopted by women in succession matters in the case of intestacy. The law, in this case, promotes the idea that the presence of a father figure and acceptance of the child by them legitimizes the child. The child is only included as a dependant once they have been recognized as a child in relation to men. This legitimization affects the child's rights of inheritance. Children who are informally adopted by women are already at a loss. If anything happens to their informally adoptive parent and they die intestate then they are disinherited. This means that the interest of these children is ignored and left unconsidered contrary to Article 53 (2) of the Constitution of Kenya.

1.3 Research Objective

The research objective is to demonstrate that Section 3 (2) of Cap 160 is in violation of the Constitution. The research is two-pronged and includes both the discrimination and the best interest of a child principle. It touches on the following sections of the constitution that is Article 27 on equality and freedom from discrimination and Article 53 (2) that provides for the best interest

⁸ *In the Matter of the Estate of Naomi Wanjiku Mwangi (deceased)*, (2017), eKLR.

of a child. Article 2 (4) of the Constitution states that any law, including customary law that is inconsistent with this Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid⁹.

The main premise is that section 3(2) of Cap 160 is discriminatory towards women and children who are informally adopted by women and it is inconsistent with the best interest of children.

Therefore, the research objective is to analyse how section 3(2) of Cap 160 is inconsistent with the Constitution of Kenya 2010.

1.4 Hypothesis

The general hypothesis of this study is that Section 3(2) of Cap 160 is unconstitutional. In all matters pertaining to the law, the best interest of a child must be considered. However, Section 3(2) of Cap 160 does not ensure this. An informally adopted child in relation to a woman is disinherited and considered a stranger to the estate because the law provides that only a biological child can be a woman's child. However, a child in relation to men includes not only biological children but also children over whom parental responsibility has been assumed.

Additionally, the application of section 3 (2) and the language used in section 3 (2) of Cap 160 discriminates against women when it comes to informal adoption. The difference in the definition of children according to Cap 160 limits who is considered a child according to women which puts both the woman and the child at a disadvantage.

The study relies on the following hypotheses stemming from the general hypothesis that section 3 (2) of Cap 160 is unconstitutional;

- i. Section 3 (2) of Cap 160 promotes discrimination
- ii. Section 3 (2) of Cap 160 is inconsistent with the best interest of a child principle

Therefore, the study assumes that Section 3 (2) of Cap 160 contradicts the constitutional right to equality and freedom from discrimination and is against the best interest of a child.

⁹ Article 2 (4), *Constitution of Kenya*, 2010.

1.5 Research Questions

- i. What is a child's best interest and does section 3 (2) of Cap 160 act in the best interest of the child?
- ii. What is the Law in Kenya on informal adoption as compared to the US where informal adoption is recognized explicitly by law?
- iii. What is discrimination according to the Constitution and is Section 3 (2) of Cap 160 discriminatory against children who are informally adopted by women and the women who informally adopt children?

1.6 The Significance of the Study

Intestacy is often a distressing situation. This is because there is a lot of uncertainty as to how the estate is to be divided and in what proportions and to whom. Often priority is given to those who are related by blood or those with close relationships to the deceased such as the wife/ husband and children. However, where one is adopted informally, that is adoption without formalities of the law by a woman, they are often disinherited, no matter how much a part of the family they were.

Those under the age of 18 are particularly vulnerable if they are left disinherited. As a result of their underage status, they are not legally able to get jobs to earn money to provide for their basic needs. Even if the law allows them to be employed, it will affect their education. The same situation may not be as severe for those above the majority age, however, this does not mean that it is not detrimental to them. The precedent set by the courts in such situations is harmful to both women and children in this situation.

In *Succession cause 1456 of 1999, In the Matter of the Estate of C M (deceased)* the applicant had been informally adopted by her aunt but her aunt's husband had not assumed parental responsibility for her. When her aunt's husband passed away she was not considered a child of the deceased. Judge W M Musyoka delivered his judgment in 2016 which stated that the applicant was not a biological child of the deceased, and therefore she cannot on that score claim a stake to his estate. She can only lay a claim on the basis that she had been informally adopted by the deceased. Section 3(2) states circumstances in which a child will be deemed to have been informally adopted by the deceased. A child will be deemed to have been informally adopted for succession purposes, by a male person, if he expressly recognized her or accepted her as a child of his own or he has voluntarily assumed permanent responsibility for the child. The provision is

silent on the informal adoption of a child by a female person, and it does not state that once a female person informally adopts a child such a child shall then be regarded as a child of the woman's husband.¹⁰ For the applicant to be considered a child of the deceased she must prove that the deceased assumed responsibility for her even though she was able to prove that her aunt had informally adopted her she still remained a stranger to the estate.

Petition 17 of 2014, *NSA and another v the Cabinet Secretary for Ministry of Interior Coordination and National Government and another*¹¹ looked into the constitutionality of a number of laws including Cap 160. The court held that section 3 (2) of Cap 160 is unconstitutional as it discriminates against unmarried women and children born out wedlock as it gives men the option to accept or deny parental responsibility. It stated that parental responsibility is mandatory and not discriminatory. While this case is important in the road towards amending the Law of Succession Act it does not look at it from the aspect of informal adoption as provided in this section and how this affects women whether married or not and children involved in the process.

This study bridges the gap where informal adoption by women is not recognized and seeks the reconciliation of section 3(2) of the Law of Succession Act with Article 27 and Article 53(2) of the Constitution of Kenya, 2010 in order to uphold the supremacy of the Constitution.

1.7 Theoretical Framework

Theory of Justice as Fairness

John Rawls proposed that justice is fairness. This means that justice is that citizens are free and equal and that society should be fair. He states that society needs a just order of its major political institutions and social institutions such as the family. The order of these institutions is the basic structure. This basic structure is where justice can be found. These institutions determine the benefits and burdens of social life such as who will have opportunities to get certain kinds of work. Rawls proposes a positive and a negative thesis.

Rawls's negative thesis states that no one as a citizen is entitled to the advantages or disadvantages they receive at birth. That is whether they are born into a rich or poor family, their gender, their

¹⁰ In the Matter of the Estate of C M (Deceased), (1999), eKLR.

¹¹ *NSA and another v the Cabinet Secretary for Ministry of Interior Coordination and National Government and another*, (2014), eKLR.

natural talents or weaknesses or their race. These features are assigned randomly and therefore, citizens are not entitled to social benefits as a result of them.

Rawls's positive thesis is equality-based reciprocity. It states that all goods are to be equally distributed unless the unequal distribution is to be everyone's advantage. Justice requires that any inequalities must be to everyone's advantage. There are two principles that citizens should have similar basic rights and liberties and that any inequalities are to be the greatest advantage to those who are advantaged least¹².

This theory means that everyone is entitled to equal opportunities regardless of who they are and if there are to be any inequalities it should benefit rather than disadvantage them. Section 3 (2) of Cap 160 puts women at a disadvantage as compared to men. Furthermore, the disadvantage is not in their benefit. This is because the best interest of the child in relation to a woman is ignored. Their legal capacity to inherit from the estate in cases of intestacy is limited.

Cass Sunstein on Traditionalism

A Constitution of Many Minds¹³ proposes a new way of interpreting the law that includes not only respecting the history of a legal document but also accepting it as a document not frozen in time. He proposes that the Constitution, in this case, should not be viewed for a specific generation but for many minds as it contains multiple deliberations. The Constitution changes in interpretation and meaning with each generation as a result of new social progressions and fundamental progressions that make one reassess their beliefs.

Traditionalism is what gives the document meaning through long-standing practices. This does not mean the views of the generation that wrote the document but the social context of the time.

The Law of Succession Act came into force in 1981, 38 years ago. The social context at the time was much different from what is happening today. Society was patrilineal and male-dominated. The laws reflected this view and women played a more passive than active role. However, Cap

¹² Rawls John, *Justice as Fairness: A Restatement*, Harvard University Press, Cambridge, 2001.

¹³ Cass R Sunstein, *A Constitution of Many Minds: Why the Founding Document Does not Mean What it Meant Before*, Oxford, Princeton University Press, 2009.

160 should not remain frozen in time but reflect the deliberation of many minds or generations. The expressive function of the law is not just to give sanctions but to reflect society's context.¹⁴

Therefore, as society progresses and adopts different ideals the law should reflect that. The 2010 Constitution captures the progress of society towards inclusivity and equality however other laws such as Cap 160 do not conform to that. While the generation at the time of writing the Act may have subscribed to the ideals set out in the law, the law should reflect the social context and not just the deliberation and rules of one generation

1.8 Literature Review

The 'Challenges in Handling Imprecise Parentage Matters'¹⁵ stated: Legal parentage is no longer limited to the definition of biological parenthood, marriage, conception or name placement on a birth certificate. Men and women are legally capable of becoming parents through de facto parenthood or equitable adoption. Because legal parentage depends upon a fluid and imprecise doctrines, lawyers and judges must be vigilant in handling legal disputes implicating parentage.¹⁶ The author, in this case, brings out that in matters of informal adoption caution is required. This is true and the law under section 3(2) of Cap 160 should provide equal opportunities to all genders and ensure the child is also protected by the law.

'When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine'¹⁷ states that the practice of informal adoption has been described as the process where dependent children are informally reared by adults who are not their adoptive parents. Such institutions are common especially in African and Hispanic communities because of the strong sense of kinship these communities often have. However more often than not succession is often tied to lineage and bloodline, this was especially prevalent in previous centuries where there was a keen interest in bloodlines and legitimacy. This relates to the study at hand as it recognizes

¹⁴ Cass R Sunstein, *A Constitution of Many Minds: Why the Founding Document Does not Mean What it Meant Before*, 54.

¹⁵ Jeffrey A Parness, *Challenges in Handling Imprecise Parentage Matters*, 28 *Journal of the American Academy of Matrimonial Lawyers* 401, 28, 2015.

¹⁶ Jeffrey A Parness, *Challenges in Handling Imprecise Parentage Matters*, 139.

¹⁷ Michael J. Higdon, 'When Informal Adoption Meets Intestate succession: The Cultural Myopia of the Equitable Adoption Doctrine' *Wake Forest Law Review Journal*, 2008, 224, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/wflr43&div=10&id=&page> on 8 February 2019.

informal adoption as common in the African community due to the strong sense of kinship. However, it focuses on the US while this study will focus on Kenya.

‘Intestate Succession Rights of Adopted Children: Should the Stepparent Exception Be Extended’¹⁸ stated that traditionally, consanguinity, or blood relationships, determined inheritance rights. This is because states assumed that an intestate deceased intended distribution of his estate only to his blood relatives, succession law has been slow to reflect adoption law's goal of completely substituting the adoptive family for the adoptee's blood relations¹⁹. This study speaks of inheritance by the adopted child from their natural parents and whether the adopters can inherit from the adoptee. It states however that adopted children should have a right to inherit from their adoptive parents, whether it is formal or informal adoption and that the succession laws and adoption laws should complement each other. However, it focuses on informal adoptions by a man and woman who are married rather than an individual.

‘Intestate Succession, Sociology and the Adopted Child’²⁰, stated that intestate succession, at Common Law, was dependent upon the existence of a blood relationship between the deceased and the party claiming the estate. However, with the advent of adoption statutes and the subsequent creation of family units across bloodlines, this basic Common Law doctrine has required adjustment and modification²¹. This study looks into the transition of the right of inheritance from the natural parents to the adoptive parents. The study does not look into how a child is defined according to each individual rather it talks about children adopted by married couples. It addresses a situation where both parents collectively assume responsibility of a child rather than a situation where each parent individually assumes the responsibility of a child.

An article titled ‘A Suggested Solution to the Problem of Intestate Succession in Non-traditional Family Arrangements: Taking the "Adoption" (and the Inequity) Out of the Doctrine of "Equitable Adoption”²² discussed equitable adoption. It stated an individual who was brought up in a deceased’s home and was dependent on them emotionally and financially should be entitled to a

¹⁸ Fuller, Lisa, Intestate Succession Rights of Adopted Children: Should the Stepparent Exception Be Extended, *Cornell Law Review*, 77, 5, and 1992.

¹⁹ Fuller, Lisa, Intestate Succession Rights of Adopted Children: Should the Stepparent Exception Be Extended, 1190.

²⁰ Kiefer Paul A, Intestate Succession, Sociology and the Adopted Child, *Villanova Law Review*, 11, 2 1966, 392.

²¹ Kiefer Paul A, Intestate Succession, Sociology and the Adopted Child, 392.

²² Johnson D Irene, A Suggested Solution to the Problem of Intestate Succession in Non-traditional Family Arrangements: Taking the "Adoption" (and the Inequity) Out of the Doctrine of "Equitable Adoption, *St Louis University Law Journal*, 54,217, 2009.

claim on their estate as a dependent. The legal status of the child, non-biological and un-adopted, should not matter²³. This study suggests that equitable adoption will not be complete and fair until the children adopted in such cases can inherit in cases of intestacy. It suggests the use of family member tests such as how the child was treated by the family, what sort of relationship they had amongst others. This study, however, does not look at how the difference in the definition of a child according to a man and a woman affects the legal capacity of the child to inherit from their new parent.

An article titled 'Virtual Adoption: The Inequities of the Equitable Doctrine'²⁴ stated that generally, intestacy allows a child to inherit from their deceased parents in the case that they die intestate. However, the definition of a child is not clear. According to the statutory language, a child is generally considered as one who has a biological relationship through reproduction or through formal adoption or even de facto adoption.

The determining factor in deciding whether a child is entitled to a share of an intestate deceased's estate depends on the definition of a child. It either qualifies or disqualifies an individual. A biological child always, in circumstances of intestacy, has a high claim on the estate of an intestate deceased. However, a circumstance in which the child was cared for, supported by, and educated by the deceased, and maintained a parent-child relationship with the deceased, but not formally adopted by the deceased it is unclear whether the child will be entitled to inherit from the intestate deceased²⁵. This study speaks on a concept called virtual adoption, which is where adoption was not formalised. It discusses the need to recognize this not only in courts but also show how parties in such situations have responsibilities towards each other. This study, however, does not cover what should happen when the definition of a child is differentiated according to men and women

Marsha Garrison wrote an article titled Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage. It stated the primary rule governing the parentage of children born to a married woman is the marital presumption of legitimacy. Under the Common Law, concern for children's interests was tempered by the risk of erroneous paternity adjudications and the desire to channel childbearing within the confines of marriage²⁶. The result was laws that

²³ Johnson D Irene, A Suggested Solution to the Problem of Intestate Succession in Non-traditional Family Arrangements: Taking the "Adoption" (and the Inequity) Out of the Doctrine of "Equitable Adoption, 280. <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1729&context=lawfaculty> on 28 April 2019.

²⁴ Weisser Jamie, Virtual Adoption: The Inequities of the Equitable Doctrine, *Nova Law Review*, 35, 2, 2011.

²⁵ Weisser Jamie, Virtual Adoption: The Inequities of the Equitable Doctrine, 553.

²⁶ Garrison Marsha, Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage, *Harvard Law Review*, 113, 4, 2000, 835-923.

penalized non-marital children and rigidly cabined the paternity claim. This study states that while it is easy to establish the parentage of a child in terms of women it is difficult for men to do the same. This is because there is no doubt a child born to a woman is her own while for men there is no obvious link between them and the child. There are tests that can be done to prove the relationship between them.

The study also stated that the presumption of children born during a marriage is that they are biologically related unless the husband can prove that he had no access to his wife. Therefore children born out of wedlock are penalized and are at a disadvantage because their parentage is not so obvious. This also plays a factor in inheritance. Succession law rules on intestacy depend on the blood relation to determine how the deceased's property is disposed of. When the blood relation is not obvious or evident it complicates the issue. This study shows the concept of legal parentage and how parents are determined by law in the US jurisdiction. It focuses on unmarried couples especially. It does not state how children who are informally adopted are left at a disadvantage when determining their relationship with the new parent in matters of succession during intestacy.

An article titled 'Adult Adoption: Intestate Succession and Class Gifts under the Uniform Probate Code'²⁷ stated that in the event one dies intestate, it is imperative that in the disposal of their estate their wishes must be considered. The estate should be devolved in the manner most likely to reflect the deceased's wishes. In every state, the law assumes that the deceased's intent was to devolve property to their closest next of kin and immediate family members. The preference of relatives in intestacy statutes arises from the concept of continuing and strengthening one's bloodline and securing its future as testators to leave their estates to spouses and lineal descendants. This provides evidence of the most likely definition of the deceased's intent.

Additionally, it is expected that in the event of one's death that their property goes to their next of kin. However, the law currently accepts adoptive children like natural children and therefore next of kin for the purposes of succession²⁸ "the requirement of a blood connection, historically a prerequisite for a parent-child relationship in the intestacy and testacy context has been largely disavowed as an outdated and under-inclusive principle of estate law." While this study recognizes that children who are adopted should be incorporated into the family it does not look into how

²⁷ Ratliff Sarah, Adult Adoption: Intestate Succession and Class Gifts under the Uniform Probate Code, *Northwestern University Law Review*, 105,4 ,2011.

²⁸ Ratliff Sarah, Adult Adoption: Intestate Succession and Class Gifts under the Uniform Probate Code, 1790.

children who are informally adopted by women especially are not considered children in terms of succession law.

Children who are informally adopted must have a promise of formal adoption in order for them to be included as children of the deceased in matters of intestacy.²⁹ Relatives by blood, Adoption and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions and Equitable Adoptions on Intestate Succession and Class Gifts)³⁰ discusses the critique of the existence of such agreements and contracts. Stating that a child in such a situation is part of the contract rather than a third party. If the child is underage, can the contract even be enforced in addition to that, can one confirm the meeting of minds for infants or children who are too young to understand the agreement? Equitable adoption should be more flexible. It should not focus on the fiction of whether there has been a contract to adopt but on the relationship between the adopting parents and the child.

The existing literature is silent on how the differentiated definition of a child according to a man and a woman in the law of succession is justified. Particularly whether a child who has been informally adopted by a woman specifically will be considered a child in succession matters and why it so. While the reviewed literature covers what status a child who is informally adopted by a couple holds in matters of succession, it is silent on what status the same child would hold when the definition of a child is based on the gender of the parent. Kenyan succession law defines a child differently in relation to men and women. While defining a child according to a man the law gives a wider scope than it does to women. Therefore, a child who has been informally adopted by a woman if she were to die intestate is disinherited. In my study, I will discuss what the law in Kenya states and the interpretation of such law by the courts and its compliance with the Constitution which is the supreme law of the land.

1.9 Research Design and Methodology

This study will adopt desk-based research. Information sources such as the internet, analytical reports and publications will be relied on in collecting information. The research will analyse cases brought before courts in Kenya that relate to the topic at hand. The majority of cases used in this

²⁹Jan E. Rein, Relatives by Blood, Adoption and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts), *Vanderbilt Law Review*, 711, 712, 1984.

³⁰ Jan E. Rein, Relatives by Blood, Adoption and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts), 2279.

study will be under Kenyan jurisdiction. The earliest case is from 1990 and the latest case is from 2019. The uses of older cases are justified as the Law of Succession Act came into force in 1981 and the cases are used to show the evolution of the court's jurisdiction since then. Cases from other jurisdictions are used to identify and emphasize key principles. This study will also rely on scholarly articles, books and journals found both online through the Strathmore University Library e-resource services and in hard copy from both my personal library and the Strathmore University Library. Additionally, a comparative study is undertaken. The US expressly recognizes Informal adoption and provides for the doctrine of equitable adoption. This study compares how informal adoption is used in the US and in Kenya.

1.10 Assumptions

Section 3(2) of Cap 160 is inconsistent with Article 53 and 27 of the Constitution of Kenya 2010

1.11 Limitations

While there are many scholarly articles on different subsections of section 3 of Cap 160 there is no scholarly writing or articles on section 3 (2) of Cap 160.

The number of cases to be studied may not be conclusive. This is a result of both the time and length of the dissertation.

1.12 Chapter Breakdown

Chapter 1 is the Introduction and will give a brief elaboration of key concepts. In addition to that, it will include the development of the study area, in this case, Section 3 (2) of Cap 160, and a brief conceptualisation of the study. Furthermore, it will have a problem statement giving the background of the problem, the research gap, research objectives, a hypothesis and research questions, the justification of the study, the theoretical framework and literature review.

Chapter 2 will look at into the best interest of a child principle and how Section 3(2) of Cap 160 goes against it

Chapter 3 will look into Informal Adoption and its existence in other jurisdictions such as the United States of America as compared to Kenya and how the Kenyan interpretation of informal adoption had discriminated against women.

Chapter 4 will look into the research question that asks what discrimination according to the Constitution is. It will look into the rationale of the law that promoted freedom from discrimination as well as the international and national developments on laws that promote equality and freedom from discrimination. It will answer the question of how the law discriminates against children and as a result women.

Chapter 5, is the findings, the conclusion and recommendations.

1.13 Duration

Dissertation writing takes place over a period of 6 months. It will begin in May 2019 and be completed on 30th November 2019. The oral defence will be carried out on 17 February 2020 and the post defence study will be completed before 30th March 2020.

CHAPTER 2: BEST INTEREST OF A CHILD

2.1 Objectives of the Chapter

Section 3 (2) of Cap 160 defines a child for the purposes of succession. In all matters concerning a child, it is paramount to offer them the best mankind has to offer. Where children are involved their best interests have to be treated as a primary consideration, and considered separately from those of the adults involved. This chapter seeks to look into what the best interest of a child is. It will also look at the existing laws within Kenya and the international community and whether Section 3(2) of Cap 160 considers this principle.

2.2 What is the Best Interest of a Child

In 1924 the Geneva Declaration on the Rights of Children was adopted. The Declaration was put in place to act against slavery, child labour, child trafficking and child prostitution that had occurred prior to, during and after the war. It reflected the concerns that people had over the rights of children. The basis of the Geneva Declaration was that ‘mankind owes to the child the best it has to give’. The Preamble of the Declaration recognized that mankind has a duty towards their children. This duty meant that they owed it to them to give them the best they could offer. This is the basis of the best interest principle.

In 1959 the United Nations adopted a Declaration on the Rights of the Child. This declaration affirmed the principles laid out in the 1924 declaration. Additionally in 1989, the Convention on the Rights of the Child further provided for these principles

The best interest of a child may be defined as the combination of factors a child requires to sustain their development at all times.³¹ This definition is vague and leaves a lot of room for discretion. This principle is aimed at ensuring the protection of a child’s rights and the holistic development of a child. It is a primary consideration.³²

The case of *Re McGrath (Infants) [1893] 1 Ch 143 at 148* stated that,

³¹ Joan B. Kelly, The Best Interests of the Child. A Concept in Search Of Meaning, *Family Court Review, an Interdisciplinary Journal*, 35, 4 October 1997, 378.

³²CRC General Comment No 14, Right of the child to have his or her best interests taken as a primary consideration, 29 May 2013. (Hereafter referred to as CRC General Comment 14).

*“...the welfare of a child is not to be measured by money alone nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.”*³³

This means that the conditions necessary to ensure child’s welfare is taken care of are not only of a financial nature but also include psychological needs. This responsibility is to be met not only by the parents but anyone caring for the child.

2.3 Laws in Kenya on the Best Interest of a Child and Parental Responsibility

The enactment of the Children Act 2001 began in 1984 when the Kenya Law Reform Commission was tasked with the review of laws relating to children. There was an absence of laws relating to children in the then Kenyan Constitution.³⁴

The Children Act under section 4 (2) provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.³⁵

The 2010 Constitution introduced a bill of rights that protects children’s rights in article 53. This bill of rights is guided by international Human Rights standards and includes not only civil and political rights such as the right to vote but also socio-economic rights such as the rights to the highest attainable standard of health. The inclusion of children’s rights in the Constitution entitles them to the realisation of all the other rights in Chapter 4 of the 2010 Constitution.

The Constitution of Kenya 2010 placed parental responsibility equally on the mother and the father in Article 53 (1) (e). This means that under the Constitution a man and a woman have equal standing as a parent and are both responsible for the welfare and matters pertaining to the child.

Prior to the 2010 Constitution, the Children Act of 2001 provided for parental responsibility in section 24 (3). The mother was deemed to have a responsibility in the first instance. The father, according to section 25, acquired parental responsibility through the court, an agreement with the

³³ <http://kenyalaw.org/caselaw/cases/view/169163/> the case of *Re McGrath (Infants) [1893] 1 Ch 143 at 148*.

³⁴ Mohammed H and Mashamba C, *Child Rights and the Law in East Africa*, Law Africa, Nairobi, 2014, 76.

³⁵ Section 4 (2), *Children Act*, 2001.

mother, accepting paternity or maintaining the child or living with the child for 12 months or more. In this case, parental responsibility was not automatic.

Section 23 (1) of the Children Act defines parental responsibility as the duties, rights, powers, responsibilities and authority which by law a parent has in relation to a child. This means that each parent is able by law to make decisions on the welfare of a child and such decisions should be for their own good.

In *Civil Appeal No.41 of 2017*, the court stated that,

*“Parental responsibility is what a parent has in relation to the child and the child’s property in a manner consistent with the evolving capacities of the child. So, these duties, rights, powers, responsibilities and authority of a parent over a child are defined by law and may change depending on the changing capacities of the child”.*³⁶

Section 2 of the Children Act defines a parent as the mother or father of a child and includes any person who is liable by law to maintain a child or is entitled to his custody. Therefore, a parent is not gendered. There is no differentiation in the capacity one has to be a parent. Kenyan law places parental responsibility on the parents equally regardless of gender. This means that each parent may be responsible for the child. This is done to ensure that the best interest of the child is considered at all times.

The 2010 Constitution of Kenya every child has the right to parental care and protection from their mother and father. This places joint responsibility on both parents whether married or not. Therefore, parental responsibility is held by the parents and is at no point complete. However, it continues to evolve as the child grows and circumstances change.

2.4 International Law on the Best Interest of a Child

Article 3 of paragraph 1 of the Convention on the Rights of the Child gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere. It establishes a framework that includes different types of obligations. That is the obligation to ensure that the best interest of a child is properly and consistently applied in the implementation of judicial proceedings that involve a child either directly or indirectly. The obligation to ensure that all

³⁶ *Civil Appeal No.41 of 2017*, eKLR.

judicial decisions or administrative decisions, policies have the child's best interest as a primary consideration. Lastly the obligation to ensure that the interests of a child have been taken into consideration in decisions or actions taken by the private sector.³⁷

The best interest of a child is a threefold concept. It is a substantive right, a fundamental interpretive legal principle and a rule of procedure. It is a substantive right because the best interest of a child is taken as a primary consideration when different interests are being considered in order to reach a decision. It creates a built-in obligation for states to take the best interest of a child as a fundamental consideration. It is a fundamental interpretive legal principle as it is open to more than one method of interpretation and the interpretation that best represents what the best interest of the child should be chosen. It is a rule of the procedure as it means that whenever a decision is to be made that will affect a child, the decision-making process must include an inquiry into the impact or effect of the decision on the child or children in question. This is done to determine whether the outcome will affect the child negatively or positively.³⁸

The principle of the best interest of a child is based on the assessment of a child's interests on a case by case basis. It is not a rigid structure. It depends on each circumstance. When determining what the best interest is there are guidelines that should be followed. The first is to assess the facts of the case and determine which ones are relevant to the child's interest. Thereafter the correct legal procedure should be followed so as to ensure the child's rights are protected.

2.5 The Law of Succession Act

The Law of Succession Act had a different interpretation of parental responsibility. The language of the Act assumes that the responsibility should fall on the father and the mother plays a more supportive role. This is as a result of the time when the Act was drafted and passed. The Act entered into force and at the same time, customary law governed most personal matters as per the then Constitution.

The Act in section 3 (2) gives men the legal capacity to voluntarily assume permanent responsibility of a child and in such a circumstance the child is then considered a child in relation

³⁷ CRC General Comment No 14.

³⁸ CRC General Comment No 14.

to the man for the purposes of succession. This places parental responsibility on the man while in the case of women, parental capability is only as a result of the natural biological process of birth.

Therefore, section 3(2) of the Act does not assess the interest of a child in this circumstance but rather looks to the interest of a man when taking on parental responsibility. This means that when a woman assumes responsibility for a child the Law of Succession Act not only does not give her the legal capacity to assume parental responsibility but also does not consider the best interest of a child in such circumstances.

2.6 Conclusion

In conclusion section 3 (2) of the Act was written with the point of view that favours men. This is because it gives them the option to assume parental responsibility for a child who is not biologically theirs. This in itself favours both the man and the child in this circumstance because if the man were to die intestate the child would for the purposes of succession be considered as his own child. However, in the case of women, the same option is not provided. A woman, according to the Law of Succession Act cannot assume responsibility for a child other than the one who is biologically hers or formally adopted by her. Therefore, if the woman were to die intestate the child would then become a stranger to the estate. However, one may argue that they may prove dependency according to Section 29 of the Law of Succession Act. While this is a possible redress it means that the child who has been informally adopted by a woman will hold a lower claim to the estate as opposed to those considered children by the Act and always be at a disadvantage as their best interest will not have been taken into account.

CHAPTER 3: INFORMAL ADOPTION

3.1 Objective

This chapter aims to compare informal adoption in Kenya and the United States of America. The US has explicitly recognized informal adoption in its Laws. This chapter aims to compare the application of informal adoption laws in both jurisdictions and whether the laws in Kenya on informal adoption consider the child's best interest.

3.2 Introduction to Informal Adoption

Informal adoption is also known as the principle of equitable adoption, de facto adoption, virtual adoption or adoption by estoppel. Claims of informal adoption often arise when someone takes in a child and raises them as their own, however, they do not formally adopt them.³⁹ This differs from formal adoption in that formal adoption follows a legal process where one can become a non-biological parent of a child. In this case for the purposes of intestate succession, the individual is treated as though they were formally adopted and thus entitled to inherit as a child of the deceased.

3.2.1 Informal Adoption in Kenya

The law in the US expressly provides for informal adoption while in the Kenyan case it is implied by the law in section 3 (2) of Cap 160. The doctrine of equitable adoption states that a person may informally adopt a child by taking them into their care without formally adopting them. If they die without a will the child has a claim on their estate. If the deceased died with a will and the child was not mentioned in the Will, the child may still claim for a portion of the parent's estate on the basis of being left out or inadequately provided for.⁴⁰ Furthermore, to establish this relationship one must either have had a promise to adopt that may have not been fulfilled or an agreement with the biological parents of the child.

In Kenya, formal adoption is provided for in statute in the Children Act while informal adoption is implied in Cap 160. It is not explicitly stated by section 3 (2) of Cap 160, however, it comes up as a result of what the law states. The Children Act of 2001 provides for formal adoption. While there are many benefits to formal adoption such as the child involved gains the same legal status

³⁹ Higdon, Michael J, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43, Wake Forest Law Review, 1, 2008, 223-282.

⁴⁰ <https://definitions.uslegal.com/e/equitable-adoption/> the dictionary definition of equitable adoption, accessed on 16 July 2019.

as a legitimate child, informal adoption still occurs in today's society. The Law of Succession Act recognizes this but assumes only men are capable of it.

3.2.2 Informal Adoption in the United States of America

Succession law offers limited or no protection for such individuals taken in by families who did not formally adopt them. Therefore, to ensure that the individual did not experience distress the courts in the United States of America gave rise to the doctrine of equitable adoption also known as informal adoption. The doctrine of equitable adoption came up to make inheritance more inclusive. The sense of family extends beyond the concept of a nuclear family and relationships arising from either blood or marriage among ethnic communities in the US. It is not uncommon for a person, whether a relative or not to informally adopt a child who may be in need. Although this concept may exist among various cultures and races, it is much more prevalent among Asian and African as well as Hispanic communities.

In these communities, the definition of family is not only limited to people living together they form part of a larger unit. Child-rearing is a communal rather than an individual activity. The extended family model played a big role in the survival of the African American community during slavery. They would informally adopt those with no parents or those whose parents had been sold off as slaves. Following the abolition of slavery, African people were excluded from foster care and childcare. It was through informal adoption that these children were taken care of.

Intestate Succession laws are based on the presumption that the deceased would have wanted their estate to be divided among their families. However, the definition of family in the law is often meant to mean nuclear family. This is done in order to ensure that probate courts have an easier task in predicting likely heirs and dependents and protect them. In most cases of intestacy, non-relatives hardly ever inherit the deceased's estate regardless of how close the emotional bond between the two was. Where no relative is available, the estate reverted back to the estate.

In the absence of a blood or legal relations to tie an individual to the deceased, equitable adoption comes into play. It is designed to protect the rights of an individual who is considered a 'child' of the deceased but lacks the legal status of a child as defined by Succession laws.

3.3 The Best Interest of a Child in informal adoption in Kenya

The Law of Succession Act in section 3 prioritized the needs of adults when defining a child. This is because the context at the time of the drafting of the Act did not consider a child's perspective. The Law of Succession Act came into place as a result of the report by the Commission on the Law of Succession in 1968. Previously succession law was found in different statutes. The Commission was directed "to make recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform code . . . applicable to all persons in Kenya."⁴¹ However, the code was to be uniform as far as may be practical. In its report, the Commission found that the existing laws that applied to succession and inheritance were defective as they were unfair to women. While it is important to consider the women are not unfairly treated in succession issues. Certain parts of the Act that directly involved children remained problematic. There is the obligation to ensure that the best interest of a child is properly and consistently applied in the implementation of judicial proceedings that involve a child either directly or indirectly.

3.3.1 The Meaning of Section 3(2) of Cap 160

Section 3 (2) of the Act states that for the purposes of succession, a child in relation to a female person is one who is conceived but not yet born and any child born to her and in relation to a male person any child they expressly recognize as their own or whom they have voluntarily assumed permanent responsibility. The literal meaning of this section is that a child according to a man is one who they expressly recognize as their own, or whom he has taken in out of his own volition on a long term basis. While for a woman a child can only be one that they give birth to. The law provides that a man can informally adopt a child by voluntarily assuming permanent responsibility for them.

When the law is interpreted this way it limits who a child is in intestate succession matters. While the law may have been written this way to ease the burden of the court in determining the relationship between the deceased and an individual to determine who can be considered a child. However, the implication of this means that a woman cannot informally adopt a child. This poses a threat to both women and any child involved in a situation where they are not formally adopted. If the woman, in this case, dies intestate then the child is immediately disinherited.

⁴¹ Commission on the Law of Succession, *Report of the Commission on the Law of Succession*, 1968.

3.4 Conclusion

In conclusion, this chapter talks about the concept of informal adoption, it compares the US and Kenyan provision for it. While US law provides for it Kenya's law does not expressly provide for it but implies that it is possible for one gender to do so. Differentiated treatment does not always result in the disadvantage of one party. However, in Kenya, the Court's application of the same shows that the differentiation produces unjust results as any child who is informally adopted by a woman is disinherited in case of intestacy. This puts the child at a disadvantage as their interest is overlooked.

CHAPTER 4: DISCRIMINATION ACCORDING TO THE LAWS OF KENYA

4.1. Objective

Discrimination has been variously defined by different laws. This chapter seeks to establish the definition of discrimination according to the domestic and International Law that applies to Kenya. The objective of this chapter is to establish how discrimination, was previously handled and how it has changed. Furthermore, because institutionalized discrimination is not obvious the law may provide for the prohibition of discrimination but may indirectly perpetrate certain forms of discrimination in its application. Additionally, this chapter discusses the discriminatory nature of Section 3 (2) of Cap 160.

4.2. Institutionalized Discrimination

Discrimination is the unfair treatment of a person principally based on race, gender, and age among others⁴². Discriminations happen when one group uses its authority to prejudicially treat another. Discrimination is often institutionalized. This means that it stems from societies, rather than an individual's belief in something.

Institutionalized discrimination is built into the structure of society. While acts of individual discrimination are often obvious, those of institutional discrimination is unconscious. It perpetuates the bias as the norm. It makes them acceptable.⁴³ An example of such institutionalized discrimination is seen in the case of *Plessy v Ferguson 1896*, which advanced the doctrine of 'separate but equal' used to justify the need for racial segregation. The United States' Supreme Court, in this case, looked into the definition of the fourth amendment equal protection laws that provided for uniform security by the laws to anyone within the jurisdiction of the United States of America. The court upheld racial segregation in schools as long as the quality of the schools was equal. This decision operated as the guiding practice until 1954 when it was overruled by *Brown v Board of Education*.⁴⁴

⁴² <https://dictionary.cambridge.org/dictionary/english/discrimination> accessed on 14 May 2019.

⁴³ "Institutional Prejudice or Discrimination." Sociology Cochise College Boundless, 26 May 2016 <https://www.boundless.com/users/493555/textbooks/sociology-cochise-college/race-and-ethnicity-10/prejudice-and-discrimination-82/institutional-prejudice-or-discrimination-478-6773/> accessed on 14 May 2019.

⁴⁴ *Plessy v Ferguson*, (1896), The Supreme Court United States of America, <https://www.britannica.com/event/Plessy-v-Ferguson-1896> accessed on 15 May 2019.

The society's belief that the races should not interact was translated into the laws and interpretation of existing laws. Regardless of this, the continued perpetuation of prejudice happens because individuals accept the stereotypes and allow it to continue. The individuals may still be held accountable.

4.3 Discrimination in Constitutions of the Past and Present

Since its independence, Kenya has had three Constitutions. These Constitutions provided for discrimination based on gender in different capacities.

4.3.1 Independence Constitution

During the time of constitutional drafting, the social climate was tense in terms of racial discrimination. During this time the most prevailing and pressing form of discrimination was based on race. Additionally, Kenyans were divided among their tribes and there was often conflict and discrimination based on one's origin. The laws at this time reflected this.

Article 26 of the Independence Constitution provided that there shall be no law with a discriminatory effect whether on the face of it or in its application. In subsection 3 it defines discrimination as treating people differently because of their tribe, race, political opinion, place of origin, creed, residence, and because of this one is treated differently from another person. However, this section did not apply in matters of burial, divorce, adoption, inheritance and any issues involving personal law.⁴⁵

The definition of discrimination in this law did not include discrimination based on gender. Therefore, discrimination against women was not unconstitutional at this time simply because it was not accounted for by the Constitution. The anti-discrimination section of the Constitution was only revised in 1997 to incorporate gender as a source of discrimination. At the time this development was made, the repealed Constitution was already in effect.

4.3.2 The Repealed Constitution

In 1969 the Constitution was reformed and a new one was put into place. The repealed Constitution no 5 of 1969 in article 82(1) as long as no law has a stipulation with a prejudicial consequence.

⁴⁵ Section 26, *Independence Constitution*, (1963).

However, article 82 (4) (c) also states that sub-article 1 is not concerned with laws that involve burial, divorce, adoption, inheritance and any issues involving personal law.⁴⁶

This means that when it comes to matters of personal law it did not matter whether it was discriminatory or not. This applied especially where customary law was used. Customary law more often than not was the order of the day in the circumstances mentioned above. Therefore, the results of decisions made in these circumstances were only unfair rather than unconstitutional.

In the Constitution of Kenya Review Commission Report in 2005 citizens requested a committee solely dedicated to gender issues that would be charged with policy development for the safety of rights of women and work towards amending laws that discriminate based on gender. Furthermore, they put forward that laws that came from customs and customary practices that have a prejudicial effect on women.⁴⁷

4.3.3 Constitution of Kenya 2010

The Constitution of Kenya 2010 was the product of more than 10 years of work towards constitutional change. It can be dated back to 1997. It was during this time that the foundation was laid through the Constitution of Kenya Review Commission Act. The motive behind this was to initiate constitutional change by establishing a framework. Multiple drafts were written and public participation played a role in the forming of this Constitution, unlike its predecessors. Among the emerging issues was discrimination due to gender. The constitutional review commission took note of the need for gender equality.

In the journey to the 2010 Constitution, there were two important laws that were decreed in 2008. They included the second Constitution of Kenya Review Act and the Constitution of Kenya (Amendment) Act. The drive behind this action was to expedite the conclusion of the evaluation of the Constitution of Kenya. This Act put in place a Commission of Experts (CoE) that was tasked with assessing and determining unsettled concerns prior to formulating a draft of the Constitution that Parliament would adopt and the public would approve through a national referendum.⁴⁸

According to section 4 of the 2008 Review Act, the rationale behind of the process of review and the objective of the assessment procedure was to acquire a democratically sound Constitution with

⁴⁶ Section 82, *the Repealed Constitution*, (1969).

⁴⁷ Constitution of Kenya Review Commission, *Final draft*, 2005, 314.

⁴⁸ Committee of Experts on Constitutional Review, *Final Report of the Committee of Experts on Constitutional Review*, 2010, 23.

a just governmental system that promotes respectable governance, gender equality, fundamental freedoms and rights, affirmative action, constitutionalism and that all institutions and people are subject to the law.⁴⁹

3.3.3.1 Equality and Freedom from Discrimination

Article 2(1) of the Constitution offers that the constitution is the ultimate law and consecrates all laws of the land. Article 259 of the Constitution admonishes the justice system to construe the Constitution in a way that perpetuates and promotes the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that advances good governance.

The law provides under Article 27 (3) of the Constitution of Kenya that; all people are identical in the way the law applies to them and is entitled to equal security and opportunities according to the law. Everyone is entitled to uniform treatment under the law whether in social, political and economic areas.⁵⁰ These statements are found under article 27 sub-article 1 and 3 of the Constitution respectively.

The implication of these statements is that the law places everyone at the same level. It also condemns and prohibits unfair treatment based on any differences. The law ideally should uplift and protect and this provision serves that purpose.

3.3.3.2 The Discriminatory Nature of Section 3 (2) of Cap 160 of the Laws of Kenya

Discrimination means the prejudicial treatment of one group over another. In this case, the discrimination is based on gender. Discrimination is often institutionalized in the structures of society and is not inherently obvious. This is seen in Section 3(2) of Cap 160. The language used in the Act is a reflection of society's beliefs and what is considered acceptable. The laws of a country reflect the character of the people.⁵¹ Section 3 (3) of the Act also states that any child who falls in the description of a child according to a male person shall have the same relations through him as though they were a biological child. This means that according to the personality of the people of Kenya women may only deem those who are biologically related to them as their own children. Additionally, a man must recognize a child as his own for it to be considered his. Furthermore, they also have the power to assume parental responsibility of a child and this action

⁴⁹ Section 4, *Constitution of Kenya Review Act*, (2008).

⁵⁰ Article 27, *Constitution of Kenya*, (2010).

⁵¹ Sir Maurice Byers, *From the Other Side of the Bar Table: An Advocate's View of the Judiciary*, 10 University of New South Wales Law Journal, 179, 1987, 182.

makes the child theirs. This implies that only men can provide for children, they are the only ones capable of assuming responsibility for a child.

The discrimination in this situation is not limited to one party. It affects both the woman and the child. The child is affected in that the law leaves them vulnerable and unprotected as compared to their counterparts who were informally adopted by women. It affects the women as it does not legally recognize the woman's ability to informally adopt a child. The law, however, recognizes that men can informally adopt children.

3.3.3.3 The Interpretation of Section 3 (2) of Cap 160 by the Court's Jurisprudence

In analysing the law if one were to say that every single time the law provided differently for every group that all the laws were unfair it would mean that every time a group receives any benefit of the law the court would be compelled to review if it is reasonable. Therefore, it is important to justify differentiated treatment. This difference must be beneficial to all the parties. Therefore, it is important to analyse whether the differentiated treatment is justified.

Formal equality states that every group must be treated similarly. However, similar treatment does not mean that it is equal. Substantive equality goes beyond the reasoning that everyone must be treated similarly and recognizes and identifies differences among groups of people and attempts to eliminate the systemic advantages people face based on their differences.

The same is captured in the South African case of *Prinsloo v Van Der Linde (1998) ILRC 173* which held in paragraph 44:

*“ the law on equality does not mean that everyone should be treated the same way, that is, the substantive law should be the same for all persons, or that the law should be applied to all persons equally without discrimination as this would not only be unreasonable but unjust.”*⁵²

Therefore, it is important to analyse the way in which the law has been applied to determine how and where the law has unfairly and inconsistently treated groups based on the differentiation in the law and how this application promotes inequality and discrimination.

In the case of *Isaiah Gichimu Waweru v Elijah Nganga Waweru*, the courts were tasked with determining whether the petitioner is a son of the deceased Mary Wanjiku. The petitioner was

⁵² *Prinsloo Vs Van Der Linde*, ILRC 173, Constitutional Court, South Africa, (1998).

raised by the deceased after the death of his mother and considers her as his stepmother in accordance with African customs. The court, however, states that in succession matters a child according to a female person is only a natural child. It also states that the law did not anticipate that a female person would recognize or accept anyone other than her biological child as her own. It, therefore, notes that a petitioner is not a child of the deceased.⁵³

In the Matter of the Estate of Mihunyo Gitimu alias Muhinyo s/o Gitimu (Deceased), the protestors alluded that the deceased's first wife had adopted him and raised him and bequeathed a portion of the property to him during her lifetime. The court in this circumstance states that according to section 3 (2) of Cap 160 the protestor does not qualify as a child as he does not fit into the definition of a child according to a female person.⁵⁴

In the Estate of Miriam Jepkios Ngetich, the deceased had no children of her own and had entered into marriage with a woman in accordance with Nandi Customary law and had three children, two of whom had passed away. Although evidence was deduced that the individual in question was indeed maintained by the deceased and was born on the deceased's land and had no other form of income and the deceased had taken him in as her own child, the court held that the definition of a child in section 3(2) of Cap 160 did not provide for informal adoption by a woman and therefore the individual can only be considered a dependant according to section 29 of the Act.⁵⁵

The court seems willing to classify children born from previous marriages or commitments as children when a man is involved. In cases such as *In the Matter of the Estate of the Late Ebrahim Gakuo Gachaga (Deceased)*, the deceased took in his wife's child from a previous marriage and as a result of his recognition of this child the court stated that the children cannot be excluded from the distribution of the state as he is considered a beneficiary.⁵⁶ Additionally, *In the Matter of Kamuyu Njiri*, the deceased had taken in his long-time partner's children from a previous commitment and accepted them as his own, although he had not formally adopted them. In this circumstance, the court found that they were children of the deceased for the purposes of the succession to his estate.⁵⁷

⁵³ *Isaiah Gichimu Waweru v Elijah Nganga Waweru*, (2015), eKLR.

⁵⁴ *In Re Estate of Mihunyo Gitimu (Deceased)*, (2017), eKLR.

⁵⁵ *In Re the Estate of Miriam Jepkios Ngetich*, (2003), eKLR.

⁵⁶ *In Re Estate of the Late Ibrahim Gakuo Gachaga (Deceased)*, (2019), eKLR.

⁵⁷ *In Re Estate of Kamuyu Njiri*, (2019), eKLR.

However, the same does not apply as *In the Matter of the Estate of Miriam Jepkois Ngetich*. The individuals in this position are disinherited because the law does not allow a woman to informally adopt a child. This provision has an unjust application and the differentiation in the law does not serve to provide equal opportunities both genders but serves to put one at a disadvantage.

While the High Court in Kakamega in the case of *NSA and another v the Cabinet Secretary for Ministry of Interior Coordination and National Government and another* has declared it unconstitutional it is not enough to ensure that the courts may not rely on it. It must be amended to ensure that the Constitutional principles are upheld

4.4 The Rationale of the Law of Succession Act

The Law of Succession Act came into place as a result of the report by the Commission on the Law of Succession in 1968. Previously succession law was found in different statutes. The Commission was directed "to make recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform code . . . applicable to all persons in Kenya."⁵⁸ However, the code was to be uniform as far as may be practical. In its report, the Commission found that the existing laws that applied to succession and inheritance were defective as they were unfair to women. It was the Commission's purpose to correct this. Cap 160 of 1981 not only unified the law but also replaced the discriminatory laws in the independence and repealed Constitution that previously governed inheritance. These constitutions considered inheritance as a personal matter to be governed by customary law. The law at the time was put in place to bar erroneous claims by women after the death of a man that their children were the deceased's child. DNA testing was not widely known until almost a decade after the Act came into force. It, therefore, considered only the children that men had recognized as their children for the purpose of succession. At this time the law did not anticipate that women could take responsibility for a child that was not biologically their child. Furthermore at the time property was mostly held by men according to customary law, the constitution stated that personal law such as inheritance was to be governed by customary law. Therefore, as property devolved through the father it made sense to give a man the legal capacity to recognize those who would be his children and subsequently his heirs.

⁵⁸ Commission on the Law of Succession, *Report of the Commission on the Law of Succession*, 1968.

4.5 Conclusion

The Constitution of Kenya prohibits discrimination either indirectly or directly towards anyone on the grounds of sex, pregnancy marital status, race, social origin, age colour, disability, conscience, culture, belief, language, or health status in article 27.

The perception of discrimination has evolved in Kenyan laws particularly as the political atmosphere changed. The post-independence definition of discrimination centred on race and tribe. The inclusion of other forms of discrimination such as against women were included in the definition much later as formal laws began to take prevalence over customary law. What remains constant is that the law encourages the prohibition of all forms of discrimination. However, there are subtle forms of discrimination that have remained. These forms of discrimination remain set in the structure of society's dealings and are a threat to the Constitution. This is the case in section 3 (2) of the Law of Succession Act where the definition of a child is differentiated according to women. This differentiation does not only accord both genders equal opportunities but also leaves a child vulnerable which is against their best interest. It is therefore, inconsistent with the supreme law of Kenya, the Constitution.

CHAPTER 5: CONCLUSION, FINDINGS AND CONCLUSION

5.1 Objective

The objective of this chapter is to summarize the findings and give recommendations

5.2 Findings and Conclusions

This study sought to critique the constitutionality of section 3 (2) of the Law of Succession Act.

The research questions were:

- i. What is a child's best interest and does section 3 (2) of Cap 160 act in the best interest of the child?
- ii. What is the Law in Kenya on informal adoption as compared to the US where informal adoption is recognized explicitly by law?
- iii. What is discrimination according to the Constitution and is Section 3 (2) of Cap 160 discriminatory against women by denying them the possibility of informal adoption and the children involved in this arrangement?

The best interest of a child is a combination of factors a child requires to sustain their development at all times. It is enshrined in international law and in the Constitution of Kenya in Article 53. Section 3 (2) of Cap 160 is not consistent with this principle. This means that a child informally adopted by a woman is not protected by the law. Therefore, this section of the law is unconstitutional

Informal adoption in Kenya is provided for in Cap 160 under section 3 (2). It allows a man to voluntarily assume parental responsibility for a child. It comes up as a result of the definition of a child in relation to a male person.

Section 3 (2) of Cap 160 is discriminatory in language and application. The language used in the Act is a reflection of society's beliefs and what is considered acceptable. The laws of a country reflect the character of the people. The law is an expression of the whole personality and should reflect the values that sustain human societies.⁵⁹ Section 3 (3) of the Act also states that any child

⁵⁹ Sir Maurice Byers, *From the Other Side of the Bar Table: An Advocate's View of the Judiciary*, 10 University of New South Wales Law Journal, 179, 1987, 182.

who falls in the description of a child according to a male person shall have the same relations through him as though they were a biological child. The children, in this case, receive not only the benefit of being considered a child but may also be able to inherit from other relatives of the male person who assumed responsibility for them. This means that according to the will of the people of Kenya women may only deem those who are biologically related to them as their own children. Additionally, a man must recognize a child as his own for it to be considered his. The court's jurisprudence states that the law did not anticipate that a female person would recognize or accept anyone other than her biological child as her own.

5.3 Recommendations

The Law of Succession Act came into force in 1981. The current Constitution was promulgated in 2010. The constitution, therefore, came into force 29 years after the Law of Succession Act. Article 262 establishes a Commission for the Implementation of the Constitution, which will work together with the attorney general and the Constitutional Implementation Oversight Committee to enact the laws that need to be passed to ensure compliance of national laws. However, almost 10 years later there are still laws in violation of the Constitution.

In March 2019 the Court in the case of *NSA and another v the Cabinet Secretary for Ministry of Interior Co-ordination and National Government and another* recognized the unconstitutionality of Section 3 (2) in a case relating to parental responsibility. It sought to rectify the provisions that allowed the fathers to deny parental responsibility for their children by refusing to recognize them. However, this does not address the children who are disinherited once they are formally adopted by a woman. Additionally, a court declaring law unconstitutional does not hold the same finality as the amendment of a law.

Section 3 (2) of the Law of Succession Act is inconsistent with the Constitution, particularly Article 27 and Article 53. Therefore a commission should be formed to review the Act as a whole and bring it should be reformed to bring it into compliance with the Constitution.

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