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Research Article

Application of Mirath sheriah in Kakamega County

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Abstract. This study, conducted in Kakamega County examined whether or not *mirath* is applied with regard to women; if there were any factors that promoted or impeded the application of *mirath* in the County and sort to identify strategies for implementation of *mirath* in the context of Islamic teachings and the Constitution of Kenya 2010. The study was guided by the Feminist Conflict Theory (propounded by Karl Max 1818-1883). Purposive sampling identified respondents from among the various segments of Muslims living in the County. The study employed a qualitative cross-sectional descriptive research design. Primary data was collected using interviews and focus group discussions from purposively sampled key respondents who included: Kadhi, Imams, widows, widowers, sons and daughters whose parents are deceased. Interview schedules and focus group discussion were the tools used. Secondary data was collected from the internet, journals and books. Data collected was analyzed thematically. This study examined the application of Islamic laws of inheritance with particular reference to Luhya indigenous Muslims and specific reference to women in Kakamega County. The findings demonstrated that the Luhya inheritance rules are patriarchal thereby favouring male children over females despite the advent of Islam in the region. The male chauvinistic

tendencies in the Luhya community have pushed Muslim women to a subordinate and inferior position hence their intrinsic value is negated. The study established that Luhya inheritance rules are so entrenched that they have not been fully altered or replaced by the Shariah. Many respondents consented that Luhya Muslims still practice the indigenous patriarchal inheritance rules though they have adopted other Islamic beliefs and practices.

Keywords: Islam, Shariah, Culture, Muslim, Mirath, Luhya.

INTRODUCTION

This study aimed to find answers to questions about *how* inheritance takes place: *how* decisions are made about who will (or will not) inherit and *how* the transfer of resources between generations actually takes place. While the study of inheritance focuses on the passing on of economic capital (in the rural context largely, but not exclusively, land), other types of valued goods can be passed on in a manner equivalent to inheritance. A family's reputation and social support networks do not die with the individual; they are valued social capital that can be passed on. Similarly, cultural, either in the form of knowledge or habit of positive attitudes towards hard work, adaptation or entrepreneurship can be passed on by one generation to the next. At a deeper level, there are background questions about *why* –essentially questions of motive: *why* are some persons seen as the proper or correct persons to receive inherited assets while others are not? *Why* are resources concentrated with some rather than being diffused across many? This study attempts to address these questions with specific reference to the application of Islamic Laws of Inheritance with regard to women among the Luhya indigenous Muslims in Kakamega County. Inheritance is often treated as peripheral to or semi-detached from general debates and policy formulation concerning security of economic empowerment yet it is one of the commonest ways of acquiring property. In Muslim societies, inheritance rules are derived from religious sources that delineate the division of an individual's property upon death. The rules are to be implemented by the family and upheld by the Muslim community. The Kadhi, and Sheikhs play an important role in the interpretation of the Islamic Laws of inheritance as the laws are complex and not known by a mass of lay Muslims. Estate administrators are also important in cases where the deceased has left a will. The application of these rules pertaining to designated shares must be understood in a broader socio-cultural and economic context and within wider inheritance systems of practice. Demystifying the complex dynamics of Islamic inheritance rules and practice may reveal important information for the implementation of strategies designed to enhance security of property especially with regard to women. While modern reforms and changes have influenced several fields of woman empowerment, the detailed classical inheritance structure has been one of the

enduring legacies of classical Islamic Law (*Shariah*). (UN-HABITAT *Islam, Land & Property Research Series Paper 6: Islamic Inheritance Laws & Systems 9*).

A few studies have been done on Islam among the Luhya. Such studies focused on the effects, impacts or influences of Islam on sub-tribes in rural settings on such issues as marriage, religion, education and culture among others. The most recent being that of Baraza, J.N and Okware K on *The Influence of Islam on Bukusu Indigenous Beliefs and Practices Relating to Inheritance*. The study investigated the influence Islam has had on the *Luhya* indigenous inheritance beliefs and practices and particularly aimed at identifying areas of convergence and divergence between Islam and *Luhya* indigenous beliefs and practices. Baraza and Okware revealed that the *Bukusu* inheritance rules have not been altered by Islamization. This study excluded the other Muslim Luhya sub-tribes in this area such as the Maragoli, Tachoni, and Wanga among others and focused on the *Bukusu*. It also focused on the influence of Islam rather than the application of the laws of inheritance. This study examined the application of the Islamic laws of inheritance by the entire Luhya Muslim community in Kakamega County with reference to Muslim women.

LITERATURE REVIEW

Among the Luhya of Western Kenya, customary laws prohibit women inheritance from their parent as opposed to Islam where provisions for inheritance by women exist. In Luhya cultural practices, the first-born son of the first wife is usually the main heir to his father, even if he happens to be younger than his half-brothers from his father's other wives. Daughters have no permanent position in Luhya families as they will eventually become other men's wives. They do not inherit property, and are excluded from decision-making meetings within the family. While *Mirath* among Muslims allows for inheritance by women, Luhya customary laws on inheritance prevail. Unlike the former constitution, the current constitution promulgated in August 2010 is explicit that women have equal rights with men on inheritance. The Qur'an fosters the solidarity of humankind, the rights of women and the implications of family relationships including equitable distribution of property after death (Mohammad 1967). Implementing the new Constitution of Kenya provides an opportunity to promote inheritance by women in Muslim dominated areas and the wider Kenya society. It is important to promote women's right as per the Holy Qur'an, Hadith and the 2010 Kenya Constitution. In 'Reviewing of Inheritance and the Intergenerational Transmission of Poverty in sub-Saharan Africa', Cooper observes that inheritance seems to lend itself well to focusing poverty alleviation policies and activities due to the fact that inheritance systems and practices are brought to light as a result of critical points in lifetimes, including the start-up of new households, usually at the time of marriage, and the devolution of property at the time of a person's death' (Cooper 2010a: 24). In a multivariate analysis of data from a ten-year longitudinal panel study, Muyanga

et. al. (2010 and Davis, 2011) established that the amount of land received from parents by the head of household is a significant predictor for identifying households that remained 'non-poor' for the duration of the study, as well as those that ascended out of poverty and those that descended into poverty. Remaining non-poor and ascent was associated with receiving larger amounts of land at the time the household was initially formed and descent with smaller amounts. Whereas Deininger, 2004 opines that low-income developing countries, land is the key asset, forming a large proportion of poor people's asset portfolios, Platteau and Baland (2001:28) observe that the major mode of land acquisition in Kakamega county is inheritance. Land is the primary source of wealth, social status, and power; it provides the basis for shelter, food, and economic activities. Owning land in subsistence economies is fundamental to household well-being (Mtika, 2003). Access to resources such as water and to services such as sanitation and electricity, as well as the ability to make long-term investments in land and housing, are often dependent on rights to access land (Cooper, 2010a). Unevenness in asset holdings can result in intense inequality in the initial conditions of households, making it much easier for asset-rich households than others to save, invest and accumulate assets.

The right to own and inherit property traverses the realms of civil, political, economic, social, and cultural rights. It is central to the empowerment of all in society and is a key developmental right. It needs to be a right shared by all members of a community (men, women and children) in order to safeguard their security and, ultimately, their dignity. In much of sub-Saharan Africa, land markets are weak and fragmented, and land is generally acquired through inheritance. As a result, the inheritance or non-inheritance of assets has been found to be integrally linked to a person's poverty and their likelihood of remaining in or moving out of chronic poverty (Muyanga *at al.*, 2010). Inherited assets (particularly land) are a key determinant of non-labour income (Quisumbing, 1994). In some places in Kenya traditions have been maintained (Aliber and Walker, 2004 and Yamano, 2008 in Cooper, 2010a), while in others they have been eroded (Human Rights Watch, 2003 in Cooper, 2010a). The barriers to women acquiring land rights can be seen as falling under three spheres of practice: the empowerment of women due to factors that promote or retard their socio-economic well-being; the implementation of customary women's rights, where the safeguards that exist in theory are not observed in practice; and barriers that exist in codified law, where the actual provisions will work to the disadvantage of women. The three spheres are linked and attempts to overcome barriers in one are likely to be ineffectual unless they coincide with changes in the other spheres (Cooper, 2010a: 14-23). Emerging legal and social trends, as they relate to the ownership and inheritance of property, indicate a practice that has largely worked to the detriment of women in virtually all communities and social classes in Kenya. These include the laws relating to property,

to marriage and dissolution of marriage, the land registration systems and the social and cultural attitudes that determine the actual enjoyment of this right. Because property is generally kept within families, women's lack of succession rights means that when they marry into other families they have no control over the property of their birth families.

The importance of securing women's property and inheritance rights has been recognised in a growing number of national laws, as well as in international legal instruments in the context of both development and equality.¹ Existing research literature from various Sub-Saharan African societies highlights how widowed women and orphaned children are particularly vulnerable and prone to lose rights of access to properties they enjoyed during the lifetime of their husbands or fathers (Rose, 2006; Strickland, 2004; Drimie, 2003; Human Rights Watch, 2003; Drimie, 2002). Such alienation from property, including housing, land and other productive resources, has been linked to economic vulnerability, poverty traps, chronic poverty and the intergenerational transmission of poverty (IGT poverty) (Carter and Barrett, 2006; Bird *et al.*, 2004). Examinations of women's poverty commonly focus on the security of women's access to assets, and especially land in Sub-Saharan African contexts. Agarwal (2001, 1997) has argued that women's ownership of property leads to improvements in their welfare, productivity, equality, and empowerment, a proposition that has gained resonance in the international development policy arena (Whitehead and Tsikata, 2003). According to many different societies' patrilineal customary systems, upon marriage women sever their affiliation with their natal family and are henceforth affiliated with their husband's family and access land through this affiliation. Yet in many such contexts wives never become recognized as full members of their husband's lineage and therefore never able to own or directly control property. The implication for inheritance is the temporal and interpersonal conditionality of widowed women's access to property. Widows may be allowed continued use of the home and other household assets, however in many cases widows are not allowed to dispose of his property nor retain it if they remarry. Describing such precarious situations, the Government of Kenyan 2006 report to the Committee on Economic, Social and Cultural Rights states that, "Under the customary law of most ethnic groups in Kenya a woman cannot inherit land, and must live on the land as a guest of male relatives by blood or marriage." (GOK 2006: supra note 3). In some societies, widows are expected to 'marry' into a deceased husband's lineage. This practice, known as leverite or 'widow inheritance', is meant to secure the woman's affiliation within her husband's family. (Potash, 1986). Studies show that competing inheritance or property claims are most often first addressed through interpersonal negotiations, possibly involving the mediation

¹ For in the International Covenants on Economic, Social, and Cultural Rights and on Civil and Political Rights and the Platform of Action adopted at the 1995 Beijing World Conference on Women.

of heads of families or clans or local customary leaders. For instance, a study in Western Kenya where patrilineal inheritance is customary found that all respondents' reported that land dispute cases first to local leaders, i.e. elders or chiefs. Although chiefs and elders do not have any legal authority to resolve disputes, they have both local social legitimacy and can act more quickly and cheaply than the official legal system (Henrysson and Joireman 2009).

Conceptual framework

Islamization is a process that involves the interaction of Islamic faith with other cultures or religions. (Attas 1993: 44 - 45) defines islamization a process of liberating one's spirit and soul. The liberation of the spirit influences the body and brings peace and harmony within the self, humankind and nature. The liberation of the soul sets one's course towards the attainment of one's original state of purity. (Attas 1993: 44 - 45) further defines islamization as the liberation of humankind from the magical, mythological, animistic, national-cultural tradition opposed to Islam and from secular control over one's reason and language. One then ceases to be controlled by magical and secular world views. The islamization of the Luhya people was geared towards enabling them attain their original state of purity which had been soiled through interaction. This was further aimed at enabling liberation from their indigenous cultural beliefs and practices after adopting Islam². (Faruqi, 1982). The conceptual orientation adopted for this study combined Bascom and Herskovit's (1959: 2 - 6) conception of "Change and Continuity"³ and Bungler's (1972) "Islamization theory"⁴. A people who believe in a supreme God and the Hereafter are more likely to revert to Islam than a group whose religion is a manipulation of impersonal forces and whose concepts of afterlife are vague (Bohannan, 1953). This provides an analytical basis of the pre-Islamic religious beliefs and practices on inheritance among the Luhya in Kakamega County. The first group to introduce Islam to Kakamega County according to Lewis and Levtzion were Merchants accompanied by Muslim clerics or themselves being both clerics and merchants (Lewis 1966; Levtzion 1968). Other groups included Nomadic tribes such as the Somali and *Baggara* Arabs and Muslim brotherhoods such as the *Tijaniyya* and *Qadiriyya*. This was important to this study as it informed the identity of the

² This was to islamize their religious knowledge, beliefs and practices through redefining and rethinking their reasoning in relation to the teachings of the Holy Qur'an, re-evaluate their conclusions and redefine their goals in relation to the cause of Islam

³ Change and Continuity theory propagated by Bascom and Herskovits (1959) and shared by Githige (1980) and Shisanya (1993) seeks to provide an understanding of the interaction between two or more cultures. It states that whenever new influences impinge on any society, some of the pre-existing body of customs and beliefs are discarded, modified or retained. Basing on this, it may be argued here that the interaction of Islam and the Luhya indigenous religion resulted in some Luhya religious beliefs and practices being discarded, changed or retained.

⁴ The theory of islamization developed by Bungler (1972) states that Islam in any given place is a function of the contact situation between the group which becomes Muslim and the group introducing Islam. The contact situation is in turn a function of: the pre-Islamic culture/religion of the group, which becomes Muslim, the culture of the group that introduces Islam, the particular sect of Islam introduced and the precise nature of the contact.

culture of the group which introduced Islam among the Luhya and its influence on the people especially in terms of beliefs and practices concerning inheritance. The theory further explains that for the last five hundred years or so, only *Sunni* Islam has played a major role in Africa, although there are *Kharijite Berber* communities *Ismailis* and other *Shia* latecomers in east Africa. The differences in the form of Islam introduced are determined by the culture of the agents. Applied to this study, we argued that the sect of Islam introduced in Kakamega County was mostly Sunni which is common in East Africa. This enabled the examination of the socio-cultural influence of the sect on the Luhya in relation to inheritance. The conceptual framework adopted explains the pre-Islamic religion of the people who became Muslim, how islamization took place, the form of Islam introduced and the contact situation between Muslims and non-Muslims, hence the influence of Islam on other religions and vice versa. The islamization theory was best suited to explain the contact situation between Islam and the Luhya culture in relation to inheritance hence provide the conceptual framework model of thought to address the objectives of this study.

METHODOLOGY

Purposive sampling was used to select urban and rural sites from which, simple random sampling was used to select respondents from among Imams, widows and other affected family members. These locations included: Kakamega, Mumias, Butere, Matungu and Navakholo town centres for the urban category and Namulungu, Mmakunda, Mwira, Mwamba, Shitinji, and Mwiya for the rural category. Using simple random sampling, 34-54 study respondents from among the following groups for: 2 Kadhis, 2 Imams, 2 widows, 2 widowers, 2 sons and 2 daughters (1 from rural and 1 from urban area respectively) were selected for interviews; and 4 groups of men, women, daughters and sons for selected for focus group discussion comprising of 6-10 participants. The offices of the Kadhi in Kakamega, Kisumu and Bungoma were visited to collect official data regarding cases of inheritance regarding women. Respondents from these areas provided in-depth information on the issues of concern to the study. Luhya elders from Nabongo Cultural Centre in Matungu were interviewed to get an insight of the effects of the contribution of culture in Muslim women's' economic empowerment endeavor through inheritance and if cultural factor either impede or promote the application of Islamic Laws of inheritance by women in the Luhya Community.

Data Collection

Both primary and secondary sources of data were utilized in this study. Primary data was gathered from the field to supplement secondary data. Primary data was derived from first hand information through oral interviews conducted by the researcher, informal group discussions and non-participant observation.

Primary data formed the core of our data which was supplemented by secondary data obtained from published books, unpublished articles, government reports and records, journals and periodicals, legislative council debates and district and provincial annual reports. These were obtained from national libraries and archives.

Oral Interviews

A structured interview guide was used for oral interviews and the researcher tape-recorded the sessions where necessary besides note-taking. The questions could easily be reframed to encourage free discussions other than just eliciting questions and answers. Oral interviews provided an opportunity for cross checking of responses to avoid possible misinterpretation and to ensure the understanding of the collected data and hence, validity. The method allowed the researcher to understand and capture the respondents' point of view through probing. According to the responses to the oral interviews, the influence of Islam on the Luhya indigenous inheritance rules and regulations is half-half and hence change and continuity in the beliefs and practices. In the course of oral interviews, discussions generated into informal group discussions. These provide information about similarities and differences in the respondents' opinion and experiences on the research topic. This enabled the researcher to quantify the validity of the data obtained.

Observation Method

Non-participant observation method was used. The researcher attended several Islamic and Luhya indigenous burial, post-burial ceremonies in order to establish the practices carried out during these ceremonies⁵. The researcher also collected data using focus group discussions from purposively sampled key respondents who included: Kadhi, Imams, widows, widowers, sons and daughters whose parents are deceased. The tools used were interview schedules and focus group discussion schedules. An interview with the Kadhi Kakamega/Vihiga sub-county revealed that not many Muslims go for mitigation on inheritance to his office.

⁵ Among the ceremonies attended include the burial of the late Rajab Mwenje in Kakamega Municipality Division. Rajab Mwenje was a renowned educationist who rose through the ranks from a classroom teacher, a teacher training college tutor and a high school principal to become the first Luhya Muslim District Education Officer in this region. He retired as the District Education Officer for Vihiga district now Vihiga Sub County in Vihiga County. The late Rajab Mwenje was buried in his home in next to Musaa Primary School in Kakamega Municipality. The other ceremony the researcher attended was the burial and post-burial ceremony of the late Mzee Ismail Osundwa in Makutano area in Lugari sub-county. Mzee Osundwa was one of the early farmers who settled in Lugari sub-county in the early 60s from Mumias. He, together with other Muslims acquired a plot and put up a mosque- Makutano Mosque in Makutano Market, Mukuyu Sub-Location, Mautuma Location, Lugari Sub-county County in Kakamega County. He was buried at his home. The other ceremony attended by the researcher was the burial and post-burial of the late Suleiman Khatib Mwanje who lived in Lurambi market in Kakamega Municipality. The late Khatibu who died at the age of 60 owned a plot with rental houses. He had two wives who had earlier passed on. He left behind 4 male children and five female children. He was buried at the Muslim cemetery in Kakamega. These attendance among others, provided a detailed and comprehensive insight of what happens before and after burial ceremonies and if inheritance is practiced in accordance with the stipulated rules in the Qur'an and Hadith.

The Kadhi has an office at the Kakamega Law courts. During the period of the study, no Muslim had sort assistance from this office on matters of inheritance. The Kadhi Bungoma County equally did not have many cases of inheritance. Very minimal cases were referred to his office. He has an office in Bungoma law courts. The Kadhi in Kisumu had a substantive list of inheritance cases. This may be due the fact that the Kadhi's court in Kisumu has been in effect for a longer time as it used to serve the western region which included Kakamega, Bungoma, Vihiga, and Busia Counties. The interviews with the Kadhis revealed that most Muslims, especially of the Luhya origin prefer to settle matters of inheritance out of the Kadhi's court. This is attributed to local settlement where in most cases; the female child does not inherit. In some cases, she is 'compensated'. In such cases, part of the land is sold and the money given to the female members of the family as according to Luhya customs, female children don't inherit land and it is a bad omen if female children were to put up houses in their father's compound, hence the 'compensation'.

Interviews with Imams revealed that a majority of Luhya Muslims do not adhere to the laws of inheritance according the Holy Qur'an and Hadith. This was attributed to luck of knowledge and the influence of Luhya traditional beliefs on the same. Asked what frequency they (Imams) educate their congregants on inheritance, most confessed that khutba's⁶ on inheritance don't feature much during Friday prayers. Interviews with widows, widowers, sons and daughters whose parents are deceased equally revealed lack of enforcement of the laws inheritance in accordance with the Holy Qur'an and Hadith caused by Luhya traditional customs and practices.

Document Analysis Method

For library research, both published and unpublished materials in Kenyan libraries were read and analyzed. Data was gathered from textbooks, journals, periodicals, official government reports, county and sub-county annual reports and county assembly debates from national libraries and the Kenya National Archives. These supplemented primary data on inheritance from Arabia to Africa, Kenya, Western Kenya and Kakamega County; and the interaction between the Luhya indigenous religion and Luhya indigenous Muslims in Kakamega County. They also provided information on the Luhya indigenous beliefs and practices on inheritance, and on the Luhya indigenous religion. The Kadhi's offices in Kakamega, Bungoma, Eldoret and Kisumu provided a great insight into this study.

Data Analysis

Some data gathered was transcribed and translated into English in cases where Kiswahili and Luhya languages were used. Data obtained from oral interview was compared and contrasted. The data was then categorized,

⁶ These are Friday sermons delivered during the Friday congregation prayers

synthesized and projected into themes based on the objectives. The data was then interpreted within the articulation of the concepts of change and continuity and the islamization theory. Through description, comparison and interpretation as methods of analytical discussion, conclusions from the data were made in respective stages

RESULTS AND DISCUSSION

Inheritance has been tackled as part of the larger problem of property rights regimes that are discriminatory against women. International and domestic campaigns to redress women's unequal property rights in Sub-Saharan African countries have advocated changes to inheritance systems within a broader reform agenda (UN Habitat, 2006; Jütting and Morrisson, 2005; Mutangadura, 2004; FAO and Oxfam, 2003; Human Rights Watch, 2003; USAID, 2003; Benschop, 2002). This larger reform agenda characterises inheritance as a human rights issue as well as an economic concern, and has primarily focused on the content of so-called family laws as well as land rights. Interest in inheritance policy has been provoked by reform to land policy and administration (IIED, 2006; Cotula, Toulmin and Hesse, 2004; Deininger, 2003). As a mode of property transfer, inheritance is highly dependent on social conventions and norms. It conjures some of the most sensitive political economy questions in many societies, including the status of women, land ownership and control, and the social legitimacy and capacity of statutory and customary systems of governance. This aggregate of divisive issues, as well as the long histories that have infused them, makes inheritance an extremely complicated and contentious issue in many contexts. The high degree of sensitivity around inheritance as a public policy issue was conspicuous in Kenya's 2005 National Referendum Campaign concerning a proposed new Constitution. In addition to many other revisions to the then existing Constitution, the 2005 draft proposed the removal of a clause which states that customary law (rather than statutory law) applies to cases of adoption, marriage, divorce, burial, devolution of property on death and other matters of personal law. During the National Referendum Campaigns, public opposition to the removal of this clause was stirred in some constituencies due to the perceived threat that this would allow daughters to inherit land. Some politicians and unelected local leaders who sought to defeat the proposed Constitution campaigned intensely against this specific issue¹ arguing that allowing women to inherit land would open the way for women to transfer land from their families, clans and tribes to the families, clans and tribes of their husbands, leading to the alienation of people from ancestral land. The fear of alienation from land is prevalent and sensitive for many Kenyans, holding as it does both economic and cultural salience. In the end the 2005 draft Constitution was defeated by a National Referendum.

In Sub-Saharan African societies, inheritance distributions are not commonly done in a formally legalistic way, but rather through immediate and intimate interactions among family members. The personal nature of such distributive practices can easily introduce controversy, in that claims to property rights arise from many different justifications. For example, when a man dies his siblings may claim his remaining property in the name of their corporate lineage rights, while the deceased's wife or wives may claim this same property due to their martial rights and/or their contribution to the accumulation of this property, and the deceased's children may assert their own claims due to lineal inheritance expectations. Various reports have documented inheritance disputes between sons and mothers, sisters and brothers, co-wives, widows and brothers-in-law, grandchildren and grandparents (Izumi, 2006a and 2006b; Rose, 2006; HRW, 2003; Drimie 2003). Such intimate disputes are most often first addressed through interpersonal negotiations, possibly involving the mediation of heads of families or clans or local customary leaders. This can mean that those least able to satisfy the demands (social, cultural, political or economic) of the terms of negotiations do not have their claims sanctioned. Data collected through this study and other published research reflects that such demands can include payment of bribes to local mediators (Henrysson and Joireman, 2009; Rugadya et al, 2008), satisfying conditions of cultural authenticity such as having been a 'good' wife and kin and community member (Henrysson and Joireman, 2009; Okuru, 2007; Fenschop, 2002) and convincing others of one's innocence in the cause of death (e.g. in some cases widows and orphans have been accused of causing deaths through witchcraft (Henrysson and Joireman, 2009; Okuru, 2007; Thomas, 2007; Lwanda, 2003). The significance of interpersonal relationships and subjective perspectives in negotiating and determining inheritance outcomes highlights how inheritance may also be understood in terms of the moral economy of rights.

There is much debate over whether customary systems of governance provide adequate protection of property rights of women and children. While it is quite widely acknowledged that local customary law adjudication is often male-dominated in contemporary Kenyan contexts, for example, some women have been found to prefer seeking adjudication of their inheritance claims to this local leaders who draw from customary, un-codified systems of law because these are more flexible and may take extra-legal, personal matters into consideration (Kameri-Mbote, 2002). Nevertheless, it seems that consideration of extra-legal personal matters can cut either way for Kenyan women, depending on their particular local circumstances. A study about land rights in western Kenya (Henrysson & Joireman 2009) reveals that women perceive that individual women's specific qualities are significant to their vulnerability to land expropriation. A different community study in western Kenya (Aliber et al 2004) did not find any evidence of land being 'grabbed' from orphaned children by their adult relatives, but found young widows more

vulnerable in terms of land tenure security than older widows which the authors theorize is likely because young widows had less time to secure their relationships among their husband's family. Findings like these point to the need to closely examine local contexts of customary governance and community dynamics, including specific local leaders, to understand the kinds of opportunities and challenges individuals face in securing their inheritance. This should not be the case in a Muslim family. While section 87 of the Native Courts Regulations 1987 gave official recognition to the application of Islamic Laws as per the Qur'an, the 1907 Natives Courts Ordinance established Islamic courts which applied Islamic Law in matters of personal law and succession. In 1920, the Mohammedan Marriage, Divorce and Succession Ordinance was passed to indicate the classes of people to be governed by the Islamic Laws of Marriage and Succession and the particular Islamic Law applicable. At section 4, it applied the Islamic Law of Succession to any person who contracted a Mohammedan marriage or being a male, contracted such a marriage. It was held that in the case of an African converting to Islam, section 4 applied to the exclusion of the customary law. During the colonial era, the content of Muslim marriage and succession Law was not interfered with through legislation. The legislation passed was meant to indicate the fact that Muslim marriage and succession laws were recognized. In Islam, inheritance shares are fixed by the Qur'an and a Muslim is not allowed to bequeath by will more than two thirds of all the property he is worth. Testate succession is not meant for the heirs of the deceased but for outsiders.

Inheritance In The Qur'an

When a Muslim dies four duties that must be performed include: payment of funeral expenses, payment of his/ her debts, execution his/ her will, distribution of remaining estate amongst the heirs according to Sharia (Klein 1971, al-Misri 1991). After the preliminary issues have been accomplished, the relatives of the deceased entitled to inherit and the quantum share entitlement of each of the heirs concerned is determined. In doing this, Muslims must adhere to all the commandments of Allah as stipulated in the Holy Qur'an (Qur'an 33: 36, Q 4:13-14). The principles of inheritance law are laid down in broad outline in the Holy Qur'an (Q. 2:180 - 240; 4:7 - 12; 19, 33, 176). The divine justness and equitability of the Islamic laws of inheritance have been appreciated by many non-Muslim scholars such as Professor Almaric Rumsey (1825-1899) of King's College, London, the author of many works on the subject of the Muslim law of inheritance and a barrister-at-law, who stated that the Muslim law of inheritance, "comprises beyond question the most refined and elaborate system of rules for the devolution of property that is known to the civilized world." (Rumsey, 1880 Preface iii). By specifying clear cut entitlement and specific shares of female relatives, Islam not only elevates the position of women but simultaneously safeguarded their social and economic interests, honour and

equitable distribution of property as well as ownership of property (Mohammed 1967, Hammudah 1985, Hameed 1981). The Qur'an contains three verses (4:11, 4:12 and 4:176) which give specific details of inheritance shares. For the male (Q 4:11), for women (Q 4:12) and for those who leave neither descendants nor ascendants (Q 4:176).

The historical development and application of Islamic laws of inheritance in Kenya, there was no specific mention of the Muslims in the 1897 Order in Council and it was assumed that reference to 'natives' also included the Muslims. The problem was that many Muslims were Arabs who did not consider themselves as 'natives'. The position was clarified in the 1897 Native Courts Regulations Ordinance. Article 57 of this ordinance provided that the law of succession for Muslims was the law contained in the Quran. These regulations were re-enacted in the 1907 Native Courts Ordinance, which established the *liwali* courts. These had jurisdiction to hear and determine matters arising out of Islamic law, including succession. This remained the position until independence when the government reaffirmed the position to the Muslims as part of a constitutional bargain to counter their threat to break away or secede from the rest of Kenya. The government assured them that under the new constitutional order, they would be allowed to keep their own personal law. This guarantee was given constitutional backing by section 66 of the Constitution, which provided for the establishment of the Kadhi's courts. These courts were mandated to decide matters arising out of Islamic law where such matters related to personal law.

That remained the position until 1981 when the Law of Succession Act became operational. This Act repealed all the then existing laws on succession and became applicable to all persons domiciled in Kenya regardless of their religion. Section 99 of the Act repealed, among other laws, the Mohammedan Marriage, Divorce and Succession Act (Cap.156) section 4 that dealt with succession. Note: Not the whole Act was repealed, only sec. 4 which dealt with succession. Between 1981 and 1990, there was intense agitation by the Muslims who regarded the government's act of passing the Law of Succession Act as a repudiation of the assurance given at independence. Their case was that the Qur'an or a statute embodying the provisions of the Qur'an must govern matters of personal law for Muslims. They sought to be exempted from the law of succession which conflicted with the Qur'anic principles for example; Section 5 of the Law of succession on Freedom of Attestation, that is, discretion of Testator to dispose off property as one wishes to persons he wishes. No obligation to provide for dependants but under Islam, only $\frac{1}{3}$ of the Muslim's estate can be disposed off by will. $\frac{2}{3}$ should be dealt with according to Qur'anic principles (al-Misri 462). Shares are fixed for particular heirs. (Q. 4:11-12, 4:176, al-Misri 470-471). Section 3(2), which defined children, and Section 29, which defined dependents were contentious. Section 3(2) defined a child to include adopted and illegitimate children. Section 29 included adopted and

illegitimate children, also step children but under Islam, stepchildren have no right of inheritance from their deceased father. They can only inherit through their mothers. Illegitimate children cannot inherit through their biological fathers (al-Misri 477-505). The government gave in to the pressure mounted by the Muslims in 1990 when government keen to have the Muslim support in view of the clamour for multi-partyism and the Law of Succession Act was amended by Statute Law (Misc. Amendment) Act No. 2 of 1990, which dis-applied the Act to persons who, at the time of their death were Muslims. Instead, Islamic law as contained in the Qur'an would govern such persons and it introduced Section 2(3) and (4) & Section 48(2). Section 2(3) dis-applied the substantive provisions of the Act to the estate of a deceased Muslim (both testate and intestate). The estate of a deceased Muslim is exclusively subject to Muslim law. Section 2(4) applied the procedural aspects of the Act, that is, the provisions relating to the administration of the estate of a deceased Muslim as long as the provisions are not inconsistent with Islamic law (Q.4: 11-12, 4:176, al-Misri 1991). Section 48(2) confers the Kadhi's Court with jurisdiction to determine questions relating to succession in accordance with Islamic law.

The Kadhi's court for Kakamega and Vihiga Counties is in Kakamega town at the Kakamega law courts. Muslims in Kakamega county under-use this court. Most cases in this court are marital. Muslims have not fully attached their lives as Muslims to this court in terms of mitigations for other misunderstandings among Muslims that require Qur'anic interpretation. The Imam's offices are also under-utilized as they, together with the Kadhi's courts, are only associated with marriage and divorce. The Islamic idea of inheritance is consistent with the Islamic concept that wealth is not our own but is Allah's property, which we hold in trust (Qur'an 57:7). It is only just therefore that Muslims should leave the property they have after death. Thus, the laws of inheritance reflect the structure of family ties because rights of inheritance are generally regarded as the consideration for distress of protection and support owed to the deceased during his lifetime. The Law of Inheritance seem to be a fundamental aspect of the individual's duty to Islam in that they provide for the continuity of the family group as a basic unit of the universal Islamic community. Thus, in the provisions of the law of inheritance we find ample attention paid to the interests of all those whom nature places in the first rank of affection; and indeed it is difficult to conceive any system containing rules more strictly just and equitable. A limit is, therefore, set to the quantum of his estate that a man can bequeath. The basic for the imposition of this limitation lies in the fact that the inheritance by the legal heir is a matter of right, not of need. In the same view, it is believed in Islam that the wealth a child inherits from his or her parents to make him/her independent of others brings greater reward to the child.

The study established that the Islamic inheritance rules and the indigenous inheritance rules conflict. The study revealed that Luhya Muslims still practice the

indigenous patriarchal inheritance rules. In the event of death, especially of the father, they normally choose the elder son or in cases where there is no son the brother to the deceased, to be in charge of the deceased's property till an appointed time when it is shared out. If some or all children are still young, the chosen custodian will be in-charge of the property till all children are mature enough before the property is shared out. During the distribution, women whether daughters or widow(s) are not given any property.⁷ In selected cases especially for those who are widowed, divorced or unstable in their marriages, some property may be given to make them financially stable but the property given is not based on their stipulated shares in the Qur'an. In cases where the late had a piece of land, a portion of it is sold and the money raised is shared out among the female children. It is worth noting that though these women know their right to inheritance based on the Qur'an, they rarely complain when denied their rightful share. This is due to the fact that they have been socialized to believe and accept that they do not need to own or inherit any property from parents. A few enlightened widows go to the Kadhi's court to demand their share of inheritance. Under such instances, the Kadhi guides the distribution of the property to ensure the widow gets her share but only if it is verified that she and the deceased legally married in accordance with the Shariah⁸.

The late Mzee Ali Ibrahim passed on in 1992 in Mumias at the age of 52. He left behind 2 widows, 7 sons and 6 daughters. The younger wife left Islam, joined Christianity and filed an inheritance suit in court of law. This was contested by the rest of the family who insisted on following the *Shariah*, hence the Kadhi should preside over the inheritance procedure in which case she would lose out. Family consultations were conducted and finally they agreed to let the Kadhi preside over the inheritance. According to Sheikh Idris Luvale Muhammad, the Deputy Imam of Kakamega Jamia Mosque, Chairman of Council of Imams and Preachers of Kenya (CIPK) and a son-in-law to the late Mzee Ali, it was resolved that out of humanitarian grounds, the wife who joined Christianity would be given part of the inheritance but the rest of the family share the inheritance in accordance with the *Shariah*. According to the *Shariah*, there are no provisions for humanitarian considerations. However, this has to be done anyway. Such are the challenges faced by Luhya indigenous Muslims in Kakamega County. There are, in most cases, conflicts between Islam and indigenous beliefs and practices of the Luhya people which cannot be wished away⁹.

⁷ Interview with Mwynyi Hatibu Suleiman, Ramadhan Akatu, Latifa Suleiman, Mwanamis Akida and Zulea Minayo March 28th, 2015

⁸ Kadhi Kakamega/Vihiga-13th April, 2015). Focus group discussion with widows and orphaned daughters at Kakamega Jamia Mosque-9th May, 2015), Imams of Namulungu, Mmakunda, Mwira, Mwamba, Shitinji, and Mwiye, 08th 15th 22nd and 29th May 2015.

⁹ Interview with Sheikh Idris Luvale Mohammad- 11th May, 2015.

Sheikh Ali Musa Onzere passed on in 1985 in Ivona Village, Mukuyu Sub-Location, Mautuma Location, Lugari Division in Lugari Sub-County. He was survived by 2 widow, 10 sons and 3 daughters. He was 78. Before he died, he equally shared his 15 acre piece of land among his 10 sons. If he died before his wife, he had willed that the wife would stay on the last born son's piece. When he finally died, the family, led by the first born son, went to the lands office in Kakamega and legitimized ownership of their respective pieces of land in accordance with their father's wish. They did not seek Kadhi's advice and they did not follow the *Shariah* despite the fact that the entire family confesses Islam. The daughters did not inherit anything and according to them, they see nothing wrong as they are happily married. They never raised any complain but agreed with the way their father had shared out his property. During the focus group discussions to which they were part, they claimed they did not see the need to mitigate the same with the Kadhi's court. Asked if this was out of ignorance of the *Shariah*, they confirmed in affirmative but did not mind things remaining the way they are as everyone was peaceful. The sons equally did not see anything wrong as long as everyone was comfortable. Inheritance matters can sometimes be very emotive especially where land ownership is involved. If a family shares out their parents' land peacefully, it is considered a very successful family. Such is Mzee Ali's family..they are peaceful and happily taking care of their mother who resides on the last born's share in accordance with the Luhya traditions and as willed by their late father. Clearly this is not in accordance with the *Shariah* but they don't mind. Such may not be the case if the wife dies first as the husband still remains in control of his property¹⁰.

In some cases, lack of property causes confusion in families and it takes so long for inheritance to be executed. Some families are so poor that what is left behind by their parents is sometimes too little to share. According to Ustadh Abdallah Nganyi of Nyakwaka Village, Lureko Sub-Location, Wanga Central Location in Mumias Sub-County, his father died in 1997 at the age of 71. He was survived by one widow, 3 sons and 4 daughters. He had 1^{1/2} acres piece of land. One of the daughters joined Christianity. The 3 sons, their mother and the 4 daughters are willing to share their late father's property using the Kadhi's court, thus following the *Shariah*. They have all agreed to leave out their sister who joined Christianity unless she reverts back to Islam. The problem is how to share the 1^{1/2} acres piece of land. The best option would be to sell it and share the money. However, they cannot cause to evict their mother who is aged. Such challenges, among others hinder immediate execution of inheritance in some families though they may be willing to follow the *Shariah*¹¹.

¹⁰ Interview with Onzere Juma, a son to the late- 4th March, 2015), focus group discussion held at Kakamega Jamia Mosque 9th May, 2015.

¹¹ Interview with Ustadh Abdallah Nganyi- 25th April, 2015

According to Maalim Ali Mohammad Ali and Sheikh Ibrahim Sadallah, some Luhya Muslims do not give women inheritance due to lack of Islamic knowledge on the same. In the researcher's view, the issue of Luhya Muslim women property ownership and inheritance rights should be addressed by the larger Muslim community¹². It is in the above context that (Mazrui, 1986) argues that though the introduction of foreign religions strongly threatened the very foundation and validity of African religions, the latter neither yielded fundamentally nor resisted indiscriminately and so managed to survive. Mazrui further states that Africans are "a people of the day before yesterday and the day after tomorrow." He notes that Africa's triple heritage of indigenous culture, Islam and western culture is sometimes a source of cultural enrichment, and at other times a cause of social and political tensions. Within the context of this triple heritage, Christianity and Islam have sometimes been in conflict, sometimes been in gracious competition, and have increasingly sought areas of ecumenical cooperation.

From the foregoing discussion, we can argue that when the Islamic faith encountered the Luhya indigenous religion, there was bound to be a conflict of interests. When two cultures come into contact, there is usually the issue of adaptation or rejection. People from diverse cultural and religious traditions may learn new interests, values and norms from one another. Cultural interaction may also lead to the undermining of religious beliefs and values. In this case, we can argue that acculturation which is the communication between cultures on the same footing of mutual respect and tolerance is a necessary condition for Islam which is a universal religion. This will make it more accommodating to the Luhya Muslim converts.

Contextualising Islamic laws of inheritance

While modern reforms and changes have influenced several fields of Islamic law, the detailed classical inheritance structure has been one of the enduring legacies of classical Islamic law or the *Shari'ah* (Q. 2:180-240, 4:7-12, 19, 33, and 176). The formal inheritance rules have several distinctive features. There are predetermined percentage shares for pre-selected beneficiaries (Q.4:11, 4:12 and 4:176) while at the same time allowing some flexibility through bequests and legitimate estate planning. A Muslim's ability to bequeath is restricted to only one-third of an individual's estate under certain rules with the remaining two-thirds devolving according to the compulsory inheritance rules. Third, the scheme of mandatory fixed shares is remarkably inclusive and provides access to property to a range of family members. Finally, the inheritance rights cannot be generally taken away. Rather than a set of abstract rules, Islamic inheritance rules are intended to

¹² Interview, 15th May, 2015

facilitate distinctive Islamic conceptions of property, family, community, empowerment and justice (al-Misri.1991)

The Islamic law of succession makes no distinction between different kinds of property. It is immaterial whether property is real (land) or personal, movable or immovable - it covers all assets. Given the wide range of beneficiaries that the Islamic inheritance system seeks to cater to through a sophisticated balancing process, the results can turn out to be hairsplitting permutations and combinations varying according to a given scenario. There are some differences in *Sunni* and *Shi'a* positions. There exist some easily perceived potential benefits to a scheme of specified shares, as compared with systems of inheritance which provide greater apparent legal freedom to the individual seeking to control devolution of his/her property upon death. The fixed inheritance share rules – which apply to big or small estates, residential or commercial property, liquid assets or investments can lead to minute divisions, making fragmentation of property a problem, particularly, although not exclusively, in relation to agricultural land. A variety of legal tools have developed in different contexts to permit individuals to make arrangements for the transmission of property, according to their own determination. Gifts can be made to take effect upon death, by means of a will, but only up to one-third of an individual's estate can be bequeathed in this manner with the remaining two-thirds devolving according to the compulsory rules.

Female relatives and spouses are accorded shares, but half that of a male in a similar position and male relatives are more likely to inherit and to enjoy a greater share of the estate. This difference in treatment between men and women is usually explained by reference to the fact that it is also a feature of Islamic law that a wife is entitled to maintenance from her husband, in terms of shelter, clothing, food and medical care. Despite the argument that women are compensated for their unequal inheritance shares through such material obligations on the part of husbands to their wives (and other tools such as dower and gift), the apparent formal paper inequality remains a matter of vigorous debate and gives rise to calls for legal reform. Since a child is deemed to be in existence from the point of conception, a child in the womb is competent to inherit within Islamic law. However, an illegitimate child whose paternity was contested may not inherit from the wife's husband, although that child may inherit from its mother and its mother's family.

Adoption is not recognised under Islamic law (*Shari'ah*), so inheritance through legal adoption into a family is not feasible. A bequest in favour of an adopted child may not exceed one-third of an estate, under the rules. An orphaned grandchild is unlikely to inherit from a grandparent under Islamic inheritance principles. There are a variety of legal techniques that a person contemplating death may deploy as a form of 'estate planning', in order to avoid the strictures of the compulsory inheritance rules. These include the lifetime transfer

or gift (*hiba*) and the establishment of a family endowment (*waqf ahli*). The tools deployed for estate planning are subject to debate but the modernisation of Islamic societies has resulted in a propensity towards several kinds of estate planning. Another legal strategy for an individual seeking to control the devolution of his or her property is to establish a family endowment (*waqf ahli*). A major source of women's historic wealth appears to have arisen from beneficial interests in endowment (*waqf*) properties, but these endowments have now either been abolished or subjected to severe limitations in most countries. There is evidence in some Muslim communities that individuals keep their property outside the formal land registration system, because of the costs involved and to avoid giving women their allotted shares under the Islamic inheritance rules.

CONCLUSION

This study examined the application of Islamic laws of inheritance with particular reference to Luhya indigenous Muslims and specific reference to women in Kakamega County. Our research findings demonstrated that the Luhya inheritance rules are patriarchal thereby favoring male children over females. Only male children are allowed to inherit. Females are expected to get married elsewhere hence, belong to a different lineage. The male chauvinistic tendencies in the Luhya community have pushed women to a subordinate and inferior position hence the intrinsic value of women is negated. In general, the gender bias against women as exemplified in the Luhya inheritance beliefs and practices is an issue to be addressed. The study also established that Luhya inheritance rules are so entrenched that they have not been fully altered or erased by the Islamization of the people. A lot of inconsistencies are demonstrated by most Luhya Muslims who observe indigenous inheritance rules.¹³ Many respondents consent that Luhya Muslims still practice the indigenous patriarchal inheritance rules though they have adopted other Islamic beliefs and practices. Islam has therefore led to continuity of the Luhya indigenous inheritance practices. The indigenous Luhya religion, just like Islam is a way of life that is flexible and adaptable. It has to be lived and not to be preached. It is pragmatic rather than spiritual and theoretical. It only adopted the foreign aspects which were acceptable to the traditional way of life. Many of the indigenous Luhya Muslims have not relinquished ties with their old beliefs and practices. In moments of distress and tribulation such as sickness as well as important social ceremonies like birth, naming, initiation, marriage and death, they often resort to the old beliefs and practices. They are children of two world views- the old and the new, but more of the former than the latter. Hence, the Luhya indigenous beliefs and practices in relation to inheritance are as ingrained in the

¹³ Interview with Sheikh Idris Luvale Mohammad-11th April, 2015.

people's lives and culture as they freely accommodate their social customs, practices and rituals.

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