THE RESPONSE OF THE MUSLIMS TO
THE LAW OF SUCCESSION IN

By

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A Thesis submitted in partial
fulfilment for the degree of
Master of Arts of Kenyatta
University.

JULY, 1993.
DECLARATION

This thesis is my original work and has not been presented for a degree in any other university.

KURIA MWANGI

This thesis has been submitted for examination with my approval as (University) supervisor.

PROF. ZABLON NTHAMBURI
DEDICATION

To my parents, Wairimu and Mwangi.
This study is a result of concerted effort by several people. Foremost were Prof. Zablon Nthamburi and Prof. Muhammad Bakari who supervised my work and provided me with a lot of valuable ideas and materials among others. Their assistance is invaluable. A lot of gratitude also goes to all respondents who assisted me in various ways.

I would like also to register my gratitude to Mr. Chege Waruingi for editing the manuscript. Mr. Ngeta Kabiri and Mr. Samita Wanakacha for giving very valuable comments in relation to the study. Last but not the least, I would like to thank Mr. Wainaina Karanja and Josephine Njoroge for typing the thesis.

To all these and others not mentioned here, I register my deep appreciation for their immeasurable assistance in various ways.
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ABSTRACT.

This study investigates the response of the Muslims to the Law of Succession Act. The study seeks to analyse the factors which informed Muslims in their response to the Law of Succession Act. The study reveals that legal, social, political and religious factors informed Muslims in their response to the Law of Succession Act. It is stressed that the beliefs and practices of the Muslims were of central importance in informing them in their response to the Law of Succession Act. The study also shows that Muslims are opposed to laws which contradict the tenets of Islam. In this regard the Law of Succession Act is opposed by the Muslims because it contradicts the principles and teachings of Islam which are enshrined and enjoined by the Holy Quran and the Hadith. This study observes that it was imprudent for the Government of Kenya to have subjected the Act on the Muslims.

In order to achieve its' objectives, the study involved Library, archival and field researches. In the latter research, interview and questionnaire methods of data collection were employed. Muslims and non-Muslims respondents were interviewed. Finally the descriptive
method of data analysis was used in the research.

It is further shown in Chapter three that Reforms in the Sharia can be undertaken but they must conform to the tenets of Islam. The study also reveals that Muslims are not opposed to non-Islamic laws provided that they do not go against the tenets of Islam.

The study found out that there were varied attitudes of the British and French colonialists in Africa towards the Sharia. This varied attitude affected and determined the extent of the application and development of the Sharia in Africa. It is further shown in the research that the application and development of the Sharia during the colonial period in Kenya and Zanzibar had a lot of bearing on its application and development in the post-colonial era in Kenya.

The study concludes in Chapter six that any legislation introduced by the Government of Kenya should respect the religious beliefs and customs of the people it is supposed to serve. It is further observed that Laws of personal status nature should be acceptable to the people they are suppose to serve in order for them(Laws) to be effective and
(xii)
capable of enforcement. Finally, the study concludes that every community and individual should have the freedom to order their religious life freely without interference from the Government through such ways as introduction of unpopular laws.
DEFINITION OF TERMS

Bequest - Legacy - Refers to the property or goods awarded to an individual (legatee) through a will (testament) made by a testator.

Estate - Movable and immovable property left by a deceased.

Inheritance - Succession - Refers to the taking over of the property through the prescribed right after the death of the proprietor.

Law of Succession Act - Refers to the controversial law of succession, Chapter 160 of the Laws of Kenya. It was enacted in 1981. It is also referred to as the "Uniform" or "universal" law of succession. Muslims were exempted from this law (Cap. 160 of the Laws of Kenya) in December 1990. This law succeeded other laws of succession which were
applicable to different communities in Kenya before the 1st July of 1981 when it was enacted.

Legacy - (see Bequest above)

Muhammedan Marriage,
Divorce and Succession

Act - Refers to Cap.156 of the Laws of Kenya. This is the law of succession applicable to the Muslims in Kenya (see Law of Succession Act above).

Nairobi Times - Refers to a former daily newspaper which is no longer in circulation in Kenya.

Sharia - Muslim law - Islamic law.

Testament - (see Will below).

The Prophet - Refers to Prophet Muhammed (PBUH)

Will - Testament - A testament or declaration made either
orally or in writing and in the presence of witnesses indicating how the maker (testator) would like his or her estate to devolve. The will may indicate the types of property or the percentage of the estate to be awarded to each legatee(s) (see also Bequest above).
LIST OF ABBREVIATED TERMS

CAP - Refers to a chapter of the laws of Kenya.

IBEA Company - The Imperial British East African Company.

KANU - The Kenya African National Union.

KNA - The Kenya National Archives.

LSK - The Law Society of Kenya.


NUKEM - The National Union of Kenyan Muslims.

PBUH - Peace Be Upon His Heart.

SUPKEM - The Supreme Council of Kenya Muslims.
CHAPTER ONE

INTRODUCTION.

1:1:0 Focus Of The Study.

1:1:1 Background To The Study.

The Islamic Law of Succession is of central importance in the Muslim religious life and forms an integral part of the Sharia. Muslims believe that the Sharia is divinely ordained and it constitutes the will of God. According to the Muslims the Sharia sets forth and regulates a person’s relation with God as well as his or her relations with fellow people. The Sharia also provides people’s obligations to God (Jannati 1985; Hitti 1970; Gibb 1962).

Muslims are bound to oppose non-Islamic laws which are in conflict with the Sharia. Muslims however can be subject to non-Islamic laws as long as they are not in conflict with the Sharia (Browne 1944; Coulson 1964; Rahman 1979).

The application of the Sharia in Kenya was facilitated by a number of ordinances provided by the Colonial
Government. There were several ordinances recognizing the application of the Sharia especially in matters related to marriage, divorce and inheritance which were in existence during the colonial period. The Colonial Government in Kenya recognized the office and court of the Kadhi. The Kadhi courts were given jurisdiction over matters related to personal status laws (Anderson 1969; Lobban 1987).

In spite of the above favourable response and attitude of the Colonial Government towards the Sharia, a number of ordinances in existence were also used by the colonialists to interfere with the Islamic law. One such ordinance was the 1902 Order-in-Council which empowered a High Court to overrule a Kadhi's ruling through an appeal. However, Achieng (1984) and Anderson (1969) note that the Colonial Government rarely interfered with the Muslims' matters related to personal laws. Anderson (1969:43) states that the Kadhi court in Kenya was rarely overruled by a Higher Court during the colonial period.

At independence, the Government of Kenya "inherited" most of the colonial laws. One such law which was adopted by the Government of Kenya was "the Muhammedan Marriage, Divorce and Succession Act". This Act is based on the 1920 "Muhammedan Marriage, Divorce and Succession Ordinance". The
"Muhammedan Marriage, Divorce and Succession Act" was applied in Kenya from the colonial period up to 1981 when the controversial Law of Succession Act was enforced after being enacted in the same year. The latter law was a result of the deliberations carried by the 1967 Commission on the Law of Succession. However Muslims in Kenya are again governed by the "Muhammedan Marriage, Divorce and Succession Act" as a result of being exempted from the Law of Succession Act in 1990 (Achieng 1984; Kenya 1980; Kuria 1982; Orengo 1974).

The Government of Kenya has undertaken many legal reforms since the year 1963. Some of these reforms have received opposition and criticism from vested interests in groups or individuals. One such reform which elicited unprecedented controversies and oppositions was on the Law of Succession Act. The controversy and conflict over the Law of Succession Act can be traced back to the 17th of March 1967, when the late President Kenyatta appointed the Commission on the Law of Succession. It's report was presented to the Government of Kenya in August 1968 and the bill passed by the National Assembly in 1972. The Law of Succession Act was enacted on July 1st 1981. Conflicts and controversies over the Law of Succession Act were witnessed between 1967 and 1990. The year 1990 marked the period when
Muslims were finally exempted from the controversial Law of Succession Act (Contran 1969; Kenya 1980; Kuria 1981). The exemption of the Muslims from the Law of Succession Act was as a result of their successful opposition to the Act.

1:1:2 Statement Of The Problem.

The effect of the Law of Succession Act went beyond the trans-ethnic and ideological spheres. Muslims in Kenya distinguished themselves by being in the forefront in resisting both the enactment and enforcement of the Law of Succession Act since the year 1967. The Law of Succession Act threatened the very existence of the Islamic religious beliefs and practices. It also infringed on the Muslims constitutional right to the freedom of worship among other problems (Bakari 1989; Kuria 1982; Matano 1982; Orengo 1974).

Existing works on the controversial Law of Succession Act are on its legal interpretations and implications to the Muslims. There is a need to study what Muslims have said and done and finally why and how they reacted towards the controversial law of succession Act. Such a study would fill the Lacuna existing with respect to the aspect of the response of the Muslims to the Law of succession in Kenya.
The overriding task of this study was to examine the factors which informed Muslims in Kenya in their response to the controversial Law of succession Act. This called for an investigation and analysis of the underlying factors behind the response of the Muslims, how Muslims reacted to the Law of succession and finally how the controversial of Law succession may have affected the Muslims in their beliefs and practices.

1:1:3 Objectives Of The Study.

1. To critically examine the Kenya's colonial and post-colonial Laws of Succession vis-a-vis the Islamic teachings with regard to succession.

2. To examine Muslims' response to the reforms in the Sharia.

3. To identify and analyse the experience of the Muslims under varied colonial and post-colonial legal systems in Kenya in relation to succession.
4. To examine the attitude of the Muslims towards the Law of Succession Act.

1:1:4 Research Premises.

1. That the Law of Succession Act is at variance with the Islamic Law of Succession as contained in the Sharia.

2. That the Sharia can only be reformed within the context of Islam.

3. That the experience of the Muslims under the colonial legal system in Kenya was better than in the post colonial system with regard to succession.

4. That Muslims have been uncompromising to the Law of Succession Act due to its infringement on their faith and practices.

1:1:5 Rationale Of The Study.

This study was mostly a result of immense interest in the Islamic law in general and the Muslim Law of Succession in particular. The issue of succession is of central importance to the Kenyans going by the hotly contested
debate about succession since the year 1967. The dearth of information on the issue of Muslims' response to the Law of Succession calls for a need to fill the lacuna. There is a need to address ourselves to the factors which inform Muslims in their response to the Law of Succession in Kenya.

The study will further contribute to the documentation of the social structure aspect related to the family law especially on succession.

The study will also enhance an understanding of the Muslim's response to non-Islamic laws. Such an aspect will be of central importance to policy makers especially in relation to the issue of law reform in Kenya.

1:1:6 Scope And Limitation Of The Study.

The study covers both the colonial and post-colonial periods in Kenya. The study begins in 1920 to 1990. The Year 1920 marks the period when Kenya became a colony of Great Britain. However the coast of Kenya (the ten mile strip) remained under the control of the protectorate of Zanzibar until independence in 1963. The application of the Sharia along the coast of Kenya was more extensive than in the
Background information dating before 1920 is provided. For the case of our present study, emphasis is given to the period from the year 1967 to 1990. The late President Jomo Kenyatta appointed the Commission on the Law of Succession in 1967. The year 1990 is significant in our study because that is the period when President Daniel arap Moi requested the National Assembly to make necessary amendments to the Law of Succession in order for it to reflect the wishes of the Muslims. On December 13th 1990 the National Assembly made amendments to the Law of Succession Act which exempted Muslims from the application of the Law of succession Act. The latter aspects brought the debate and conflicts over the Law of Succession Act to a close in relation to the Muslims.

The scope of this study was mostly limited by the constraints of time and financial resources. The present study could not adequately cover the colonial period to the present within the given time and financial limits. We could not interview all the Muslims who played important roles in opposing the Law of Succession Act. The Law of Succession Act affected Muslims all over the Republic of Kenya. Due to the aforementioned constraints, we could not cover all the Muslim individuals, groups and areas. The Shia group of the Muslims, for instance, is left out of our study due to
financial and time constraints.

The researchers also experienced problems such as respondents refusal to be interviewed. However they tried to solve this problem by establishing rapport between them and the respondents or through the use of Muslim field assistants in order to reduce the "mistrust". Some of the respondents withheld information on areas they considered sensitive and personal especially in such issues as the reasons for the exemption of the Muslims from the Law of Succession Act. In other cases some of the Muslims sought anonymity. Several respondents did not return the questionnaires administered to them. Nevertheless the researcher managed to gather adequate information which has formed the basis for this research.

Research Methodology And Information Resources.

Various methods and information resources were used with an aim of collecting data for the study. These included library research, field research and archival research.

Library Research.

The bulk of the data used in the study was provided by
material from various libraries. Primary and secondary sources of information from the libraries have been used in the study. Under library research are data gathered from local daily newspapers and magazines.

1:2:2 Archival Research.

The archival data used in this study was derived from various sources gathered at the Kenya National Archives (KNA) in Nairobi. The documents which provided data in the archives includes provincial and district annual reports and legislative council debates on succession.

1:2:3 Field Research.

Interviews and questionnaire methods were used to collect data in the field research. Interviews were conducted on an individual basis. Muslim and non-Muslim respondents interviewed were mostly those perceived to be conversant with the aspect of succession. Those respondents who participated in the debate over the Law of Succession Act were sought and interviewed. Individuals conversant with the aspect of succession such as lawyers and kadhis were interviewed. However fifty respondents drawn from various categories of income groups were randomly selected and
interviewed in relation to the aspect of the response of the Muslims to the Law of succession. The aim was to get views of a cross section of society. Information adduced from interviews was recorded in note form.

The questionnaire method was used to complement the interview method. Two types of questionnaires were administered to the Muslims and non-Muslims. The questionnaires administered were composed of open-ended questions.

1:2:4 Data Analysis.

The descriptive and qualitative methods of data analysis were employed in this study. Data collected from the field, archives and libraries were classified then synthesized and interpreted in accordance to the subject content and their locations in various chapters in the study.

1:3:0 CONCEPTUAL FRAMEWORK.

The conceptual framework informing this study is based on the Sunni Muslims' perception of the Sharia. The interpretation of the Sharia in this study is based on the
The word Sharia means a path. Muslim jurists developed the term Sharia to acquire the meaning of "a path leading believers to God". The word Sharia acquired the meaning of the duties prescribed by God for the Muslims in order to lead them to Him (Quran 45:18; Badamasy 1989; Okunola 1989).

Muslims hold that the Sharia is a complete and final code of law which was revealed by God through prophet Muhammad(PBUH). This belief is based on the idea that the Holy Quran is the final revelation and that it contains the most perfect solutions to all questions of being and conduct (Anderson 1969:47; Ishaque 1979:170; Trimingham 1968).

The Sharia is fully binding to all Muslims. Muslims are strictly warned by God that any violation or negligence of the Sharia is an act of religious disobedience which calls for a religious penalty as a consequence (Sura 6:34; Naomami 1964; Trimingham 1968).

The Sharia can only be reformed within the context of Islam. Some of the methods used in the Islamic law reform include the borrowing or combining of opinions from
different schools of law in Islam. A particular school of law can borrow an opinion(s) from any other Sunni or Shia school with an aim of reforming a particular aspect(s) of the Islamic law (Anderson 1976; Lobban 1987).

The structure of the Islamic law is built on four foundations known as the "roots of law" or the sources of law. The primary sources of the Sharia are the Holy Quran and the Sunna. The other two are secondary sources of law known as *ijma* and *qiyas*.

The Holy Quran is the most authoritative source of law. The three other sources of law stem from the Holy Quran. The Holy Quran is believed by the Muslims to be the most consummate and final revelation of God to mankind. (Rahman 1979; 68-69).

The Sunna is based on the actions and utterances of the Holy Prophet, Muhammad (PBUH). Muslims consider Prophet Muhammad (PBUH) as the most authoritative exponent of the Holy Quran. The Sharia was revealed through the Holy Prophet. It is therefore imperative that his utterances and deeds were divinely inspired (Muslehuddin 1962; Rahman 1979).
The qiyas and ijma sources of law are only applied when there arises some points of law not covered by a clear statement(s) in the Holy Quran or the Sunna of the prophet (Ali 1950).

Ijma refers to a "consensus of the Muslim community". In case of difference(s) in opinion among the Ulama, the opinion of the majority of the learned members of the community is made the basis of the decision. The agreement made by the Ulama is known as ijma. The basis of the application of the ijma as a source of law is the prophetic saying "my followers will not agree upon error" (Ali 1950; Muslehuddin 1962:146).

Ijma is also used to decide whether a certain opinion(s) of a jurist or a decision made by a practising judge is right or wrong. Qiyas cannot attain the status of law unless, it is authenticated by ijma (Muslehuddin 1962).

Qiyas means analogical reasoning. It implies reasoning between parallel cases. Qiyas is normally applied when a new or complicated legal issue(s) which is not clearly covered by the Holy Quran or the Sunna arises. In qiyas, specific verses in the Holy Quran or particular cases in the Sunna are studied and a decision made based on the latter two
sources with regard to the issue in question. Rules in another legal case can be taken and applied to a similar case(s) also (Fyzee 1974; Jannati 1985; Muslehuddin 1962).

However, rules of law which are analogically deduced are of a lower rank in comparison with those of the Quran, the Sunna and the Ijma sources. The main reason for the lower rank given to Qiyas is the belief that personal judgment is liable to error (Muslehuddin 1962).

Muslims also recognize other sources of law as long as they are not in conflict with the Sharia. As a result, Muslims have in several cases accommodated non-Islamic laws and customs in Africa and elsewhere.

Law in Islam is an important part of the Islamic beliefs and practices. The application of the Sharia to the Muslims is not only an essential condition of faith but also obligatory. The Islamic Law of Succession therefore is an integral part of the Islamic faith and practices.

1:4:0 Literature Review

The literature under review is categorized into two broad groups. The first category of literature deals with
the aspect of the experience of the Muslims under varied colonial and post-colonial legal systems. The second category is on the aspect of the response of the Muslims to the Law of Succession in Kenya.

There exists abundant literature on the aspect of the Muslims' experiences under varied colonial and post-colonial systems in several parts of Africa and other parts of the world. However, works on this aspect in the Kenyan context is inadequate. This necessitates a study in regard to the experience of the Muslims under the colonial and post-colonial legal systems in Kenya in order to fill the lacuna.

One of the main issues which have been given considerable attention by scholars is that of the Muslims' response to reforms in the Sharia. Works related to this aspect includes those by Anderson and Coulson (1973), Anderson (1976), Pearl (1979) and Lobban (1987).

These scholars concur that the only reforms in the Sharia which are acceptable to the Muslims are those which are carried within the context of Islam. The technique known as "patching" is applied in the reform of the Sharia. In this technique, opinions from different schools of law in Islam are taken and combined to form a unique view on a
particular legal aspect. Anderson and Coulson (1973) show how the aforementioned technique was applied in Egypt, Tunisia and Morocco. Anderson (1976) gives a detailed account on the response of the Muslims to the Islamic law reforms in Iran, Malaysia, India and Northern Nigeria. Lobban's (1987) study is on the response of the Muslims to the reforms in the Sharia during the colonial and post-colonial periods in Sudan.

Reforms in the Sharia in all the aforementioned countries were accepted by the Muslims because they were carried within the context of Islam. In these areas the "patching" technique was applied. For example, in Egypt and Iran, which are predominantly Sunni and Shia countries respectively, Muslim jurists borrowed and applied opinions from even the Shia and Sunni schools of law respectively. Egyptian jurists also borrowed opinions from various Sunni schools of law (Anderson and Coulson 1973; Anderson 1976; Pearl 1979; Lobban 1987).

In contrast to the Muslims in the aforementioned countries who accepted the reforms in the Sharia, Muslims in Turkey and Somalia were opposed to the reforms in their respective countries. Anderson and Coulson (1973) and Anderson (1976) studied the aspect of the reform in the
Sharia and the response of the Muslims towards the reforms in Turkey. Both scholars concur that the reforms were un-Islamic. Muslims in Turkey resisted the reforms as a result and were supported by Muslims from other countries. Majority of the Muslims in Turkey opposed the reforms mainly because they (reforms) were in conflict with the Sharia. According to Anderson (1976) "the reforms in Turkey implied a total break away from the Islamic tradition".

The reforms of the Sharia in Turkey are comparable to those in Somalia. The Somali Government on its part decided to reform the Islamic Law of Succession. Shares given to both men and women were equalized, contrary to the teachings of the Holy Quran. The reforms in Somalia caused armed resistance from the Muslims leading to the execution of some of the leaders of the groups opposed to the reforms (Lobban 1987).

The aforementioned issue of the reforms in the Sharia will enhance an understanding of how Muslims respond to reforms in the Sharia. Any reform which is in conflict with the Sharia is bound to face opposition from Muslims.
The issue of the attitude of the British towards the Sharia has been studied by Anderson (1969) and (1976), Badamsay (1989), Lobban (1987) and Okunola (1989). These scholars contend that the attitude of the British colonialists towards the Sharia varied considerably from one place to another. These scholars have documented some of the reasons for the varied responses of the British colonialists towards the Sharia in given colonies and protectorates. However, they have not accounted for the varied responses of the colonialists in the same location or colony. The latter aspect was evident in Kenya during the initial stage of colonialism. For instance, the 1887 Order-in-Council stated that the British colonialists recognized the application of the Sharia only along the coastal areas of Kenya. Muslims in the interior of Kenya were therefore initially excluded from the application of the Sharia (Achieng 1984; Anderson 1976; Lobban 1987; Orengo 1974). No date is however given as to the exact time when the British Colonialists recognized the application of the Sharia in the interior of Kenya. There is a need to study the aspect of the experience of the Muslims under the colonial legal system in Kenya.

Northern Nigeria has been given adequate attention by scholars in relation to the experience of the Muslims under the colonial legal system. Studies on this area show that
the fundamental law there was the Sharia (Anderson 1969 and 1976; Lobban 1987; Okunola 1987). The aforementioned scholars concur that the Sharia thrived well in this area. Both public and personal aspects of the Sharia were applied during the colonial period in Northern Nigeria. The studies are of the conclusion that Muslims in Northern Nigeria were satisfied with the way the colonialists treated the Sharia especially in relation to its application among the Muslims.

In Yorubaland, Nigeria, Okunola (1989) shows that some jurisdictional problems arose as a result of the application of the Sharia side by side with the customary law during the colonial period. He blames the colonialists for the problem. The Muslims in Yorubaland, would have preferred the Sharia to be treated as a distinct law and not as a part of the customary laws. Muslims in Yorubaland wanted the British colonialists to recognize the Sharia as a fundamental law. Okunola (1989:38) documents in his study how Muslims in Yorubaland on several occasions resisted the British colonialists moves in interfering with the Sharia.

Badamsay (1989) shows that the British colonialists faced armed resistance from the Muslims in areas such as Yorubaland in Nigeria as a result of their moves which were aimed at subjecting the Sharia to reforms. However, her
study does not specify the kind of reforms which elicited the resistance.

The aforementioned studies on the experiences of the Nigerian Muslims under the colonial legal systems portrays varied responses of the British colonialists towards the Sharia. The studies on the Muslims' experiences under the colonial and post-colonial legal systems will enhance an understanding of the factors which inform them in their response to non-Islamic legal systems or laws.

Varied responses of the British colonialists towards the Sharia are evident in East Africa. In Zanzibar, the Sharia was treated as the fundamental law during the initial period of the British colonialism. Lobbans study (1987) shows that the Sharia in Zanzibar was later supplemented by the English statutory law in matters of criminal law and that of evidence. However, She does not specify when the Sharia was supplemented by the English statutory law in criminal and evidence legal aspects nor does she give the reasons for the change of attitude of the British towards the Sharia.

The Sharia was recognized by the British colonialists in Tanganyika. Muslims were however opposed to the use of
non-Muslim judges in the application of the Sharia in Tanganyika with respect to some legal cases (Anderson 1976; Lobban 1987). The latter aspect sometimes gave rise to problems related to interpretation and application of the Islamic law. It would have been better if only Muslim judges and kadhis were allowed to preside over Islamic related cases of law.


Achieng’s (1984) and Orengo’s (1974) studies provide important data on the legal aspects which informed the Muslims in their response to the Law of Succession in Kenya. However the two studies have not addressed themselves to the social, economic, religious or political factors which informed Muslims in their response to the Law of Succession in Kenya. The present research found out that social, political, economic and religious factors played an
important role in informing Muslims in their response to the Law of Succession in Kenya.

Contran (1969) provides important data related to the aspect of the colonial and post-colonial Laws of Succession. Contran (1969) also provide a background to the colonial legal system in Kenya. His study shows that the Colonial Government adopted the Indian code which was applied in legal matters such as that of succession. The Indian code was also applied in the post-colonial period in Kenya in the form of the various Laws of Succession in existence before the enactment of the "uniform" Law of Succession in 1981.

The report of the 1967 commission on the Law of Succession (Kenya 1980) provide us with important data related to the factors which informed the Muslims in their response to the Law of Succession. The report however falls short of revealing the legal factors which informed Muslims in their response to Law of Succession. This shortcoming can be explained from the fact that the commissioners were in favour of a "Uniform" Law of Succession. The present research addresses itself to the factors which informed Muslims in their response to the Law of Succession in Kenya.

Bakari (1989), Matano (1981) and the Supreme Council of Kenyan Muslims (1982) all provide data related to the response of the Muslim to the law of Succession in Kenya. The data provided is analysed with an aim of finding out the factors informing Muslims in their response to the Law of Succession in Kenya. The data provides important religious and legal factors underlying the response of the Muslims to the Law of Succession.

Past issues of the daily newspapers and journals such as al-Islam, al-Tawhid and Africa Events provide important data related to the response of the Muslims to the Law of Succession and also the views of the proponents of the Law of Succession Act. The newspapers and journals provide very relevant data on the factors which informed Muslims in their response to the Law of Succession Act in Kenya.

Our present study will primarily focus on the aspect of the Muslim's participation to the opposition of the Law of
Succession Act. Factors informing Muslims in their response to the Law of Succession will be analysed. Factors which contributed to the decision of the Government to exempt Muslims from the "uniform" Law of Succession Act are also analysed.
Endnotes

1. The Sunni Muslims have four schools of law, viz. The Shafii, the Hanbali, the Maliki and the Hanafi schools. Each Sunni Muslim must belong to one of the four schools of law. Sunni Muslims in a given area normally belong to the predominant school of law in the area. The Sunni Muslims in Kenya are generally governed by the Shafii school of law which also happens to be the predominant school of law in East Africa.

2. The Sunna refers to the sayings and deeds of the Holy Prophet, Muhammad (PBUH). The terms Hadith and Sunna are used synonymously in the research. The Sunna is regarded by the Muslims with a lot of esteem and is second only to the Holy Quran as an important source of the Sharia.

3. Ijma refers to the consensus of opinions among the Muslim Jurists while qiyas refers to analogical deduction.

4. The Ulama are Muslim jurists, academics and other educated elites, in the umma (Muslim society). In certain cases they make deliberations and decisions on matters related to aspects such as that of Islamic law reform.
CHAPTER TWO

2:0 THE ISLAMIC LAW OF SUCCESSION.

2:1:0 Introduction

This chapter examines the structure and importance of the Islamic law of succession. The thesis adopted in this chapter is that the Islamic law is of central importance to the life of the Muslims. The Islamic law of succession is binding to all Muslims due to its divine origin as indicated by various Quranic injunctions.

Muslims believe that God is the absolute owner of the universe and everything therein. People in the universe are regarded as trustees of the wealth and property therein. It is imperative that every individual should dispense the property and wealth held in trusteeship in accordance with the will of God (Ati 1977).

Several Quranic injunctions and prophetic dictums on the law of succession are in existence. The Holy Quran has broadly laid down several principles of the Islamic law of inheritance (S2:180,120; S4:7-9,11-13,19,13,176; S5:105-108). Some of the dictums of the prophet include the well known one which states that, "Learn the laws of succession and teach them to the people for they are one half of useful
knowledge" (Fitzgerald 1931:120). Another prophetic teaching states that, "the inheritance laws constitute one third of religious scholarship and they are the last discipline to be forgotten" (Khaldun 1967:22). The aforementioned Quranic injunctions and prophetic dictums portray the central importance of the Islamic law of succession to the Muslims.

Compared to other aspects of the Sharia, the Islamic personal laws are held in higher esteem by the Muslims. The family law in Islam plays a very important role in the life of the Muslims. The importance of the family law to the Muslims is best explained by Fitzgerald (1931) and Schacht (1964). Schacht (1964:76) states,

"The institutions concerning the statute personal law (i.e. Marriage....inheritance) have always been in the conscience of the Muslims more closely connected with religion than other legal matters and therefore generally ruled by Islamic law. The hold of the Sharia was strongest on the law of the family than in other legal aspects.

Muslims are opposed to the application of non-Islamic personal laws on them. Non-Islamic personal laws are likely to be incompatible with the Muslims religious beliefs and practices. This argument is supported by Browne (1944:29) who states, "while Muslims who are under non-Islamic governments would not mind being subject to non-Islamic public laws, they would mind to be subject to non-Islamic
The thesis adopted in this chapter is that personal laws are very central to individual's and family's religious and cultural aspects of life. As part of the personal law of the Muslims, the Islamic law of succession affects the core of their life and religion. Application of non-Islamic laws of succession to the Muslims can therefore infringe on some of their rights especially the freedom of worship (See Chapter Five).

2:2:0 The Structure And Scope Of The Islamic Law of Succession.

In comparison with the pre-Islamic laws of succession in Arabia, the Islamic law of succession portrays a more extensive distributive system centred around a wider family circle. Fixed fractional shares are provided to certain relatives of the deceased. Unlike the pre-Islamic laws of succession, women and minors are entitled to inheritance. The discriminative aspects of the pre-Islamic laws of succession in Arabia were either reformed or replaced by the Islamic law of succession. Another example of the reform was in the area related to the extent of those who were eligible to inheritance. The male agnate who was nearest to the
deceased in blood relation succeeded to the property to the
total exclusion of other agnates alive in the pre-Islamic
scheme of inheritance. The Islamic laws of succession allows
a wider scheme of inheritance in relation to the relatives
of the deceased (Ati 1977:250; Muslim 1982; Pearl 1979;
Schacht 1964).

Rules introduced by the Islamic law of succession
emphasize ties existing between members of the extended
family. The Islamic law "aims" at consolidating the family
system in that regards. Islam also aims at breaking up the
concentration of wealth in the individual's hands so as to
spread it out in the society (Muslim 1982:849). These
aspects correspond with the belief held by the Muslims that
individuals are supposed to spend and dispose the property
they have according to the will of God since they are the
trustees of the wealth and property they hold (Quran 4:3;
Ati 1977; Muslim 1982).

The estate of the deceased is divided among all the
heirs regardless of its size. However, an heir(s) is allowed
to buy or sell shares to other heirs by mutual consent. The
heir is also allowed to give up his or her share or take up
something specific in lieu of his or her share with the
consent of other heirs (Maududi 1978:308).
The Sunni and Shia schools of law are not in agreement on the issue of whether a share of a deceased person can pass by succession to his or her heirs. The Sunni schools of law do not allow the right of representation in succession unlike the Shia schools of law. Thus, an individual whose father pre-deceased his grandfather cannot inherit the latter if there are sons of the latter in existence. Inheritance among the Sunni Muslims is by degree of proximity. The sons of the deceased disqualify the deceased's grandson(s) from inheriting as a result. Such a grandson can only inherit through a bequest made in his favour (Ati 1977:250; Buhuri 1947:23; Fitzgerald 1931:119 and Mulla 1922:28-29). However, such a shortcoming among the Sunni Muslims in relation to the issue of inheritance rights of orphaned grandchildren is solved in several ways by various schools of law. The Maliki school, for instance, allows a father to have the right to direct that children of a pre-deceased son shall succeed in place of their deceased father (Fitzgerald 1931,119; Pearl 1979).

A child conceived but not yet born at the time when inheritance falls due is entitled to inherit on being born alive. Schools of law among the Muslims differ on how to treat such a happening. The Maliki school of law will postpone the distribution until the child in question is
born. Other schools safeguard the rights of the unborn child by setting aside the maximum possible share which that child may inherit. The unborn child in such a case is presumed to be male. Redistribution of the remainder of the share will take place if the child is born female. Sons and brothers normally get a double share of their female counterparts. The Maliki school is more practical on this aspect since there is always a possibility of twins or quadruplets being born. A hermaphrodite will inherit according to the prevailing gender and if in doubt, half according to each gender (Fitzgerald 1931:158; Maududi 1978:27).

The issue of the female share has drawn considerable debate among scholars of the Islamic law. Daughter(s) and germane sister(s) normally receive half the share(s) of the son(s) and brother(s) respectively. The Quran enjoins inheritance for such cases thereby making it binding to all Muslims (S4:11). Muslim scholars agree that the difference between shares of daughters and sisters on one hand and those of their male counterparts on the other accounts for the varied financial obligations between the males and females. Women in the Muslim society are free from the usual economic responsibilities. They are not legally required to provide food and other needs for any person, not even for
themselves. The able male relatives are required to provide all the needs to the females if the latter do not have independent resources. Males' obligations may therefore, even exceed what they could possibly inherit. However, females are free to work in various economic spheres and thus can be breadwinners in certain cases (Ati 1977:269; Maududi 1978:304).

Women in Islam are free to exert full control over their property and are expected to keep the dowry made at the time of their marriage as part of their personal property. Married women in Islam inherit their parents unlike in several Western and African societies. Thus the economic autonomy enjoyed by the Muslim women offset the half share they get in inheritance. In the same token, women who are able to assist relatives will be expected to do so in accordance with their expected share of inheritance. For instance, when a daughter is required to support a needy parent, she only bears one third of the cost while the brother bears two thirds (Ati 1977:26; Maududi 1978:304).

The issue of the legitimacy of children is of central importance to our present study. In a case where a marriage has not been formalised, a father must acknowledge the paternity of the children before the latter get inheritance
rights in accordance with the Islamic Law of Succession. Illegitimate children can only inherit their mother and their maternal relatives (Fitzgerald 1931:12; William 1925:67). This aspect concurs with the recommendation number 44 of the Commission on the Law of Succession in Kenya (Kenya 1980).

The law of Succession Act has several aspects which are not acceptable to the Muslims' beliefs and practices. Muslims do not allow adopted children to inherit the adoptee because the Holy Quran does not provide shares for the adopted (Sura 4:11-13). The Commission on the Law of Succession recommended (recommendation number 45) that the adopted children are to inherit equally with the adoptee's own children (Kenya 1980). The law of succession allows equal division of shares in an estate between the females and males as per recommendations number 31 and 33 (Kenya 1980). These recommendations run counter to the Quranic injunctions (Sura 4:11-13). The Holy Quran allows females to inherit half the shares of males in case of sisters and brothers on the one hand and daughters and sons on the other hand (Sura 4:11).
The Islamic scheme of inheritance is simple and certain because it is based on a fixed share-distribution system. This results into minimal conflicts over inheritance. In case of a deceased with more than one wife, the Islamic Scheme of inheritance allows for fixed shares of the children of the deceased. The wives of the deceased get a fourth of the estate (Sura 4:11-12). The recommendation of the commission on the laws of succession allowed the division of an estate of the deceased to be paid per "house" in case he had more than one wife (Kenya 1980; Patel 1969:235). This imply that children in one "house" may get more than their counterparts in the other "house" in a polygamous marriage. This recommendation of the Commission on the law of succession thus contradicts the teachings of the Holy Quran because the Islamic scheme of inheritance allows sons of the deceased to inherit equally. Sons of such a deceased get double shares those of their sisters regardless of whether the marriage(s) was monogamous or polygamous.

Any rule or law which is incongruous with the Sharia cannot be accepted by the Muslims. The Holy Quran has clearly laid down injunctions for the distribution of an estate of a deceased (S4:11-14). The divine injunctions are fully binding to all Muslims.
The Islamic law of succession allows Muslims who are not minors or insane to make bequests (Muslim 1982; Pearl 1979:117). The testamentary capacity is however limited to one third of the total estate of the deceased. It is thus impossible for an unscrupulous Muslim to disinherit any or some of his or her heirs through a will(s). Through the current "uniform" law of succession in Kenya an individual can dispose of the whole or part of his or her property by a will. Such an arrangement can cause suffering to the ascendants or descendants of the deceased (Fyzee 1974:358).

The testamentary capacity of a Sunni Muslim is further limited by his or her inability to bequeath to his or her heirs. The Shia Muslims however can bequeath to their heirs in accordance with their schools of law. As opposed to the Sunni Schools of law, the Shia Schools of law allows their adherents to make bequests to their heir(s) with or without the consent of all the heirs. However, such a bequest should not exceed one third of the total estate (Maghniyya 1989:57)

The testator can use the right to testamentary disposition to bequeath a share of the estate to those who
may be excluded from inheritance. A testator is allowed to reward a stranger or friend who may have rendered valuable service(s). The bequest will be valid as long as it falls within the one third limit. The limitation of the bequests to one third of the total estate is based on the prophetic dictum which stated that "the power to bequest should not be exercised to the injury of the lawful heirs" (Fyzee 1974; Pearl 1979:117).

Written and oral wills are both acceptable in the Islamic scheme of inheritance. Witnesses must be present when both the oral or written wills are made in order to verify the validity of the will later. The witnesses must not be interested parties in the estate. The will must not be made or procured by undue influence, coercion or fraud because these may invalidate it. However the bequest made should not benefit an object opposed to the spirit of Islam such as a Hindu temple. The practice of polytheism in the Hindu temple invalidates such a bequest (Fyzee 1974:359; Pearl 1979:117).

The Sunni schools of law allow bequests in excess of one third limit in cases where all the heirs give consent. In cases where some heirs give consent and others refuse to give the consent, the consenting heirs will have their
shares reduced to make up for the excess bequest (Pearl 1979:118; Ruxton 1966:371).

A testator can revoke a legacy either explicitly or tacitly. The revocation of the legacy is made before two witnesses who must not have any interest in the estate. A legacy will lapse in case the legatee predeceases the testator in accordance with the Sunni schools. The Shia schools of law allow such a legacy to pass to the heirs of the legatee (Fitzgerald 1931:271; Ruxton 1916:272).

The Shia, Shafii, Hanbali and Hanafi schools of law are all of the opinion that a foetus should be in existence at the time of making the will. Such a foetus however should be born alive within a six month period from the time of making a will. The latter aspect is aimed at ascertaining that the foetus was conceived before the bequest was made. The Maliki school of law however does not object to the making of a will to non-existent foetus but it must be born alive (Maghniyyah 1989:54).

There are differences between the schools of law in Islam in regard to the issue of whether bequests made to murderers and manslayers of the testator are valid. The Maliki and Shafii schools of law are of the opinion that
such a bequest is valid regardless of whether the murder was intentional or unintentional homicide. The Hanafi school of law allows such a bequest to be invalidated if the heirs give consent. The Hanbali school of law will validate the legacy only if the bequest was made after the injury causing the death (Maghniyyah 1989:55; Pearl 1979:140). The views of the Hanbali school of law are in agreement with the recommendation number 85 of the Commission on the Law of Succession. The recommendation states, "a person who, while sane, murders another person is not entitled to any share in the estate of the murdered person" (Kenya 1980).

The Islamic laws of succession allow the appointment of a Wasi to probate a will. The executor must be a Muslim who is sane, trustworthy, truthful, and major. Guardians or parents of minors or of mentally retarded persons must give consent before a bequest made in their favour is executed. A magistrate or Kadhi may restrain a guardian or parent from giving consent to such a bequest if he or she feels that it would require expenses for its fulfilment and could thereby be devoid of profit (Buhuri 1947:57; Maghniyyah 1989:65-70).

Intestate succession in Islam is in accordance with fixed and compulsory set of rules. Various relations of the
deceased are given fixed shares. These sharers are known as Quranic heirs. The residue of the estate, if any is then distributed to the nearest agnates (Pearl 1979). The Islamic law of succession thus gives clear mode to be followed in both testate and intestate succession. As a result there are few, if any squabbles among Muslims over matters related to succession.

2:4:0 Factors Affecting The Islamic Law Of Succession.

The Islamic law of succession is affected by factors such as normal gifts (Hiba), Waqf and death sickness. These factors are bound to affect the distributive system in the Islamic Law of succession in several ways.

2:4:1 Hiba And Family Waqf.

Simple gifts (Hiba) and family endowments (Waqf ahli) affect the Islamic law of succession in terms of distribution of the estate. Muslim jurists are of unanimous decision that rules of inheritance take effect upon the deceased's property only at the time of death or during the death sickness. An individual may not be mentally and physically stable at the time of death sickness to make fair judgement regarding the property's disposal (Fitzgerald
The Islamic law of succession does not place any limitation upon the size of property that an individual can dispose in the form of endowments or gifts. Thus an individual can dispose a part or the whole estate to a heir(s) or any other person. The property disposed by the individual must however be individually owned and should be made prior to death sickness. Any disposition of property made contingent upon the death of the testator becomes a bequest and thus cannot be in excess of the one third of the estate (Jaffer, O.I; Powers 1977:8).

The Holy Quran exhorts Muslims not to disregard the welfare of their relations when disposing off an estate (S4:9-10). It is thus against the spirit of Islam for an individual to disinherit his or her heirs through family endowments, public endowments or normal gifts.

The law of succession is affected by the Waqfs and Hiba in the sense that the quantum of the estate to be distributed to the heirs is reduced. An unscrupulous individual may use the freedom to give gifts to favour some of his or her heirs. Such a move is however against the spirit of Islam and would contradict the dictum of the
prophet which directed that a donor should not favour one child over the other (Mulla 1922:109; Powers 1977:8).

Family endowments ensure that the property endowed remains intact throughout the generations. The heir can only get the produce from the family endowments since it is not subdivided. Public endowment may be made for purely religious purposes. The heirs do not get any material benefit from public endowments. The institution of the Waqf is approved by all the Sunni schools of law and has become an integral part of the Islamic law (Mulla 1922; Powers 1977).

2:4:2 **Sadaqa And Public Waqf.**

Charitable gifts (Sadaqa) are made with the intention of pleasing God. The object(s) of charitable gift(s) cannot be returned to the donor. Any donation made in favour of orphans, the poor, female relatives, poor relatives or to religious objects such as mosques are all treated as Sadaqa (Powers 1977:10). The aim of making charitable gifts is to get rewards in the other world.

Charity to one's family is believed to have the highest merit. A prophetic dictum states "it is better to give alms
to kindred than to beggars" (Fitzgerald 1931:202). Thus family Waqf is held in higher esteem than public Waqf.

Sadaga cannot be used to benefit objects or acts seen by Muslims to be unpleasing to God. The Court of East Africa upheld the latter aspect in Ahmed vs Hussein 1 E.A. 39 and also in Sharriff Abdulla vs Wasibu, 3 E.A. 90. In these two cases, the use of usury, which is condemned in Islam arose. The Court of East Africa upheld that usury is an act unpleasing to God. The defendants in both cases lost as a result (Fitzgerald 1931).

An interesting case related to gift giving arose between Joka vs Iki 4 E.A. 27. The Court of East Africa upheld that it is unpleasing to God for a parent to treat children unequally as by giving a large portion of the property to one child to the exclusion of other children as in this case. The issue of Hiba also rose in the colonial period when the Court of East Africa upheld in Talib vs Siwa Haji 2 E.A. 33 that gift giving while one was heavily indebted was an act unpleasing to God. Such a gift becomes void (Fitzgerald 1931:202).

Philanthropic acts such as endowing public waqfs are part and parcel of Muslim worship. Muslims view such acts as
obligations and are aimed at propagating Islam. Provisions to one's family through methods such as family waqfs is emphasised and is seen as a very important sacred duty. A Waqf can be made for the support of the founders own immediate descendants after which the proceeds may be directed to the disadvantaged members of the community. The founder thus may limit the beneficiaries of the Waqf to a certain generation or to certain members of his or her family. A Waqf may be dedicated or directed to certain members of the family who are disadvantaged (Fitzgerald 1931:212; Mulla 1922).

The application of the Waqf in Kenya has been widespread. The institution of the Wakf Commissioners was established in Kenya in 1900. The Waqf Commissioner Ordinance (Chapter 28; 1900-1990) allows the appointment of four Wakf Commissioners. The Commissioners control all Waqf for public purposes. They also take over the control of waqf(s) under trustees who may mismanage them, in accordance to section 6 of the Ordinance (Fitzgerald 1931:224; KNA 9).

Conflicts over the application of Waqf are evident in East Africa. Such conflicts were evident in Muhammed vs Mwana Mkee 1 E.A. 55 and also in Korshed vs Mwanate 7 E.A. 194. The Court of East Africa upheld that Sadaga and public
Waqf for any purposes is neither revocable from the moment of declaration nor is its delivery, acceptance and possession necessary unlike the simple gifts (Hiba) (Fitzgerald 1931:202).

Male and female share equally in the proceeds from a Waqf as opposed to succession. An individual can escape legally the strict letter of the Islamic law of succession through the use of public Waqf, family Waqf or simple gifts. An individual can avoid the fractional subdivision of his or her property through the use of simple gift or waqfs. Thus the use of waqfs, Sadaga or simple gifts can directly affect the Islamic law of succession (Mulla 1922).

2:4:3 Death Sickness.

The Islamic law of succession is affected by death-sickness in several ways. A person reaches death sickness when he or she is no longer able to fulfil religious obligations such as prayers. The person concerned must actually die of such sickness for it to be regarded as death-sickness (Fitzgerald 1931:174; Mulla 1922:107).
No sales or other transactions related to the estate between the deceased and some of the heirs is valid during death sickness. Such transactions will be valid if other heirs give consent. Business transactions between the proprietor of the estate and non-heirs is only valid if it is restricted to one third of the total estate during death sickness. Gifts during death sickness can not exceed one third of the total estate. Such gifts however must be delivered, accepted or taken into possession before they are declared valid. There can be a deliberate acknowledgement of liability on a gift made between acknowledger, acknowledgee, and the claimants to the estate. Such an acknowledgement becomes binding to the claimants and cannot be revoked (Fitzgerald 1931:175; Mulla 1922:108; Powers 1977).

Acknowledgement of debts made in death sickness or in good health are regarded the same in accordance with the Hanbali, Maliki and Shafii schools of law. Muslims place a lot of importance on the payment of debts. Payment of debts is given priority over the actual distribution of the estate among the heirs (Ati 1977:270-71; Fitzgerald 1931:175-6).

2:4:4 Legitimacy.

A child born of a married woman six months after the date of
marriage is presumed to be the legitimate child of the husband in such a marriage. A legitimate child is entitled to inherit both parents and their relatives. However, an illegitimate child can only inherit his or her mother and maternal relatives. (Ati 1977; Mulla 1922;191; Pearl 1979:141).

One of the main conditions for legitimacy in Islam is that conception should have commenced after the marriage. A child born within two years after the death of the father or after a divorce is presumed to be legitimate (Ati 1977; Mulla 1922;192).

A lawful marriage is a necessary condition of legitimacy. Where legitimacy cannot be established by direct proof of a lawful marriage, acknowledgement of paternity by the father will be enough proof to qualify the claimant to inherit. The acknowledgement must not be impossible upon the face of it such as where the mother is proved to have been married to another man or was a prostitute at the time of conception. Such a claimant must also not be a product of adultery, incest or fornication. The right to inheritance is vested to both the acknowledgee and the mother since the latter is deemed to be the lawful wife of the acknowledge (Ati 1977; Mulla 1922; Muslim 1982).
Inheritance can be postponed in a case where a widow is pregnant. The aim of the postponement is to establish the sex of the child so as to establish the actual share of the claimant. Postponement of inheritance can also take place where the deceased's brother's wife, or his son's wife are pregnant (Ati 1977; Ruxton 1916).

Division of the inheritance can also be postponed in case an heir has disappeared and it is not known whether he or she is alive. A presumption of death of the heir is legally allowed. The absent heir may be presumed to have died when he or she reaches the age between 70 and 120 years. This however depends on the school of law. The age of such an heir in question is calculated from the date of his or her own birth. The share of such a heir is set aside until when his or her whereabout is ascertained or when he or she is presumed to be dead. The share in such a case is redistributed to the surviving heirs when it is ascertained or presumed his or her whereabout (Ruxton 1916).

Modification on inheritance may take place when a heir dies before he or she has received his or her share. In such
a case the share of the deceased heir devolves on his or her heirs. Modification on the shares may also take place when one of the heirs declares a third party to be a relative of the deceased who is being inherited. The share of the third party is taken exclusively from that of the heir who has affirmed the relationship but only after other heirs have given consent to the relationship (Ruxton 1916).

2:5:1 Partial And Complete Exclusion

In certain cases some heirs may be excluded from inheritance completely while other heirs may have their shares varying. For instance, a husband whose deceased wife leaves behind a child or more will have his share of her estate reduced from one half to one third due to the existence of the children. Likewise, a sister to the deceased will have her share of his estate reduced from half-share to one-third if there is another sister to join her. Such a sister to the deceased will however be totally excluded from inheritance if there is a son of the deceased as a heir. The son being closer in relation to the deceased excludes the sister to the deceased (Muslim 1982:852; Pearl 1979:134-135).
Certain heirs known as Quranic heirs cannot be excluded completely from inheritance. These are the primary heirs whose shares have been assigned by the Holy Quran. The shares of the Quranic heirs can only be adjusted but they cannot be excluded completely on account of intermediary of other heirs (Ati 1977:258; Muslim 1982:849-852; Pearl 1979).

The second class of sharers after the Quranic heirs is known as aswaba. These are relations who are entitled to inherit but do not have definite shares assigned. They are also known as residuaries and can be excluded completely on account of intermediary of certain heirs. The third group of heirs is composed of distant kindred known as dhul arhami. The latter group normally inherit on account of a residue remaining after the first and second category of sharers have inherited. The dhul arhami can also inherit the estate on the account of non availability of heirs among the Quranic sharers and the aswaba. In cases where there are no heirs, the estate is taken to the treasury (Bayt-al-mal), where Muslim religious funds are kept. A residue of the estate may also be taken to the Bayt-al-mal. In case of non existence of the Bayt-al-mal, the residue is returned to the heirs (Buhuri 1949; Pearl 1979). The residue can also be taken to a religious institution such as a public Waqf or mosque in a place where there is no Bayt-al-mal such as...
not bar one from inheritance on account of accidental homicide (Fitzgerald 1931:157; Muslim 1982:850; Pearl 1979:140).

Murderers and manslayers are excluded from inheriting the victims in order to avoid cases of unscrupulous individuals hastening the death of innocent persons for the purpose of premature inheritance.

2:5:3 Difference In Religions.

A non-Muslim cannot inherit a Muslim. Likewise a Muslim cannot inherit a non-Muslim. The Shia Muslims however do not object to Muslims inheriting non-Muslims but not vice versa (Ati 1977). A Muslim can however make a will in favour of a non-Muslim relative but such a will should not exceed one third of the net estate (Ati 1977; Muslim 1982:850; Pearl 1979:140; Ruxton 1916:395). In a case where members of the immediate family are non-Muslims and there is no will, such members do not inherit. The estate of such a deceased Muslim is inherited by his or her Muslim distant relatives or in case of non availability of Muslim heirs, the estate is taken to the Bayt-al-mal.
Some of the Muslim jurists are of the opinion that difference of abode should be a ground for excluding one from inheritance. Jurists holding such views are of the opinion that for one to qualify to inherit, he or she must be the national or permanent resident of the same country, region or locale as the one he or she wants to inherit. This argument is based on the assumption that it is sometimes practically impossible to enforce different laws on different people in different countries and at the same time expect solidarity or co-operation from the two areas. It may also be very difficult to distribute immovable property located in different countries (Ati 1977; Muslim 1982:850; Ruxton 1916).

The issue of exclusion from inheriting on the ground of difference of abode is quite controversial. Some communities and individuals such as nomads and refugees respectively are likely to be adversely affected by this ground. In cases where the laws of certain countries prohibit inheritance of immovable property for non-residents or citizens, provisions can be made for conversion of such property to movable property. Such conversion can facilitate easier distribution of the property to all heirs. It is a more just
way of distributing the estate of the deceased to his or her heirs. The ground of excluding some heirs on account of difference in abode does not have any Quranic or prophetic support. However, cases may arise where legal problems may militate against the Islamic law of succession in relation to the issue of difference in abode.

2:6:0 Conclusion.

The structure and scope of the Islamic law of succession gives us guidance on the way the Muslims hold the issue of inheritance. This aspect is of central importance to the present study because it leads to an understanding of the reasons why Muslims in Kenya are opposed to the controversial law of succession Act.
1. In this research the term personal law(s) is applied synonymously with the terms family law(s) and also private law(s). These are laws which affect the personal lives of the community or individual(s) as opposed to public law(s). Under the category of personal laws, we have laws such as of succession and divorce. Personal laws are of central importance to the religious life of the Muslims because they incorporate their worship.

2. The Islamic law defines minors as individuals who have not reached the stage of puberty. Such individuals may not be in a position of making fair and independent decisions related to such aspects as disposal of property.

3. A wasi is an executor or probator who is appointed by the testator to execute or probate a will. The wasi probates or executes the will on behalf of the legatee(s) or heirs.

4. Hiba refers to normal gifts which may be awarded by the proprietor to an heir(s) or any other person prior to death sickness. The gift is taken by the individual from his estate. On the other hand Waqf refers to an endowment which may either be to the benefit of the members of the family of the endower or to the public. Waqf ahri is the Waqf made to the benefit of the member(s) of the family of the endower. Waqf khayri is the public Waqf as opposed to family waqf. Waqf khayri can be made for the purposes of religion such as provision and upkeep of cemeteries/burial grounds, mosques and also for the benefit of the disadvantaged members of the society.

5. Sadaqa refers to charitable gifts. It involves alms giving and other religious acts such as gifts to mosques, disadvantaged relatives and social institutions. Waqf is also regarded as an aspect of sadaqa.

6. Quranic sharers are the heirs to whom the Holy Quran has assigned definite shares (sura 4:11-12). They include children, parents, wife, husband and other collaterals of the deceased.
7. Muslims scholars such as Ati (1977) are of the opinion that inheritance is a religious issue. According to Ati (1977) it is an expression of solidarity and medium of co-operation which are seen as religious issues not binding individuals of different religions. Inheritance is an important aspect of Muslim worship.
CHAPTER THREE

3:0 MUSLIMS RESPONSE TO THE REFORMS IN THE SHARIA.

3:1:0 Introduction.

This chapter examines the response of the Muslims to the reforms in the Sharia. The chapter begins by examining how reforms in the Sharia are acceptably undertaken. The chapter also investigates the various reforms which have been undertaken in different parts of the world in relation to the Sharia. Finally the chapter examines the attitude of the Muslims towards conflicts between the Islamic Law and non-Islamic laws and Customs.

The following thesis is adopted by this chapter. "That reforms in the Sharia can be undertaken but they must conform to the tenets of the Holy Quran and the Sunna of the prophet; that Muslims can recognize any law or custom as long as it does not contradict the Sharia". The chapter concludes that subjecting Muslims to the Law of Succession Act was tantamount to reforming the Sharia.
Muslim jurists agree that there exist diversity of opinions in legal matters. This belief in diversity is based on a prophetic dictum which states that "diversity of opinion of my people is a mercy from God" (Fitzgerald 1931:17).

Muslims are legally free to have recourse to schools of law other than which they adhere to. A Muslim can transfer his or her allegiance in whole or in part from one school to another. This arrangement is applied by North African Muslims belonging to both Maliki and Shafii schools of law. Muslims in this area often make Waqf by Hanafi law with an aim of having lifetime benefits which are provided for by the latter school of law. The Maliki and Shafii schools of law do not provide such benefits (see Chapter Two).

One of the commonest method which is applied in the Islamic Law reform is that of Talfiq. Views from different schools of law can be "patched" or combined to form a new view(s). Courts are normally bound to follow the opinion(s) of the predominant school of law in an area. However in certain cases the court may apply the school of law of both the defendant and the plaintiff. The latter aspect may
take place to avoid miscarriage of justice (Anderson 1969, Lobban 1987).

Muslim leaders are legally free when public interests so require to order courts to apply opinions held by other schools of law or by reputable Muslim jurists. Muslim leaders are also legally allowed to issue legal rulings (Fatwa) as long as they are within the tenets of Islam (Anderson 1969:48; Lobban 1987:36).

The reform in the Sharia can only be undertaken by Muslim themselves and must conform to the teachings of the Holy Quran and the prophet. Muslims in Kenya rightfully challenged the attempt by the Government to force them (Muslims) to be subject to the Law of Succession Act which is in conflict with the tenets of Islam (see Chapter Five).

3:3:0 Islamic Law Reform In Various Parts Of The World.

Reforms in the Sharia are evident in a number of countries in the world. Studies on the reforms which have been undertaken in different parts of the world, indicate that Muslims are opposed to reforms which are in conflict with the tenets of Islam. The reforms which have elicited
the most opposition are in relation to the personal law aspect of the Sharia. Some of the reforms in the Islamic Law of succession have faced a lot of opposition from the Muslims due to its importance in relation to their beliefs and practices.

3:3:1 The Islamic Law Reforms In The Maghreb.

Several countries in the Maghreb have undertaken reforms in the Sharia. The reforms undertaken have been in relation to the personal law of the Sharia. However, reforms in the public law aspect of the Sharia such as land law reform in the post-colonial period in Algeria, have been undertaken. The land law reform undertaken in Algeria did not elicit opposition from the Muslims. This is because the reforms in Algeria did not offend the tenets of Islam.

Morocco, Tunisia and Egypt undertook reforms in the family law. The reforms in these countries were acceptable because they were carried within the context of Islam. In Morocco, for instance, the Maliki jurists, prepared a new code of personal law based on opinions drawn from different Sunni schools and jurists. The reforms in the Sharia carried in the Maghreb took full account of the demands of modern life while still preserving the teachings of Islam. Anderson
is of the opinion that "the basis of selection of the reforms in the Maghreb was public interests rather than intrinsic merits of the arguments on which the opinion concerned were based".

One of the remarkable reforms which have been undertaken in relation to the Sharia in Egypt, Morocco and Tunisia is in regards to the inheritance rights of orphaned grandchildren. Grandchildren are legally excluded from inheriting when there exist sons of the grandfather they are supposed to inherit. According to the Islamic Law of Succession, relatives near the proprietor of the property normally exclude the more remote one(s) (relative(s)) in terms of degree of relation. As a result grandchildren cannot inherit the shares of their deceased parent(s) if there exist brothers of their deceased father. In the aforementioned countries, the Islamic Law of succession was reformed by enforcing obligatory bequests in favour of such orphans. The orphaned children get one third of the total estate of their grandfather in accordance with the rules relating to bequests (see Chapter Two). Courts are empowered to make a decree authorizing a mandatory bequest in case it is not provided for in the will made by the grandparent(s). The reforms made allows offsprings of a predeceased to inherit their grandparents (Anderson and Coulson 1973:79).
An interesting reform in the law of succession took place in Egypt. The Egyptian law of testamentary bequests of 1946 allows a testator to bequest to his or her heirs provided that the bequest does not exceed the one-third limit (Anderson and Coulson 1973:80). One of the remarkable aspects of this reform in the Egyptian law of succession is that it departed from the Sunni Muslim practice. Egypt is predominantly Sunni but it adopted the law of succession of Ithna Ashari group of the Shia Muslims. The Sunni schools of law do not allow bequests to heirs unless they (heirs) give consent. The Egyptian law of succession allows an individual to bequest an heir who may be in a particular need. The other heirs in such a case do not have to give consent.

The reforms of the Sharia in the aforementioned countries are not repugnant to the tenets of Islam. The reforms were carried within the context of Islam. Muslims accepted the reforms because they were not in conflict with the Sharia.

3:3:2 The Islamic Law Reform In Sudan.

A number of reforms in the Sharia were carried out in Sudan during the colonial and post-colonial periods. Most of the reforms undertaken in Egypt were also introduced into Sudan. The Ulama of Egypt and those of Sudan closely
collaborated in matters of Islamic law during the time when Sudan was ruled by a condominium composed of the Egyptian and British rulers. The Grand Qadar of Sudan at that period were of Egyptian nationality and were appointed by the Governor-General of Sudan. The Grand Qadi in Sudan was authorized to issue judicial circulars and regulation in relation to the development and reforms in the Sharia.

The Judicial circulars and regulations issued in Sudan played an important role in the Islamic law reform in Sudan. Lobban (1987;37) affirms this view, "the judicial circulars provided a major vehicle for reforms and for the adoption of the principles of the Sharia to local conditions in Sudan".

The Sharia judges of the High Court in Sudan discussed the major reforms and then issued the circulars through the office of the Grand Qadi. The talfiq technique was applied by the Sharia judges when undertaking reforms in the Islamic Law. The Islamic Law was also reformed through the application of the principle which allows a ruler to deviate from the views held by the dominant school of law when public interests so require. In the latter case a ruler especially the Grand Qadi was empowered to deviate from the views held by the dominant school applicable in the local area and apply rule of law of any other Muslim school of law

Reforms in Sudan were accepted by the Muslims because they were carried within the context of Islam. They therefore did not elicit any opposition. The British rulers in Sudan are credited for taking a kind of laissez faire attitude towards the Sharia and its reforms. The attitude of the British towards the Sharia minimised conflict in Sudan over the Sharia. Lobban (1987:37-38) is of the opinion that the British attitude towards the Sharia was aimed at keeping the once rebellious Muslim population from finding grounds for further outbreaks. The British may have also wanted to keep a good relationship with their co-rulers, the Egyptians, whose religion was Islam.

3:3:3 Islamic Law Reform In Turkey.

Reforms in the Sharia in Turkey elicited a lot of opposition from the Muslims because they were in conflict with the tenets of Islam. The Turkish Government abolished the Islamic personal status law in 1924. The Sharia courts were abolished at that time. The Turkish Government adopted the Swiss code but gave some minor concessions to the Sharia. The Government of Turkey decided to separate
religious institutions such as marriage and succession from those of politico-economic. This aspect is unacceptable because secular institutions are not separated from the religious ones in Islam in accordance with the Sharia. The separations are unacceptable in a Muslim country such as Turkey.

Majority of the Turkish Muslims were opposed to the reforms in their country. The Turkish Government and its supporters reformed the Sharia with an aim of pleasing Western donor countries which were opposed to some politico-economic aspects of the Sharia. The western powers unjustifiably considered some aspects of the Sharia as the causes of the economic retardation of Turkey (Anderson 1976:15).

The reforms in Turkey were in both private and public aspects of the Sharia. Muslims religious practices and beliefs were adversely affected. As a result, severe unrest took place in Turkey. Muslims were not ready to abandon their Divine Law for an alien inspired law. At least the reforms should not have been at the area of personal status law. In regard to this aspect, Muslims hold that the personal laws should remain essentially Islamic (see Chapter Two).
Muslims rejected the un-Islamic laws and continued to be governed by the Islamic Law of marriage, succession and divorce in Turkey inspite of the fact that the "new" law based on the Swiss Civil Code was in force. For instance, the Turkish Government only recognised civil marriages, but in the rural areas, the majority of the people conducted Islamic Marriages. The Turkish Government was as a result forced to legitimize such marriages in order to safeguard the interests of children of such marriages. The masses were not willing to abandon their cherished religious practices and beliefs (Anderson 1976 and Rosenthal 1965).

The Turkish Government failed because of implementing unpopular reforms. The masses should have been consulted first through methods such as public referendum before the introduction of such reforms. The reforms carried in Turkey have affected Muslims adversely in relation to the extent of the application of the Sharia. Muslims have continued to date to agitate for pre-reform period in Turkey when the Sharia application was wider in scope.

3:3:4 Islamic Law Reform In India.

Several reforms on the Islamic Law were undertaken in India during the colonial and post-colonial periods. The
reforms undertaken portray a lot of tolerance on the part of
the reformers in spite of the fact that India is a country
with multi-religious groups. Muslims in India are a minority
group.

The British colonialists are credited for having taken
great lengths to avoid any interference with matters of
religious laws and practice. The British colonialists left
alone the Hindu, Muslims and other religious groups to
follow their respective personal laws. The cautious step
taken by the British Colonialists led to minimal conflicts
and opposition from their subject over religious matters
(Anderson 1976).

The Post Colonial Indian Governments have also been
cautious in introducing reforms which may be unpopular among
the Muslims. This aspect is noted by Anderson "Indian non-
Muslim Government has hesitated even more than most Muslim
governments before it introduces legislations which may be
regarded by Muslims as contrary to their sacred law"
(1976; 25).

The attitude of the regimes in India during the colonial
and post-colonial periods is worthy of emulation by non-
Muslim governments. The Kenyan Government should have been
guided by such an attitude before it introduced the unpopular law of succession Act. The steps taken by the Indian Colonial and Post-Colonial regimes deserves commendations and should be emulated by policy makers in regard to their attitude towards personal status laws. Such attitude is vital for peace and prosperity in countries with diverse communities and religions such as Kenya.

3:4:0 The Attitude Of The Muslims Towards Conflicts Between The Islamic Law And Non-Islamic Laws And Customs.

There exist evidence of conflicts between the Islamic law and non-Islamic laws and customs in Africa and elsewhere. These aspects have arisen because Muslims are legally free to practise their local customs or follow their customary law(s) as long as they are not in conflict with the tenets of Islam.

There are cases where some Muslims have practised laws and customs which are in conflict with the Sharia. Rannat (1960;11) reports of such a case in Sudan among the Messariya of western Kordofan. The Messariya do not allow married women to own property in accordance with their customary rules. The unmarried women who have property are
forced to pass their property to their brothers after marriage. Some of the Muslim Messariyas practise the customary law which is in conflict with the Sharia.

The Islamic law allows women to retain (in the new marital status) the property acquired before marriage. Married women can inherit their relatives in accordance with the Islamic Law.

It is encouraging to note that the provincial council in the Sudan declared the Messariya custom as contrary to justice, morality and order. The Islamic law was applied by the courts henceforth among the Messariya women in their new marital status (Rannat 1960).

In Nigeria, conflict between the Islamic law and the English laws was evident in Bartlett vs Bartlett (1925) A.C. 377. The main issue in this case was whether a Muslim could make a will in the English law and thereby disinherit the heirs through the will. The Nigerian court ruled in favour of the Islamic Law by holding that a Muslim making a will disposing off more than a third of the estate would have erred. Such a will was therefore invalid and the heirs were legally free to challenge its validity (Morris 1970:4). The Nigerian court therefore affirmed that Muslims were governed
by the Islamic Law of Succession. This position was upheld by the court in Rasaki Yinusa vs Adesubokan Bello J. Zaria (1968) civil suit No. Z 23/67 in Nigeria. The court in this case ruled that a will made by a Muslim according to the English law was invalid in an area where Islamic Law was considered the Native Law and Custom. Thus a Muslim could not choose a non-Islamic rule of law in relation to inheritance in such a case. In Nigeria, Islamic Law and Custom was considered as part of the Native Laws and Customs. In Nigeria Muslim were governed by the Islamic Law of a particular locality where they resided or hailed. The latter position was upheld by the Court of Appeal of West Africa in Ayoola and others vs Folaway and others (1942) 8 W.A.C.A. 39 (Morris 1970).

In East Africa, the Kadhi Courts played an important role in safeguarding the interests of the Muslims during the colonial period. They refused for instance, to recognise laws which were un-Islamic. Anderson (1970;69) reports such a case involving Muhd vs Abdulla (1938) 5 Z.L.R. 26. In this case which took place in the Zanzibari protectorate, the Kadhi refused to enforce an agreement where interest had (contrary to islamic law) been charged on property. The Islamic law prohibits usury. In relation to the same case, the High Court of East Africa upheld the decision of the
There are instances of interference with the Islamic Law in East Africa by the British Colonial Government. The Colonial Government in some instances made decrees which were issued by the office of the Sūltan of Zanzibar. Some of the decrees ran counter to Islamic Law. The decrees issued were aimed at safeguarding the interests of the British Colonial Government but at the expense of the interests of the Muslims. An example of such a decree was the 1917 Evidence Decree which replaced the Islamic Law of evidence in favour of the English law. Muslim litigants henceforth were to be tried under the English law of evidence. This decree affected Muslims in the Protectorate of Zanzibar and Kenya. The Kenya coastal area was affected because it was under the protectorate of Zanzibar (Anderson 1970; Lobban 1987).

The application of the English law of evidence on the Muslim was in total disregard to the Zanzibari Courts Decree (section 7) which stated that the Sharia was fundamental law in the protectorate of Zanzibar. It was unfair therefore to subject Muslim litigants to English law of evidence when the Islamic Law was declared to be the fundamental law in Zanzibar. The Zanzibari Courts Decree (Section 17) had not
been annulled by any other Decree, thereby leading to a conflict between it and the 1917 Evidence Decree (Anderson 1970; Lobban 1987).

In spite of the encroachments on the application of the Sharia in the Zanzibari protectorate, the Kadhis continued to follow the Islamic Law of evidence. Anderson (1970:69-70) notes that the Kadhis ignored repeatedly the Evidence Decree of 1917 which they were officially bound to follow. This aspect led to conflicts of law between the Islamic Law and the English law as is evident in the case, Baraka Mjanakhiri vs Khamis Nahoda (civil appeal No. 9 of 1945 - unreported). The English Judge in this case held that Muslim rules of evidence no longer applied in Kadhi Courts. The ruling made by the judge indicates that the courts of the Kadhi were ignoring the Evidence Decree of 1917 in favour of the Islamic rules of evidence (Anderson 1970)

Conflicts between the Islamic Law and non-Islamic laws are evident in the post-colonial period in Africa. For instance, the military regime of Ghana promulgated a law in 1979 whose article 32 allows a child whether born in wedlock or out of wedlock to be entitled to reasonable provision out of the estate of his or her parent. The latter provision runs counter to the Islamic Law which does not allow
illegitimate children to inherit their father (see Chapter Two). Muslims in Ghana are opposed to the law because it contradicts the Sharia (Woodman 1985).

In conclusion, Muslims are urged by their religion to ignore or oppose any rule of law which is in conflict with the Sharia (Browne 1944:29). It is not possible for Muslims to be subject to non-Islamic laws which contradict the Sharia and at the same time remain Muslim (see Chapter Five).
Endnotes

1. **Talfiq**—means "patching". It is a method used in the Islamic law reform. A part or section of a school(s) of law or of a jurist is taken and combined with a part(s) of another school(s) to form a single view(s) or law. The reformer is free to adopt doctrines of extinct schools of law or of views of certain jurists. However such views adopted must conform to the teachings of Islam.

2. In case of conflict between the schools of law of the plaintiff and the defendant, the court is bound to apply the relevant law applicable to the school of law of the defendant.

3. **Kadhi/Qadi**—Refers to the persons appointed by governments to be in charge of matters related to Islamic law. They act as magistrates in relation to the Sharia especially in matters of personal law. The head of the office of the Kadhi is the Chief/Grand Kadhi/Qadi.
CHAPTER FOUR

4:0 THE EXPERIENCE OF THE MUSLIMS UNDER VARIED COLONIAL AND POST COLONIAL LEGAL SYSTEMS

4:1:0 Introduction

This Chapter analyses the experience of the Muslims under varied colonial and post colonial legal systems. Special attention is given to the experience of Muslims in East Africa in general and in Kenya in particular. The Chapter begins by examining and analysing the attitude of the colonialists toward the Sharia in Africa. The Chapter also analyses the experience of the Muslims in the protectorates of Kenya and Zanzibar and finally of the Colony of Kenya.

The following thesis is adopted by the Chapter. That the attitude of the French and the British towards the Sharia varied considerably from one colony or protectorate to another. This varied attitude of the colonialists affected the application of the Sharia in Africa and elsewhere. It is also noted that the application and development of the Sharia in the Protectorate of Zanzibar and Kenya was better than in the Colony of Kenya because the Sharia was given higher status in the former protectorate. Finally, the Chapter also adopts the thesis that the application and development of the Sharia in the colonial period had a lot
of bearing on its application and development in the Post-Colonial era in Kenya.

4:2:0 The Attitude of the French and British Colonialists Towards the Sharia in Africa

The attitude of French and British Colonialists towards the Sharia varied considerably from one colony or protectorate to another. The type of the administration adopted and the attitude of the initial administrators towards the Sharia are some of the factors which determined the extent of the application and development of the Islamic Law in a specific colony or protectorate.

In most cases, the development and the application of the Sharia was carried for the convenience of the colonialists. Any legal aspect which was not considered to be beneficial to the administrators and was perceived to be "unjust" was discarded through the use of decrees or ordinances. Several aspects of the Sharia and Native laws were in many colonies and protectorates declared to be unjust or "repugnant to justice and equity". In the eyes of the administrators, laws incompatible with the English law and customs were discarded as unjust. The colonialists failed to note that the perception of the term justice and equity vary from one
community to another since these are relative and general terms.

Some of the colonialists held the belief that their law(s) was/were superior to the Native laws and the Sharia. Such beliefs adversely affected the extent of the application and development of the Sharia in certain colonies and protectorates. This position is affirmed by Morris (1970:6);

The judicial point of view of the colonialists was that continued existence of Native Courts was unavoidable. Native law and custom was an inferior form of law and that English based law and procedure should be available for any African who wished to take advantage of it ... there should be no watering down of that law and procedure to meet the supposed needs of the African.

In some instances, the Islamic law was treated as a part of the Native laws and customs. That was the position of the Islamic Law in West Africa. Lack of distinction between the Native law and custom on one hand and the Islamic Law on the other led to problems related to application and development of the Sharia. Problems related to the application of the Sharia in such cases are evident among communities which are Islamized but still follow some
aspects of customary law. Such a problem rose in Sudan.
Section (b) of the Sudan Muhammedan Law Courts Ordinance (1902), allowed Islamic law to be applied as modified by customary law. It was difficult in some cases to distinguish between local customs and "pure" Islamic laws and customs. The aforementioned ordinance created problems because it allowed the rules of customary law to prevail in case of conflict arising in the civil court between the Islamic and customary laws. Such arrangements are unacceptable in the Islamic Law because it states that the Sharia should prevail where the litigants are Muslims. Section 5 (2b) of the Muhammedan (sic)-law Courts Ordinance (1902) affected the application and development of the Sharia in Sudan during the colonial period until the post colonial period when it was reformed in favour of the Islamic Law (Akolowin 1973:152). The Sharia cannot be modified by custom under any circumstance due to its divine origin (see Chapter Three).

The relationship between the colonialists and local (indigenous) rulers had a lot of effect on the application and development of the Sharia. The Sharia thrived well in areas where indirect rule was applied. In such places, the local rulers were normally left alone by the colonialists to practice the Sharia. In Northern Nigeria, local rulers who
co-operated well with the colonialists were left alone to apply local customs and laws in the legal circles. The Sharia in Northern Nigeria was applied as Native Law but thrived well. The Sharia was the fundamental law in Northern Nigeria (Anderson 1969 and 1970; Lobban 1987; Okunola).

The Sharia rarely thrived well in places where direct rule was applied. Such was the case in the colony of Kenya. The Court of Appeal of Eastern Africa, sitting in Kenya, held that "the law of Islam cannot be described as Native Law", (Anderson 1970:3). The position of the Court of Appeal of Eastern Africa was that Islamic Law could not be so embraced and assimilated by the people themselves as to mould or partially replace their own indigenous customs. This position of the Court of Appeal of Eastern Africa was upheld by the Appeal Court sitting in Kenya in 1927 in the case involving Ali Ganyuma Vs. Ali Muhammed C.A. (1927) II K.L.R. 30. Article 7 of the Kenya Colony Order-in-Council allowed the application of Native Laws to the Natives of Kenya (Anderson 1954:112).

The assertion of the Court of Appeal of Eastern Africa failed to note that some communities such as the Wa-Swahili and some individuals among the Digo and the Pokomo had
become fully Islamized even by that time as to mould or partially replace their own indigenous customs. Some of the aforementioned communities and individuals have Islam and the Sharia as their indigenous custom and law. The Court of Appeal of Eastern Africa should have allowed individuals to declare whether they wanted the Islamic Law to be applicable in matters related to personal law.

The attitude of some of the colonialists positively facilitated the application and development of the Sharia. For instance, some colonial administrators maintained that justice was best administered to Africans primarily in Native Courts applying native law and custom. Such attitude of the colonialists facilitated the application of the Sharia among the inhabitants of areas where the Islamic Law was considered as native law and custom (Anderson 1970; Morris 1970).

Muslims in several parts of Africa vehemently opposed the intrusion of foreign rules of law into the Sharia especially in matters of personal law. Such intrusion of foreign law to the Sharia or customary law was propagated by colonialists who held that foreign (Western/English/French) law was superior to the Sharia or customary laws and procedures. Morris (1970) gives an example of such an
administrator, a former Attorney-General in the Colonial Nigeria. The Attorney-General once remarked that:

Monogamy is intimately connected with civilization in its highest form. If the estate of a monogamist is subject to the Native law of inheritance, his effort to lead the life of a civilized man will not survive to the next generation (Ibid; 7-8).

As noted by Morris (1970:6) the attitude of such colonialists hampered the application and development of the Sharia. The notion that English law is superior to the Sharia or the African Customary Law is not only racist but does not hold water.

The definition of who constituted a Muslim adversely affected the application and development of the Sharia. Different colonial administrators and laws defined the term Muslim differently. For instance, in Algeria, the Colonialists defined a Muslim according to the French Law as only those Muslims who were born Muslims and had embraced the Islamic religion. The definition applied by the French colonialists in Algeria excluded those who were converted to Islam. The new converts were to be subject to their native or French Personal laws instead of the Islamic Law. Muslims who opted to be conferred the "civil status" through the
French assimilation process were allowed to opt out of the domain of the Islamic Law. The practices were opposed by Muslims because they were un-Islamic (Achike 1971). The French colonialists should have borrowed a leaf from countries such as India, Sudan, Pakistan and Egypt which allow a person who professes the religion of Islam to be subject to the Islamic law. In Kenya, mere conversion to Islamic religion does not legally change the de cujus personal law of the individual (see Chapter Five). However, such individuals normally inherit in accordance with the Islamic Law of Succession since matters of inheritance are dealt with by the office of the Kadhi among the Muslims. The rulings can however be overruled by a higher court on appeal in Kenya because the Kadhi Court are/were considered as part of the regular judicial hierarchy (see Chapter Five).

Non-Muslim legal officers sometimes presided over legal matters related to the Islamic Law. Such cases normally involved High Courts and Courts of Appeal in different parts of colonial and post colonial Africa. Some of the non-Muslim legal officers presiding over Islamic Law were not conversant with the Sharia. In some cases, such legal officers portrayed a bias against the Islamic Law and procedure thereby affecting negatively the application and
development of the Sharia. For instance, in Francophone Africa, French Colonial Judges presided over cases involving the Sharia with Muslim Qadar sitting only as assessors in the courts. British judges also presided over cases involving the Sharia in India. Such foreign judges sometimes portrayed ignorance of the Islamic law as noted by Anderson (1959). The main reasons for such miscarriage of Justice were the fact that such Judges did not have adequate legal training in the Sharia law and procedure and in some cases looked at the Sharia from a Eurocentric point of view. Anderson notes that "Some of the cases decided by the courts in Kenya and by the Court of Appeal for Eastern Africa were illuminative and controversial from the point of view of Islamic law" (1970:70).

Miscarriage of justice was evident in a case involving Fatuma Binti Muhamed bin Salim vs Muhamed bin Salim (1952) A.C.I. The court of Appeal in this case held that a Shafi Waqf in favour of the founders two daughters and their children in perpetuity and in the event of their total extinction for the benefit of certain other relations or failing them, or three Mosques was void, on the ground that the court was bound by the privy council decision in the case of Abul Fata Vs Russomoy (1894)22 I.A. 76, and by the Appeal Court own decision in Said bin Muhamed bin Kassim,
The decision of the privy council in the case of Abul Fata Vs Russomoy (1894) 22 I.A. 76 has been criticised and recognized universally as contrary to pure Sharia (Anderson 1970:96-7). This case was later virtually reversed in India by the Mussalman Waqf Validating Act, 1913. Considerable evidence was produced later to show that the courts decision was contrary to Muslim authorities. In Zanzibar, the Waqf validating Decree, 1946 also had reversed the Abul Fata vs Russomay case. The other main problem was that the Waqf in question in East Africa was created by a Shafi Muslim while the privy council decision made in India concerned the Hanafi Law. There is a lot of difference in the Law of Waqf between the Shafi and Hanafi schools. It was therefore contrary to natural justice for the Eastern Africa Court of Appeal to be bound by the Privy Council decision which had been based on a different school of law from that of Eastern Africa. Anderson (1959) blames the miscarriage of justice on the problem of shortage of personnel conversant with the Islamic legal system among the members of the Privy Council and in the Court of Appeal. Miscarriage of justice also took place in certain cases in several parts of Africa where foreign judges not conversant with the Islamic legal system
were presiding over cases involving the Sharia in the Court of Appeal and other subordinate courts (Ibid 1959 and Nigeria 1989:27).

The colonial Governments in general are credited for tolerating and respecting the Sharia especially in places where Islam was the predominant religion of the local people. Scholars such as Richardson (1969:110) are of the opinion that the colonialists did not want to antagonize the Muslims for the sake of public security.

The cautious attitude adopted by the colonialists in several parts of Africa gave rise to positive growth and application of the Sharia. The best example of non-interference of the colonialists with the Sharia was in Northern Nigeria. Northern Nigeria as a result witnessed one of the best areas in terms of growth and application of Sharia. The latter aspect is affirmed by Anderson who notes that "...Islamic law was more extensively followed and enforced in Northern Nigeria than anywhere else in the world except in Arabia" (1970:3).
In the Kenyan and Zanzibari protectorate, the British and Sultan's Court exercised a dual jurisdiction\(^1\). The British Courts had jurisdiction in all cases in which the plaintiffs or defendants were British subjects or British protected persons or subjects of foreign powers who had agreed thereto or were subjects of any Christian power not represented by a consul in Zanzibar. The Sultan's Courts on the other hand had jurisdiction over all other cases not represented by the British courts (see above). The Sultan's Court initially applied the Islamic Law and procedure in both personal status and public laws among the Muslims (Anderson 1970:58). The extent of the application of the Sharia was later limited to personal status laws (see below).

Persons domiciled in the protectorate of Kenya as distinct from those in the colony were subject to the Sultan's Court if they were Muslims. Non-Muslims in the protectorate of Kenya were in most cases presumed to be British protected persons and, therefore, under the British Courts.
The jurisdiction of the Courts of the Sultan was adversely affected by the 1923 British Subordinate Courts Order and also by the Zanzibar Courts Decree of the same year. Section 7 of the Zanzibar courts decree (1923) limited the application of the Sharia to civil and family legal matters. Before the promulgation of this Decree in 1923, the Sharia courts also applied the Islamic criminal Law and the Law of evidence. The British subordinate courts order of 1923 allowed the application of English criminal law and law of procedure. The later aspect had the effect of replacing the application of the Sharia in criminal law and the law of procedure. Appeals from the Sultan's courts hitherto proceeded to the Court of Appeal of Eastern Africa and finally to the Privy Council.

The British Subordinate Courts Order of 1923 and the Zanzibar Courts Decree of the same year contradicted Section 7 of the 1923 Courts Decree which declared that "in all civil matters, the law of Islam is hereby declared to be the fundamental law of the protectorate". The English law replaced the Sharia in regard to matters of criminal law and laws of evidence and procedure. Thus, even in civil matters involving the Islamic law, the English law of evidence and procedure was to be applicable to the detriment of the Sharia. However, Anderson (1956:71) and Lobban (1987:35)
note that the Kadhis largely disregarded the Decrees and Orders which had displaced the Sharia and continued to apply the Islamic Laws of Evidence and Procedures. The most unfortunate aspect about the steps taken by the Kadhis in disregarding the promulgations unfavourable to the Sharia is that a court higher than the Kadhi's could dismiss their rulings on appeal. Muslims in the protectorates of Kenya and Zanzibar were unhappy with the British Subordinate Courts Order of 1923, the Zanzibar Courts Decree of 1923 and other successive promulgations which eroded the extent of the application and development of the Sharia.

4:4:0 The Experience of The Muslims in the Kenyan Colony

In the Colony of Kenya, the Muhammedan (Muslim) Courts exercised jurisdiction over indigenous Muslims and Arabs in all matters of personal and family law. The Muhammedan (Muslim) Courts did not exercise jurisdiction over British Muslim subjects such as Indian immigrants. The latter subjects were governed by the ordinary British courts which normally applied the English law (Fitzgerald 1931).

The application of the Sharia in the Colony of Kenya was explicitly authorized by several promulgations. For instance, the Muhammedan (Sic) Marriage, Divorce and
Succession Ordinance, empowered the Kadhi Courts or the Supreme Court in Kenya and East Africa to apply the Islamic Law among Muslim litigants. The Kadhi courts in Kenya and Zanzibar were considered as part of the regular judicial hierarchy. Thus, the Kadhi Courts were subject to the ordinary system of appeals. The Chief Kadhi in Kenya was allowed to sit in the Supreme Courts but only as an assessor in cases involving the Islamic Law. The application of the Islamic Law in the colony was limited to matters of succession, marriage and divorce. Miscarriage of justice was feared in the Supreme Court of East Africa where non-Muslim judges presided over cases involving the Islamic Law (Anderson 1970).

Muslim Courts were in operation over most of the East Coast of Africa even before the British Protectorate was declared in East Africa. The Muslim Courts were under the authority of the Sultan of Zanzibar. The Sultan of Zanzibar was recognized as the ruler of most of the coastal areas prior to the declaration of the British Protectorate in East Africa (Anderson 1970; Lobban 1989).

The Sultan of Zanzibar granted concession to the British East African Association regarding his territories on the mainland from Vanga to Kipini in May 1887. This concession
provided that judges were to be appointed by the association or its (association) representatives subject to the Sultan's approval but the Kadhis were to be appointed by the Sultan himself. A similar concession was granted to the Imperial British East Africa (IBEA) Company, on the 9th of October 1888. On the 3rd of August 1889 an agreement was reached between the IBEA Company and the Sultan concerning the Sultan's territories North of Kipini. The latter agreement has article 2 providing that the possessions were held by the company as His Highness the Sultan's representatives or agents and that they were to be administered according to the Sharia. The agreement allowed the retention of the Sultan's flag, liwalis, Alkalis and Kadhis. When the British Government took over the control of the protectorate of East Africa from the IBEA Company in 1895, the New Commissioner emphasized that "all cases and law suits between Natives will continue to be decided according to the Sharia along the coast which was to remain under the sovereignty of the Sultan" (Anderson 1970:84). The then Commissioner also promised to respect the Kadhis and the Ulama, and the Sharia (Anderson 1970; Jaffer O.I.).

The earliest regulation which provided for the application of the Sharia was the Native Courts Regulation of 1897. This regulation was promulgated by the East Africa
Order-in-Council of 1897 which empowered the Commissioner, with the consent of the Secretary of State to "make rules and orders for the administration of justice in Native Courts" (Anderson 1970:82-83). Muslims were placed under the category of the Natives.

The East Africa Order-in-Council of 1897 has article 3 providing that Muslims domiciled under the domain of the Sultan of Zanzibar were to be governed by the Sharia in matters related to criminal, civil and personal status laws. The East Africa Order-in-Council (1897) however, excluded Muslims in the Colony of Kenya from being under the jurisdiction of the Sharia law and courts in as far as matters related to civil and criminal laws were concerned. Muslims in the Colony were only governed by the Sharia in matters related to divorce, succession and marriage. Article 57 of the same order authorized the High Court to apply the Islamic Law and custom in deciding matters related to divorce, succession, and marriage brought before it among Muslims. The aforementioned promulgations facilitated the application and development of the Sharia in East Africa.

The application and development of the Sharia was however, hindered by some promulgations such as Schedule III of the Courts Ordinance. The Schedule III of the Courts
Ordinances allowed the establishment of Courts subordinate to the High Court. As a result of the aforementioned schedule, Kadhi's, Murdir's and Liwali's Courts were to be subordinate to the High Court. Although such courts were at par with ordinary subordinate English Courts, the Kadhi's, Murdir's and Liwali's Courts could be over-ruled by a higher court. This led to instances of miscarriage of justice because the judges sitting in the Court of Appeal sometimes were not conversant with the Islamic Law as was evident in Abul Fata Vs Russomoy (22 I.A. 76) in India and also in Fatuma Muhammed Vs Muhammed bin Salim Bukhshuwen (1952) A.C.I in East Africa (Anderson 1970; Fitzgerald 1931).

The jurisdiction of the Kadhis Courts in Kenya was also expressly limited by the Courts Ordinance of 1931, Section 17 which provided that such courts were to deal with matters of personal status only. As a result of the promulgation of the ordinance in 1931, the Islamic Law was only applicable to the Muslims in matters related to succession, divorce, marriage and waqf in the Colony of Kenya (Anderson 1970; Fitzgerald 1931).

The British colonial courts sometimes failed to have a clear cut distinction between the Kenya Colony and the Protectorate leading to conflicts of law. The British
colonial Judges in some instances treated the Kenyan Colony and Protectorate as similar leading to legal problems as was evident in Fatuma binti Muhammed bin Salim Vs Muhammed bin Salim (152) A.C.I. In this case the Court of Appeal for Eastern Africa and the Privy Council failed to make a distinction between the Kenya Protectorate and Kenya Colony leading to a miscarriage of justice (Anderson 1970). The aforementioned case originated in the protectorate but was treated as if it originated from the colony. The application of the Sharia along the coast (protectorate) was wider in scope than in the Colony (see above).

The principle ordinance which covered succession issues among Muslims in the Colony of Kenya was the Muhammedan Marriage, Divorce and Succession Ordinance of 1920. The ordinance allowed individuals who contracted marriages in accordance with the Islamic Law or were issues of such marriages to inherit or be inherited according to the Islamic law. Any ordinance or rule of law to the contrary was disregarded. The ordinance failed to cover Muslims who may have been Islamized through conversion but had not undergone a marriage through the Islamic Law. Thus, individuals Islamized through conversion could legally loose their inheritance rights. They cannot be inherited in accordance to the Sharia as a result. Kadhis disregarded
Conflicts between the Islamic Laws and the English law hindered the application and development of the Sharia in the colonial and post colonial Kenya. For instance, the Sharia does not recognize the doctrine of the binding authority of precedents. The English law, on the other hand, binds courts to follow decision made previously. Thus, a court could be bound to follow a decision wrongly or unjustly made previously by a court in accordance to the English law (Anderson 1970:98).

The application of the Sharia was also hindered by the use of English Law of Evidence and Procedure which was applied even when the litigants were Muslims tried under the Islamic law. This led to a number of problems related to miscarriage of justice as was evident in Baraka binti Bahnrisi Vs Salim Bin Abed Busawadi (1939) 20 K.L.R. The judge in this case disregarded the Islamic rules of Evidence and Procedure. This was contrary to a previous case which had held that Section II of the 1931 Courts Ordinance had allowed the application of the Sharia rules of
Evidence and Procedure in the protectorate. Conflicts over interpretations of the promulgation led to miscarriage of justice in cases involving the Sharia. The Islamic rules of Evidence and Procedures should have been applicable in cases involving the Sharia in order for justice to have taken place (Anderson 1970).

In spite of the fact that the custody and guardianship of children is part of the personal status laws, the Kadhis Courts were not given jurisdiction over such matters. The reason given for the exclusion of the Sharia from jurisdiction over the custody and guardianship of children was that the aspect was not covered by the 1920 Muhammedan Marriage, Divorce and Succession Ordinance. This aspect created problems among Muslims as was evident in Hamisi bin Ali Vs Mariamu binti Ali (1929) 12 K.L.R. 51 and also in Nana binti Mzee Vs Muhammedan Hassan (1932) 20 K.L.R. (Anderson 1970; Fitzgerald 1931). The Kadhi Courts should have handled the cases involving custody and guardianship of children since the law applicable on such issues among the Muslims is the Sharia. All personal matters must be governed by the Islamic Law among the Muslims (see Chapter Two).

Conflicts and contradictions over the application of the Sharia were evident in the High Court of Kenya in relation
to the custody of children. The Court of Appeal for Eastern Africa held in Muhammed Hassan Vs Nana binti Mzee (1943) II E.A.C.A. 4 that "questions of guardianship of children are part of common English law and have been always determined by the English Courts.....". This assertion contradicts an earlier decision made by the High Court in East Africa in Mbaraka bin Diwansap Vs Hamsini bin Jumbe Kimemeta (1927), II K.L.R. 56 which held that the Islamic Law would apply among the Muslims in relation to custody of minors (Anderson 1970). The main issue which arises in regard to the aspect of custody and guardianship of children is whether the English Law had legally ousted the Islamic Law in relation to Muslim litigants. Anderson (1970:106) states that "no enactments had ousted the Islamic law in matters dealing with the custody and guardianship of children". In respect to the same aspect, the English Courts did not prove that the Islamic Law was contrary to justice and equity in regard to the issue of guardianship and custody of children. The Islamic Law should have been the law applicable in regard to guardianship and custody of children since this aspect is part of the personal status matters.

The various laws of succession in existence in Kenya before July 1st 1981 were borrowed from India. The laws borrowed included the Indian Succession Act (1865) and the
Probate and Administration Act of 1881. The former act was applicable to the Europeans while the latter Act was applicable to the Asians. Each African community in Kenya was governed by its Customary Law of succession while Muslims were governed by the Islamic Law of succession (Contran 1969). The enactment of the law of Succession Act in 1981 witnessed the replacement of the Statutory Succession Act and other diverse Customary Laws of succession in Kenya. These Laws were applicable from the colonial period to 1981 July 1st when the Kenyan government enacted the controversial Law of Succession Act (Contran 1969; Kenya 1980).

The 1920 Muhammedan Marriage, Divorce and Succession Ordinance which governed Muslims in relation to succession, divorce and marriage aspects was adopted to form the current Muhammedan Marriage, Divorce and Succession Act (Contran 1969; Kenya 1980).

The controversial Law of Succession Act came into effect on July 1st 1981. It was to be applicable to all Kenyans. Muslims in Kenya opposed its application on them leading to their exemption from the jurisdiction of the Law of Succession Act in December 1990. As a result, Muslims are again under the jurisdiction of the Muhammedan Marriage,
Divorce and Succession Act which was in existence before the enactment of the Law of Succession Act on July 1st of 1981 (see Chapter Five).
Endnotes

1. The coastal area of Kenya (the ten mile strip) unlike the rest of the colony of Kenya was considered as part of the protectorate of Zanzibar. The Courts of the Sultan of Zanzibar which applied the Islamic law had jurisdiction over the Muslims in the Protectorate of Kenya and Zanzibar. The Islamic Laws of evidence, procedure and criminal were enforced in their entirety among the Muslims in the protectorate of Kenya and Zanzibar until 1923 when the British Subordinate Courts Order and Zanzibar Courts decree were promulgated. Henceforth, the application of the Islamic law was limited to civil matters. It (Sharia) however continued to be considered as the fundamental law of the protectorate until the post colonial period in Kenya.

2. Liwalis, Alkalis and Kadhis are titles used to refer to Muslim legal officers. During the colonial era, they presided over cases involving the Islamic law especially in matters related to personal law status. Liwalis and Alkalis courts were normally subordinates of the Kadhis Court. The Chief Kadhi is the head of the office and Court of the Kadhi in Kenya. In the colonial period, Kadhi and Liwali courts were categorized as courts of second class while Murdirs courts were of third class. Liwalis and Mudirs were only in existence along the coastal region of Kenya (Protectorate).
CHAPTER FIVE

5:0 THE RESPONSE OF THE MUSLIMS TO THE LAW OF SUCCESSION ACT

5:1:0 Introduction

This Chapter analyses the response of the Muslims to the Law of Succession Act. The Chapter begins by examining and analysing the views held by the proponents of the Law of Succession Act. The Chapter also analyses the response of the Muslims to the Law of Succession Act. Finally, the Chapter examines the reasons which led to the exemption of the Muslims from the Law of Succession Act.

The following thesis is adopted by the Chapter. That it was imprudent of the Kenyan Government to subject Muslims to the Law of Succession Act; that Muslims were informed by their faith, economic, social, political and legal factors in their response towards the Law of Succession Act; and that the Law of succession Act contradicts the Sharia.

5:2:0 Background To The Problem Related To The Law Of Succession Act

The late President of the Republic of Kenya, Mzee Kenyatta, appointed the Commission on the Law of Succession on the 17th of March 1967 (Kenya Gazette Notice No. 1095 of
The Commission submitted its report to the President on the 3rd of September, 1968. As a result of the deliberations carried by the Commission on the Law of Succession, the Law of Succession Act came into being. The draft bill on the Law of Succession was passed by the National Assembly in 1972 (*Kenya Gazette* Supplement No. 32 of 1972). However the Law of Succession Act remained in Statute books from 1972 up to July 1st 1981 when it became operational after the consent given by President Moi (*Kenya Gazette* Legal Notice No. 93 of 1981).

The Law of Succession Act was meant to have a "Universal" application to all cases of intestate and testate Succession among the Kenyans. The "universal" application of the Law of Succession Act on the Kenyans elicited a lot of conflict and controversy from diverse Communities and Religious Groups (Kuria 1981; Matano 1981; Shee O.I.).

Since 1967 when the Commission on the Law of succession was appointed, Muslims in Kenya; (a) waged a protracted opposition to the Law of Succession Act, (b) were unanimous when they were stating that the Law of Succession Act threatened to undermine the base of their religious beliefs and their way of life, (c) several Muslim groups came together regardless of their social, political and sectarian inclinations and worked in co-operation to present a united
position aimed at exempting Muslims from the "uniform" Law of Succession Act (Bakari 1989:3; Jaffer O.I, Matano 1981, Shee O.I).

5:3:0 The Views Of The Proponents Of The "Uniform" Law Of Succession Act

Proponents of the "uniform" Law of Succession argued that the existence of a variety of Succession Laws caused problems such as of conflict and administration. This view was held by the Commission on the Law of Succession which argued that "the existence of different Laws of Succession within the same territorial legal jurisdiction necessarily causes problems" (Kenya 1980: paragraphs 37-38). The Commission cited problems such as of conflicts between the Laws and of administration of the Laws of Succession. The Commission further argued that the problems were compounded by inter-racial and inter-tribal marriages and urbanization. Former Attorney-Generals, Messrs Charles Njonjo and John Kamere were of the same opinion (Contran 1969; Nairobi Times 16/8/81; Kenya 1980). The Commission on the Law of Succession failed to note that conflicts caused by the former diverse Laws of Succession were caused by poor draftsmanship (of the laws). A solution to the problem of the conflict of the succession laws lays on the redrafting
of the Laws and not in the introduction of the "Uniform" Law of Succession as was recommended by the Commission.

The administration of a "Uniform" Law of Succession may be easier and cheaper in terms of personnel and capital as noted by the Commission on the Law of Succession. However the Commission failed to note that it is quite difficult and sometimes impossible to administer unpopular Laws such as the "Uniform" Law of Succession Act. The Kenyan Government failed in its attempt to subject Muslims to the unpopular Law of Succession Act because it failed to respect their religious beliefs and practices.

The proponents of the "uniform" Law of Succession also argue that such a Law is an essential pre-requisite to sound economic development. This view was held by a former Attorney-General, Mr. Charles Njonjo who argued that "the Success of Kenya's Land registration programme depends to a large extent upon the application of a "uniform" Law of Succession (Contran 1969:6) Proponents of this position held the view that a uniform Law of Succession would accelerate economic growth. In relation to this aspect they (proponents of the Law of Succession Act) opposed the subdivision of land as advocated by the former various Laws of Succession. They further argued that the former diverse
Laws of Succession (see Chapter Four) were meant for traditional type of property and thus had become "archaic" and difficult to apply. An example of property which was "not catered for" by the former diverse Laws of Succession is given by Patel (1969:227) who argued "that house Leases and bank accounts were not catered for by the former different Laws of Kenya" (Sic). Contrary to the assertions of the proponents of this view, the Islamic Law of Succession caters for both movable and immovable properties. The issue of conflict between "modern" and "traditional" types of property has never arisen in any Succession dispute involving the Islamic Law of Succession. Patel (1969) did not document any case of law involving conflict between "modern" and "traditional" types of property in relation to the Islamic Law of Succession.

The commission on the Law of Succession argued that the different communities of Kenya are not "radically" different from one another. It noted in its report that "a remarkable measure of similarity in the Laws of Succession of various communities exist in spite of the differences in matters of detail" (Kenya 1980: Paragraph 60 of the commission report). The argument of the Commission was therefore, far fetched because there exists radical differences between the Islamic Law of Succession and other Laws of Succession. There are
also remarkable differences between Laws of Succession of various Communities in Kenya. The imposition of a "Uniform" Law of Succession on the Kenyans on account of similarity between the Laws is absurd. The commission failed to show in what respect different Laws of Succession are similar.

The imposition of the Law of Succession Act on the Muslims on account of similarity of Laws of Succession is opposed by Kuria (1981:2). Kuria (1981:2) is of the view that "the interaction between the Muslims and other Kenyans are not the kind that could have produced a common view of life to be given effect by a uniform Law like the Act". Kuria (1981) further argues that the Muslims, the Asians and the Europeans have not formed a common homogeneous community with the same culture, social life, expectations and lifestyle. The imposition of the "Uniform" Law of Succession on the Kenyans was bound to face opposition from different groups such as Muslims and proponents of African traditional heritage.

The Commission on the Law of Succession aimed at a "uniform" Law of Succession which was compatible with the African way of life and which was not based on any foreign model (Kenya 1980:3). This aim though laudable was bound to cause conflicts. In the first place it failed to appreciate
that there exists remarkable differences between African customary Laws of Succession and that of the Islamic Law. The aim also presupposes that the African customary Laws in existence were incompatible with the African way of life (Sic)!. The "Uniform" Law of Succession Act in actual fact reflects more of western way of life than the African way of life (see Kuria 1981).

The commission on the Law of Succession also held that a "uniform" law of Succession would be a catalyst to national unity. This view was proved wrong by the Law of Succession Act. One cannot think of any other piece of legislation which has threatened national unity as much as the Law of Succession Act. Muslims in Kenya felt that the imposition of the "Uniform" Law of Succession was an example of interference with their religious way of life. This aspect was perceived by many of the Muslims as discrimination against them. Several Members of Parliament supported the Muslims in the latter call for the respect for the Sharia in 1967. Muslims were opposed to any move by the Kenyan Government to subject them to a "uniform" Law of Succession (The National Assembly Official Report - 3rd May 1967). Among the Members of National Assembly who supported the Muslims in their opposition to the "uniform" Law of Succession were Messrs Jaramogi Oginga Odinga, Martin
One of the causes of destabilisation in the North Eastern Province of Kenya is believed to be the perceived discrimination against the Muslims by the successive regimes in Kenya (The National Assembly Official Report 3rd May 1967; Makokha 1979). Members of National Assembly of Kenya in 1967 accused the Somalia Government of spreading propaganda to the effect that the predominantly Christian Government of Kenya was disregarding (read discriminating) the Kenyan Muslims (The National Assembly Official Report of 3rd May 1967). The imposition of the "uniform" Law of Succession on the Muslims was tantamount to discrimination against them because it interfered with their religious beliefs and practices.

The views forwarded by the Commission on the Law of Succession and the proponents of the "Uniform" Law of Succession in relation to the need for a "universal" Law of Succession in Kenya are unacceptable to the Muslims. Muslims could only have accepted the "uniform" Law of Succession Act if it was wholly drafted to Suit the demands of the Sharia. The uniform Law of Succession has several aspects which are totally unacceptable to the Muslims.
because it conflicts with the Sharia (see below).

5:3:1 The Reaction Of Non-Muslims Towards The Islamic Law Of Succession In Kenya

An examination of the reaction of some non-Muslims towards the Islamic Law of Succession portrays ignorance and mistrust towards the Sharia and Muslims respectively. Many of the non-Muslims interviewed portrayed a bias against the Muslims and Islam. They portrayed lack of appreciation and understanding of the Muslims way of life. Non-Muslims in most cases look at the Muslims way of life from a christian point of view. For example, many of the non-Muslims do not comprehend why the Islamic Law of Succession is considered by the Muslims to be part and parcel of their religious beliefs and practices. Majority of the non-Muslims therefore cannot comprehend how the "Uniform" Law of Succession would infringe on the Muslim's freedom to Worship if subjected to it. This ignorance was also portrayed by the Commission on the Law of Succession and a former Attorney-General Mr, Joseph Kamere (Daily Nation 3/9/1981; Kamere 1982; Kenya 1980:3).

The Commission on the Law of Succession recommended that "a Secular Law be passed which was capable of keeping up with the rapid development of Modern Society" (Kenya 1980:
paragraph 66 of the Commission's Report). This recommendation was in response to the Muslims contention that the Islamic Law cannot be changed or reformed by secular laws. The Commission on its part held that the Islamic Law of Succession is applied in its pure religious form in Kenya. The Commission did not however indicate the reasons as to why the application of the Islamic Law of Succession in its pure religious form should call for its replacement or reform. The Commission failed to note that the Islamic Law of Succession is applied in accordance with the tenets of Islam (see Chapters Two and Three).

The Commission on the Law of Succession argued that Muslims in Kenya have not taken into account the "Modern" reforms that have been introduced in several countries in the Middle East, North Africa and Asia (Kenya 1980:12). It's argument shows lack of appreciation and knowledge on how reforms in the Sharia are carried by the Muslims in an acceptable way (see Chapter Three). Muslims unanimously rejected the proposal of the Commission which called for a replacement of the Islamic Law of Succession with a Secular Law. Such a move would have the consequence of breaking the commandments of God which bind Muslims to the Sharia (Maududi 1978:147). Reforms in the Sharia can only be effected by Muslims using Islamic principles such as of
talafiq (see Chapter Three).

A former Attorney-General, Mr. Joseph Kamere argued that the main "defect" under the Islamic Law of Succession is that a non-Muslim cannot inherit the property of a Muslim. He further contended that this issue tended to work "injustices" in case of the Coastal Communities which are largely but not wholly Muslim especially among the Digo, Duruma and Giriama (Nairobi Times 16/8/81). Mr. Kamere however failed to note that the Islamic Law of Succession provides for testamentary disposition of up to one third of the net Estate of the deceased. This legacy is supposed to take care of those who are excluded from inheritance on grounds such as of religion (see Chapter Two). In certain cases the one third legacy is more than the actual share of individual Muslim heirs. Most Muslims with non-Muslim relatives or friends make use of the one third bequeath provision to make up for the latter's inability to inherit (Jaffer O.I; Shee O.I; Kanyeki O.I).

Some non-Muslims such as the former Attorney-General, Mr. Joseph Kamere were of the opinion that the Islamic Law of Succession had "conflicts" and "defects" arising from its draftsmanship. An example of the "defects" on the law as outlined by Mr. Kamere was its "inability" to determine who
is to be governed by the Islamic Law of Succession (Nairobi Times 18/8/81). The Islamic Law of Succession applies to the Estate of Muslims by virtue of Section 4 of the Muhammedan Marriage, Divorce and Succession Act. This act provides that;

Any person who contracts a Marriages in accordance with the Muhammedan Law after or before the commencement of the Act and where the issue of any such Marriage or Marriages dies after the commencement of this Act the Law of Succession applicable to the property both movable or immovable of any such person shall be in accordance with the principles of Muhammedan Law, any Act or rule of Law to the contrary not withstanding (Kenya 1989; Chapter 156).

Mr. Kamere was opposed to the provision which allowed non-Muslim issues of a Marriage contracted in accordance with the Islamic Law to be governed by the Islamic Law of Succession. He argued that such issues would be disinherited as a result (Nairobi Times 18/8/81). As noted above such issues can inherit their Muslim relatives through a bequest made in their favour (See also Chapter Two).

Muslims are opposed to some provisions of the above cited Act (Cap. 156 of the Laws of Kenya). The Act uses Marriage as the only basis for one's qualification to inherit in accordance with the Islamic Law of Succession. Muslims
would like a redrafting of Section 4 of the Muhammedan Marriage, Divorce and Succession Act. The redrafted section of the Act would have reference to marriage(s) omitted or included together with reference to profession of faith (Islamic). The redrafted section of the Act might simply state that "where any person has made a profession of Islamic religion, the Law of Succession applicable to the property ...... shall be in accordance with the principles of Islamic Law, any Act or rule of Law to the contrary not withstanding". Such a redrafted Act would cater for the interests of intestate Succession involving Muslim converts who are not covered by the Muhammedan Marriage, Divorce and Succession Act. As it exists currently this Act is only applicable to the Muslims on the basis of Marriage (see above citation). Muslim converts may be disinherited or may have their property devolving in an un-Islamic manner due to the poor draftsmanship and lack of foresight on the part of the draftsmen of the Act.

Some non-Muslims held the opinion that Kenya being a secular state should not have religious Laws provided for in the constitution. A former Deputy-Speaker of the National Assembly, the late J.M. Seroney held that opinion. Former Attorney-Generals Messrs Charles Njonjo and Joseph Kamere were also of the opinion that the "Uniform" Law of
Succession must be subjected to all Kenyans regardless of their religious affiliations (Contran 1969; Nairobi Times 16/8/1981:11/10/1981, The Standard 11/9/81). Proponents of this view failed to appreciate the fact that the Islamic Law of Succession is an integral part of Muslims's beliefs and practices. To force Muslims out of the Islamic Law of Succession is tantamount to denying them their freedom to worship which is enshrined in the Kenyan constitution. Matters of Succession cannot be separated from the Muslims religious beliefs and practices since Islam is a wholistic religion.

Proponents of the "Uniform" Law of Succession argued that the Act is fairer than the Islamic and Customary Laws of Succession because it only allows a spouse and her children to inherit an individual who dies intestate. The "Uniform" Law of Succession Act provides for equal division of an estate of the deceased among the surviving children where one of the spouses dies intestate or where a widow remarries (Kenya 1980 : recommendations numbers 31 and 33). But proponents of the "Uniform" Law of Succession however failed to appreciate the fact that Islam stresses the Spirit of Sharing as opposed to the "Uniform" Law of Succession which lays emphasis on the division of property on a very limited category of heirs. Many of the deserving relatives of the
deceased are denied the right to a portion of their relative's fortune by the Law of Succession Act. In some cases, some of the deceased's relatives may even be equally deserving to inherit as his children or the wife. Such deserving relatives may include parents of the deceased (Jaffer O.I; Kanyeki O.I; Khalifa O.I.).

One has to understand and appreciate the underlying philosophy behind the Islamic Law of Succession and how it is applied before he or she could make judgement against it as it has happened among some proponents of the "Uniform" Law of Succession (see above). One also needs to understand the theory of the application of the Sharia for him or her to appreciate the importance of the Muslim's Law of Succession (see Chapter Two).

5:4:0 The Response Of The Muslims Towards The Law Of Succession Act

5:4:1 Introduction

The Law of Succession Act elicited a lot of conflict and opposition from the Muslims. Muslims were unanimous in their decision that they did not have anything to do with the Law of Succession Act because it threatened to undermine the base of their religious beliefs and practices. Muslims
held that the "Uniform" Law of Succession could not be subjected to them as to do so would be tantamount to asking them to abandon their faith. Their argument was that the Islamic Law of Succession is divinely inspired and thus cannot be replaced by any secular law in conflict with it (Jaffer O.I; Bakari 1989:3; Matano 1981; Shee O.I).

Muslims actively and unanimously demanded for a total exemption from the Law of Succession Act. All the divergent groups of the Muslims both Shia and Sunni presented a common and united view after working in co-operation. Senior Civil Servants, Academics, Lawyers and Spiritual leaders played a leading role in articulating the position of the Muslims, vis-à-vis, the Law of Succession Act.

The Muslim Community unanimously opposed the application of the "Uniform" Law of Succession on them. Since the Commission on the Law of Succession was set in 1967, the Law of Succession was not enforced on the Muslims because they rejected all attempts at subjecting them to the Act. Muslims continued to apply the Islamic Law of Succession between 1967 and 1990 in spite of the fact that the Law of Succession Act was in operation after its enactment on July 1st 1981. The Government of Kenya never realized its goal of enforcing the Law of Succession Act on all Kenyans.
Several Muslim pressure groups, organizations and individuals sent petitions and Memoranda to Presidents Kenyatta's and Moi's Regimes since the year 1967 when the Commission on the Law of Succession was appointed. Some of the pressure groups and organizations which were in the forefront in opposing the application of the "Uniform" Law of Succession on the Muslims were (a) the Jamia Mosque Committee (b) the Supreme Council of Kenya Muslims (c) Muslim members of the National Assembly (d) Young Muslim Association et al. On top of drafting several Memoranda and sending them to the Presidents, Muslim pressure groups and individuals successfully used the media to spell out their position and also to raise public awareness about the plight of the Muslim community, vis-a-vis, the Law of Succession Act (Bakari 1989; Matano 1981; Shee O.I.; SUPKEM 1982).

The Commission on the Law of Succession notes in its report that Muslims arguments were unanimous and were forcefully put forward (Kenya 1980). Muslims argued that the Islamic Law of Succession is divinely ordained in the Holy Quran and is consequently incapable of change (see Chapter Two). They further argued that any change, however small, in the Islamic Law of Succession would contravene
Section 22 (1) of the Constitution in that it would encroach on Muslims right to manifest, propagate, teach, practice or observe the Muslim religion (Kenya 1980:1 and 1989; Kuria 1981; SUPKEM 1982).

During the deliberations on the Law of Succession under the "guidance" of the Commission on the Law of Succession, Muslims regardless of their gender, social and academic background presented their position in thousands (Kenya 1980; Bakari O.I; Jaffer O.I; Jahazi O.I). The position of all the Muslims was that the Islamic Law of Succession was divinely inspired and thus, it could not be replaced by a secular law, especially when the latter is in conflict with the Sharia (see Chapter Three).

Kenyan Muslims demonstrated rightfully to the Government that the Law of Succession was unsuitable to them. It is unfortunate that the successive regimes in Kenya since 1967 refused to listen to the wishes of the Muslims until 1990 when they were exempted from the Law of Succession Act. Muslims feel that they were not given a fair hearing by both the Commission on the Law of Succession and the Government of Kenya (Jaffer O.I; Matano 1981; Shee O.I). An academic, Mr. S. Rutto was of the opinion that democratic principles were not evident during the debate between the Muslims and
the Attorney-General over the Law of Succession Act (*Nairobi Times* 11/10/81).

All the Muslims were of the position that their objection to the Law of Succession was a matter of defending their religion (*Kenya* 1980). Muslims declared that they would not obey the "Uniform" Law of Succession because it undermined the authority of the Holy Quran (*SUPKEM* 1982). Mr. Muhammed Amana, a former Organizing Secretary of KANU and three former members of the National Assembly, Messrs Mohammed Soba, Abdi Mohammed Sheikh and Jaafar Sheikh Ali opposed the Law of Succession Act arguing that it is impossible for one to remain a Muslim if he or she is subjected to the "Uniform" Law of Succession. To compel the Muslim Community to abide by the law of succession would be tantamount to violation of the freedom to worship which is guaranteed in the Kenyan Constitution (*Daily Nation* 3/9/81; *The Standard* 4/9/81).

5:4:2 The Constitutional Factors Informing Muslims In Their Response To The Law Of Succession Act

Muslims were informed by several legal factors in their response to the Law of Succession Act. The Law of Succession Act contradicts the Kenyan Constitution in
several respects. Muslims pointed the contradictions to the Government with an aim of being exempted from the application of the "Uniform" Law of Succession on them.

One of the major contradictions of the "Uniform" Law of Succession Act with the constitution of Kenya pointed by the Muslims was in relation to Section 3 of the Constitution. Section 3 of the Constitution states that any law that contradicts the Constitution without first making necessary amendments to the Constitution becomes void. The imposition of the Law of Succession Act on the Muslims contradicted the provision in the Constitution which allows for the establishment of Kadhi Courts. Section 66 (5) of the Constitution provides for the existence of Kadhi Courts which "shall extend to the determination of questions of Muslim Law relating to personal status such as marriage, divorce and inheritance in proceedings which all parties profess the Muslims religion" (Kenya 1989). The Kadhi Courts have jurisdiction which extend to matters of personal status law such as of inheritance among the Muslims. Section 179 Subsection 3 of the Kenyan Constitution allows the Kadhi Courts to apply the Islamic Law of Succession in relation to inheritance among the Muslims (Kenya 1989). The Law of Succession Act was illegally imposed on the Muslims because Section 179 subsection 3 of the Kenyan Constitution had not
been annulled or amended. The application of the "Uniform" Law of Succession on the Muslims was, therefore, null and void (Achieng 1984; Kanyeki O.I.; Kuria 1981:24; Kenya 1980:4; Orengo O.I.).

Conflicts related to the protection of fundamental human rights as enshrined in the Constitution were created by the "Uniform" Law of Succession. Such fundamental human rights include the freedom of worship which is guaranteed by Section 22 (1) of the Constitution. This Section (22 (1)) of the Constitution gives the Muslims the right to propagate, teach, observe and practice their religion. The imposition of the "Uniform" Law of Succession on the Muslims amounted to gross erosion of the freedom to worship because the Islamic Law of Succession is an integral part of the Muslims' worship (see Chapter Two). Muslims' Constitutional rights were as a result encroached upon by the Kenyan Government (Achieng 1984:1; Kenya 1989; Kuria 1981:4; Mutunga O.I.; SUPKEM 1982).

Muslims also submitted that the "Uniform" Law of Succession infringed upon the constitutional guarantees enshrined under Section 78 of the Kenyan Constitution. The National Assembly is prohibited from passing laws which contradict the guarantee(s) enshrined under Section 66 and
of the Kenyan Constitution. The Uniform Law of Succession Act was passed by the National Assembly in 1972 (Kenya Gazette Supplement No. 32 of 1972). The passing of the Law of Succession Act by the National Assembly contradicted Section 66 and 78 of the Constitution because Section 82 (4) allows Muslims to apply their personal law(s). Section 82 (4) of the Constitution provides for the existence of different Laws of Succession and Marriage. Muslims further argued that the views and interests of all the Muslim groups are taken care of by the provisions under Section 4 of the "Muhammedan Marriage, Divorce and Succession Act. The passing of the Law of Succession Act by the National Assembly was therefore unconstitutional (Kuria 1981; Kenya 1989; SUPKEM 1982):

Kuria (1981:24) was of the opinion that the National Assembly did not have any power to enact the Law of Succession Act in 1972 because it failed to first amend relevant Sections such as 66, 78 and 82 (4) of the Constitution. The latter Sections protect individuals rights such as freedom to worship. Kuria (1981:24) further alludes that the Kenyan courts should be asked to decide whether Parliament had the power to amend the provision that protects fundamental human rights.
The Law of Succession Act also contradicted Section 26 (1) of the Constitution. The latter Section of the Constitution prohibits the enactment of laws which are discriminatory either in themselves or in their effects. The Law of Succession Act had the effect of discriminating against the Muslims. Muslims were required to be subject to a legislation which went against their faith. The Islamic Law of Succession is an integral part of Muslim worship. Subjecting Muslims to the Law of Succession Act was tantamount to interfering with their freedom to worship and discriminating against them (Kenya 1989; Kuria 1981; Mutunga O.I.; SUPKEM 1982).

The main ground for the Muslims opposition to the Law of Succession Act was that the Islamic Law of Succession is protected from statutory interference by Sections 22 (1), 26 (1), 66, 78, 82 (4) and 179 of the Constitution. The fact that the Islamic Law of Succession is an important aspect of the Islamic religious beliefs and practices make it to be protected by the cited Sections of the Kenyan Constitution. The cited Sections of the Constitution were not annulled or amended before the enactment of the Law of Succession Act. The Law of Succession Act also contradicted the Judicature Act of 1967 which stipulates that "Jurisdiction of the High Court and of all Subordinate Courts shall be exercised in
conformity with the Constitution". The Judicature Act also allows the High Court and Subordinate Courts to be guided by "the African Customary Law in civil cases which one or more of the parties is subject to it or is affected by it in so far as it is applicable and it is not repugnant to justice and morality or inconsistent with any written law". The Judicature Act, therefore, allows the application of the Islamic Law of Succession to the Muslims who are subject to the Sharia in matters of personal law. These aspects rendered the application of the Law of Succession Act on the Muslims null and void. The Constitution is superior to any other piece of legislation (see Section 3 of the Constitution of Kenya).

Muslims also felt that the imposition of the "Uniform" Law of Succession on them was against the constitutional guarantees made in 1962 when the present day constitution was being negotiated. During the formal transfer of the East African Protectorate from the B.E.A. Company to the East African Protectorate on the 1st of July 1895, both the Sultan of Zanzibar and the representative of the British Government had made a declaration which states:

All affairs connected with the faith of Islam will be conducted to the honour and benefit of the religion (Islam). . . . and his (Sultan) wish is that everything should be done in accordance with Justice and law.
This agreement made in 1895 between the Sultan of Zanzibar and the British Colonial Government was binding to the independent Kenyan Government in accordance with the constitutional agreement made in 1962.

During the negotiations for the Constitution of Kenya in 1962 between the representatives of the (a) British Colonial Government, (b) of the people of Kenya and (c) the Sultan of Zanzibar, Muslims were assured that their fundamental rights would in future be protected and preserved by the successive independent Kenyan Governments. Freedom to worship was one of the rights of the Muslims supposed to be preserved and protected. The imposition of the "Uniform" Law of Succession on the Muslims was, therefore, contrary to the guarantee made between the representatives of the "Government" of the independent Kenya, the British Colonialists and the Sultan of Zanzibar. This aspect should be considered in relation to the importance of the Islamic Law of Succession to the Muslim religious beliefs and practices (Jaffer O.I; Kuria 1981:3-4).

Jaffer (O.I) and Kuria (1981:3-4) further contend that, it was due to political problems related to the existence of
Kenya as a Nation and those of the guarantee of fundamental human rights that led to the inclusion of Sections 66, 78 and 82 (4) in the Constitution (see above). Prior to the time of attainment of Kenyan independence from the British Colonialists, Muslims were expressing fears that fundamental human rights could be interfered with by the successive independent Governments in Kenya. Muslims needed constitutional guarantees to protect their rights as a result. Kuria (1981:5) was categorical that "Muslims stopped to clamour for Secession due to that guarantee". The enactment of the "Uniform" Law of Succession Act and its enforcement on Muslims was a breach of these guarantees.

The independent Kenya Governments under the late President Jomo Kenyatta and President Moi failed to honour the political and constitutional guarantees made to the Muslims in 1962. The violation of the rights of the Muslims was practiced in spite of their constitutional protection from interference (see Kenya 1989: Sections 22 (1), 26 (1), 66, 78, 82 (4) and 179 of the Constitution of Kenya). The latter Sections of the Constitution were disregarded by both the 1967 Commission on the Law of Succession and the Government when the Law of Succession Act was imposed on the Kenyan Muslims.
It is quite clear that it was a constitutional breach and infringement of individual rights for the Kenyan Government to have enforced the "Uniform" Law of Succession to the Muslims. The Government of Kenya must have realized the mistake it had done in relation to the enforcement of the "Uniform" Law of Succession on the Muslims when it exempted them from the Law of Succession Act in 1990.

5:4:3 Muslims Response To The Conflict Between The Islamic Law And The Law Of Succession Act

Muslims were informed by their religious beliefs and practices in their response to the Law of Succession Act. The Law of Succession Act contradicted the Sharia in a number of aspects. Muslims held that individuals must neither permit what God has forbidden nor forbid what He has permitted. Muslims maintained that the "Uniform" Law of Succession Act restricted considerably a number of aspects otherwise allowed by the Sharia and in other respects had permitted what is explicitly prohibited by the Sharia. The imposition of the "Uniform" Law of Succession on the Muslims amounted to an abrogation of the Sharia. Muslims were required to abandon the Sharia in relation to inheritance, a practice which is unacceptable to them (Muslims) (see Chapters Two and Three).
The gravity of the problem caused by the imposition of the "Uniform" Law of Succession on the Muslims is noted by Anderson (1969:19) who states that "the Muslim world knows no parallel to such a wholesale abandonment of the Islamic principles except in Turkey where the Swiss Civil Code was substituted for the Sharia in regard to family law as a whole" (see also Chapter Three). The Commission on the Law of Succession noted in its report that Muslims were unanimously opposed to the "Uniform" Law of Succession (Kenya 1980, paragraph 47). The imposition of the "Uniform" Law of Succession was, therefore, against the wishes expressed by the Muslims during and after the deliberations of the 1967 Commission on the Law of Succession (Bakari O.I.; Kenya 1980; Shee O.I).

The Commission on the Law of Succession should have been guided by the earlier Commission on the Law of Marriage and Divorce in Kenya which had adopted a proposition stating;

We thought there should be minimum interference with religious and customary practices in general, that no one should be required by law to do anything which is forbidden by his religion or tribal custom but we consider that the law may properly restrict or prohibit the doing of acts which religion or custom may allow (Anderson 1969:5).
The Commission on the Law of Succession had failed to appreciate the importance of religion and customary practices in matters related to succession.

The main area of contention between the Muslims and the proponents of the "Uniform" Law of Succession was Section 5 (1) of the Law of Succession Act. The controversial section of the Act allows an individual to opt out of the "Uniform" Law of Succession Act by way of making a will stating how she or he would like her or his property to devolve. The main problem of the provisions of Section 5 (1) was that Muslims were required to make wills in order for them to have their property devolve according to the Islamic Law of Succession. The Commission on the Law of Succession failed to appreciate that majority of the Muslims are neither literate nor aware of the requirement to write a will. There was also a possibility that a Muslim might suddenly die intestate thereby leading to his or her property devolving in an un-Islamic way. Such a Muslim would have broken the commandments of God which require Muslims to abide by the Islamic Law of Succession (see Chapter Two). It was feared that majority of the Muslims would likely be ignorant of the provision of Section 5 (1) of the Law of Succession Act. The high rate of illiteracy among the Muslims was likely to affect the making of oral wills
provided for by the "Uniform" Law of Succession due to its limitations (Kenya 1980:23-24). The "Uniform" Law of Succession provides that oral wills are only permissible when two or more competent witnesses are in existence and when the testator dies within a period of three months from the date of making the will. This limits adversely the provision for oral wills which were likely to be applied by the majority of the people in Kenya as opposed to written wills. The short period allowed for the permissibility of oral wills would have affected the Muslims as they would all have wished to apply the Islamic Law of Succession (Kenya 1980:1989; Matano 1981).

Making of wills was encouraged during the time of the Prophet but this was merely carried as an explicit endorsement of the Islamic Law. The Islamic Law of Succession, for instance, provides for will making but one must not dispose more than one-third of the net estate by way of will (Bakari O.I; Shee O.I; see also Chapter Two).

There was no need to require Muslims to make wills specifying whether they want their property to devolve in accordance with the Islamic Law because they were all unanimously opposed to the application of the "Uniform" Law of Succession. It should have been obvious to the
Commission on the Law of Succession that Muslims wanted their estates to devolve in accordance with the Islamic Law of Succession (Kenya 1980; paragraph 47 of the Report).

The Islamic Law of Succession allows Muslim minors to own property. Such minors can thus legally be inherited or inherit. Such minors are legally not required to make wills. The Law of Succession Act discriminated against such minors because they could not opt out of the Law of Succession Act thereby denying them their inalienable right of having their property devolve in accordance with the Islamic Law of Succession (Kenya 1980:1989; Matano 1981; see also Chapter Two). The Commission on the Law of Succession recommended that an individual is capable of making wills when he has reached the age of eighteen years or sixteen years for females (recommendation number 2 of the Commission on the Law of Succession). This provision disadvantaged Muslim minors who may own property (see above).

The Law of Succession Act allows a court to have the power, on the application of the dependant, to vary the will of any testator who had failed to make provision for that dependant (Kenya 1980:30). However, an individual is free to dispose off any amount of his or her property by way of a will (Kenya 1980:19-20; Kenya Gazette Supplement No. 32
The latter provision of the "Uniform" Law of Succession runs counter to the Islamic Law of Succession which allows a testator to bequeath a maximum of one-third of the net estate (see Chapter Two). A Muslim cannot therefore disinherit his or her heirs by way of a will. The "Uniform" Law of Succession therefore contradicts the Sharia in this respect.

The Islamic Law of Succession does not allow a testator to bequeath heir(s) except among the Ithna Ashari Shii Muslims. However, a testator can bequeath a heir(s) if other heirs give consent (see Chapter Two). The Commission on the Law of Succession recommended that dependents should have the right to apply to the court to protect their legitimate interests but at the same time allowed a testator to bequeath any amount of property to a heir(s) (Anderson 1969:17; Kenya 1980: Recommendation number 26).

Recommendation number 34 of the Commission on the Law of Succession allows the substitution of a share(s) of a grandchild for his or her parents' share where the parent(s) predeceases the child's grandparent(s) (Kenya 1980). This provision runs counter to the Islamic Law of Succession. The Islamic Law of Succession does not provide for substitution of a share of a grandchild for his or her
deceased parent's share. Such a child can only inherit his or her grandparent through a bequest not exceeding one-third of the net estate in accordance with the Islamic Law of Succession. A grandchild can be an heir if her or his grandparent does not have a son(s) other than the predeceased (father of the grand child). Inheritance in the Islamic scheme of Succession is in accordance with the degree of proximity in relations (see Chapter Two).

The Islamic Law of Succession does not provide for the right of inheritance of the adopted children. Likewise, the Islamic Law provides that an illegitimate child can only inherit her or his mother and maternal relatives (see Chapter Two). The Commission on the Law of Succession recommended that illegitimate children would only inherit the property of their mothers and their maternal relatives while adopted children would inherit equally with the children of the adoptee(s) (Kenya 1980: Recommendation number 23). There is a difference, therefore, between the "Uniform" Law of Succession and the Islamic Law of Succession in relation to rights of inheritance of illegitimate children. Section 38 of the Law of Succession Act allows illegitimate children to inherit their natural "father" if they prove that they depended on the deceased. Such a provision is not provided for by the Islamic Law of
Succession (see Chapter Two).

Section 40 of the Law of Succession Act provides for equal division of assets of the deceased among their heirs. This provision contradicts the Islamic Law of Succession which is based on a system of "unequal" fixed shares (see Chapter Two). This Section of the Law of Succession Act (Section 40) provides for equal shares between sons and daughters of the deceased. The Holy Quran enjoins daughter(s) and the germane sister(s) to receive half as much as the share(s) of son(s) and germane brothers respectively (Sura 4:11). The divine origin of the Sharia binds Muslims to the Islamic Law of Succession (Muslim 1982; Pearl 1979:122).

Recommendations numbers 31 and 33 of the Commission on the Law of Succession vested a "discretionary" trust in the surviving spouse and provides that where a deceased has children, there should be an equal division of shares between them in relation to the estate of the deceased (Kenya 1980). The Law of Succession Act excludes the extended members of the family from inheriting the deceased if the latter was married. These recommendations are unacceptable to the Muslims whose Law of Succession is based on a more extensive distributive system of inheritance. The
spirit of sharing stressed by Islam is not given consideration by the "Uniform" Law of Succession. The Law of Succession Act excludes several relatives of the deceased whose shares are fixed and enjoined by the Holy Quran (S4:11 - 12; Bakari 1989; Pearl 1977; see also Chapter Two).

The Law of Succession Act allows a marriage to annul a will (Kenya Gazette Supplement No. 32 of 1972). The Islamic Law of Succession does not allow the revocation or the annulment of a will upon marriage of the testator (Anderson 1969:18). On the other hand the Law of Succession Act provides that a widow who remarries loses her share of the deceased estate. The estate in such a case devolve upon the surviving children. The Law of Succession Act also provide that where the deceased has left no surviving children or spouse, the estate of the intestate devolve upon his kindred in the following order of priority: (a) father or if dead: (b) mother or if dead: (c) brothers and sisters and any child or children of the deceased brothers and sisters in equal shares or if none: (d) half-brothers or half-sisters and any child or children of the deceased half-brothers and half-sisters, in equal shares or if none: (e) the relatives who are in the nearest degree of consanguinity upto and including the sixth degree in equal shares. Where none of the aforementioned heirs is in existence, the estate
devolves upon the state. It is then taken by the Government to the consolidated fund (Kenya Gazette Supplement No. 32 of 1972). These provisions runs contrary to the Islamic Law of Succession. A Muslim widow does not loose her share upon remarriage in accordance with the Islamic Law. A Muslim who dies intestate and has left no surviving relative would have his or her estate devolving to the Bayt-al-mal (see Chapter Two). It is, therefore, against the teachings of Islam for the state to take property belonging to deceased Muslims on the account of lack of surviving heirs as advocated by Law of Succession Act. Sheikh Shee (O.I.) states that the Kenyan Government through the office of the Public Trustee has in the past illegally taken property belonging to deceased Muslims on account of lack of heirs.

The Law of Succession Act provides for the division of the estate of the deceased who had married more than one wife to be according to the number of children in each "house". In the Law of Succession Act a surviving wife is added as an additional unit to the number of children (Kenya Gazette Supplement No. 32 of 1972). The Islamic Law of Succession on the other hand has fixed shares for wives and children in a polygamous marriage. The estate is not divided as per "house" in such a case nor do male and female children receive equal shares in the Islamic Scheme of
inheritance (see Chapter Two).

The intestate succession provided for by the "Uniform" Law of Succession would lead to a complete abandonment of the Islamic Law of Succession by the Muslims if it is imposed on them. Muslims, therefore, had no alternative other than to agitate for their exemption from the "Uniform" Law of Succession. The only other alternative left for the Muslims was for an amendment of Section 5 of the Law of Succession Act to require those who wish to have their estate to devolve in accordance with the "Uniform" Law of Succession to write wills to that effect. It is unlikely that any Muslim would write wills to that effect. Muslims called for a reinstatement of Section 4 of the Muhammedan Marriage, Divorce and Succession Act. The latter Act had been repealed by the Law of Succession Act with the enactment of the latter Act on July 1st 1981.

5:4:4 The Reaction Of The Muslims Towards The Law Of Succession Act

Muslims hold that they were under-represented in the Commission on the Law of Succession. This view of the Muslims was in contrast to the position held by a former Attorney-General of Kenya, Mr. Joseph Kamere, who had
asserted that the Commission on the Law of Succession was representative of the major communities and religious groups in Kenya (Kamere 1981). The late Mr. S.M. Akram, a former District Commissioner of Nairobi was the only Muslim member on the Commission (Kenya 1980). Mr. Akram was also the only member in the Commission to have opposed the imposition of the "Uniform" Law of Succession on the Muslims. Unfortunately, his views, like those of his fellow Muslims were not given a fair hearing by both the Commission and the Government until the year 1990 when Muslims were finally exempted from the "Uniform" Law of Succession Act. Mr. Akram's dissent from the recommendations of the Commission were noted in the report of the commission. He stated categorically that Muslims should not be subjected to the Law of Succession Act (Kenya 1980:16; Kuria 1981; SUPKEM 1981:2). The Commission's report therefore was not unanimous since the report (Paragraph 70) attests to the dissent of the late Mr. Akram. This aspect brings the question of whether the report of the Commission was comprehensive.

Muslims felt that the Law of Succession Act failed to respect their religious beliefs contrary to the promises made by the commissioners (Kenya 1980:3). The Commissioners on the Law of Succession and the Government failed to
appreciate the religious importance of the Islamic Law of Succession to the Muslims. Although the Commission on the Law of Succession noted that it fully respected the sincerity of the arguments of the Muslims, it however failed to act on their case. Muslims had made among other arguments, that any change however small in the Islamic Law of Succession would contravene Section 22 (1) in that it would encroach on their right to manifest, propagate, practice and observe their religion. In reply to the assertion of the Muslims, the Commission notes in its report that:

We do not agree that a change in the Islamic Law of Succession would in any way contravene Section 22 (1) of the Constitution. Section 22 (1) does not preclude Parliament from passing laws relating to matters of inheritance, whether or not such laws directly or indirectly affect the application of religious laws. We do not agree that the enactment of a Law of Succession which differs from the Islamic law would prevent Muslims from manifesting, practicing or observing the Muslim religion especially where there is freedom of testamentary disposition ......

(Kenya 1980:4).

The Commission on the Law of Succession failed to appreciate that Islam, unlike christianity, does not separate the secular matters from the religious. Matters of inheritance among the Muslims are considered to be of central importance in their religious beliefs and practices.
Muslims rejected the assertions made by a former Attorney-General, Mr. Kamere, to the effect that "freedom of worship is limited to either prayers to God or not to pray ...." (Kuria 1981:3). Mr. Kamere also stated that "Islamic Law was just like other customary laws in Kenya and was, therefore, subject to common laws of the country.... The Uniform Law, being opposed by Muslims catered for all communities in the country" (Daily Nation 3/9/1981). Mr. Kamere's arguments indicate that he is either totally ignorant of or arrogant toward the Islamic religious beliefs and practices. He failed to note that the "Uniform" Law of Succession offends the tenets of Islam and grossly contradicts the Sharia. The former Attorney-General should have known that the Islamic Law of Succession is an integral part of the Muslims worship and, therefore, protected by the Constitution of Kenya from statutory interference (see Sections 22 (1) and 179 of the Constitution of Kenya).

Muslims spoke against the introduction of the "Uniform" Law of Succession from the time the Commission was set up in 1967 and against the "findings" of the commission when its report was submitted and published in 1968. Muslims also opposed the introduction of the Law of Succession when it was first introduced in Parliament in 1970 and when the draft legislation was submitted and passed by the National
Assembly in 1972. When the Law of Succession was finally enacted on July 1st 1981, Muslims again unanimously opposed its imposition on them. Muslims all over the Republic spoke and acted loudly and spontaneously against the "Uniform" Law of Succession. Debates and protests against the "Uniform" Law of Succession Act are attested by the numerous statements and articles made and written by the Muslims in the daily press and news magazines between March 1967 and December 1990.

The position of the Muslims was that it is impossible for them to be inherited or inherit in accordance to the "Uniform" Law of Succession and at the same time remain Muslims. Muslims felt that their religious rights were violated and their faith eroded with the imposition of the "Uniform" Law of Succession on them. Professor Matano notes that the move to impose the "Uniform" Law of Succession on the Muslims was "undignified, oppressive and legally unsatisfactory" (Matano 1981:19).

The "Uniform" Law of Succession failed to respect the traditional customs and religious beliefs of the people of Kenya. The proponents of the African customary laws also opposed the "Uniform" Law of Succession (Kuria 1989). It failed for instance to appreciate the religious importance
of inheritance to the Muslims. The "Uniform" Law of Succession failed to be effective and capable of enforcement among the Muslims. It also undermined the base of the Muslims religious beliefs and practices.

The successful and protracted "battle" waged by the Muslims against the "Uniform" Law of Succession Act culminated in the exemption of the Muslim from the Act. President Daniel Arap Moi finally agreed to accept the demands of the Muslims in 1990. On the 12th of August 1990, President Moi asked Parliament to make necessary amendments in the Law of Succession with the aim of exempting Muslims from the "Uniform" Law of Succession Act. The National Assembly made the amendments in the Law of Succession Act in 1990. As a result, Muslims were finally exempted from the "Uniform" Law of Succession.

5:5:0 Factors Leading To The Exemption Of The Muslims From The Law Of Succession Act

The unanimous position and decision taken by the Kenyan Muslims to oppose the "Uniform" Law of Succession since the year 1967 to August 1990 made it possible for the Kenyan Government to realize the gravity of the issue related to the imposition of the Act on them (Muslims). The problem
related to the "Uniform" Law of Succession Act threatened National unity and security, thereby forcing the Government of Kenya to bow down to the demands of the Muslims in the year 1990. In this regard, Bakari states that "Muslims had adamantly refused to barter their cherished values and Islamic culture for a law that was against the spirit of Islam" (Nairobi Times 16/8/81).

Factors leading to the exemption of the Muslims from the Law of Succession Act can be linked to the "politics" of the country during the period 1989 to 1990. During and prior to the year 1990, the Kenyan Government was facing alot of opposition from various pressure groups and individuals. These pressure groups included the Law Society of Kenya (LSK), the National Christian Council of Kenya (NCCK), the Catholic Church and the Supreme Council of Kenya Muslims (SUPKEM). These groups were all in the forefront in opposing several "unpopular" state policies. The period (1989-1990) also witnessed the advent of multi-party politics in Kenya which was characterized by opposition of the Government from several quarters of the Kenyan population. By exempting the Muslims from the Law of Succession Act in the year 1990, the Kenyan Government wanted to elicit the support of the Muslim community in the wake of the unprecedented opposition to the Regime of
President Moi. The Minister for Culture and Social Services, Mr. Hussein Maalim Mohammed, is of the same opinion as he stated that the Law of Succession Act was repealed in 1990 at the advent of multi-party politics when KANU realized that it needed the support of the Muslims in order to win the elections (The Standard 18/2/1993). The question most Muslims wanted answered was why the Government took such a long period to realize that the Law of Succession was unsuitable to them.

Muslim policy makers including the politicians and high ranking civil servants may have prevailed upon the Government to exempt Muslims from the Law of Succession Act in 1990. Related to this aspect was the Muslims perceived feelings of being discriminated against by the successive post-colonial Governments of Kenya. The Minister for Culture and Social Services, Mr. Muhammed, stated that the Muslim community has been getting a raw deal from the Government since independence (The Standard 18/2/1993). Mr. Muhammed's sentiments were also echoed by Prof. Ali Mazrui who feels that issues of paramount interest to the Muslim community have been ignored by the Governments in Kenya since independence (Sunday Nation 14/2/1993). The failure of the Government to appreciate the importance of succession to the Muslims before 1990 was seen by the Muslim community
as a kind of discrimination against and neglect of the community (Weekly Review 26/2/1993). The National Union of Kenya Muslims (NUKEM) wanted the Kenyan Government to enquire into and solve the problems faced by the Kenya Muslims (Sunday Nation 21/2/1993). The neglect of the Muslims by the Kenyan Government is not only reflected in its imposition of the Law of Succession Act on them (Muslims) but sometimes also in economic and political spheres. For instance, the first development plan (1964-70) of the independent Kenya failed to incorporate the North Eastern Province (which is predominantly Muslim) in its development strategies (Makokha 1979:136). The failure to incorporate North Eastern Province by the Government in its first development plan was tantamount to discrimination against the Muslim residents of the area. Muslims also point out that the Kenyan Government has appointed only one Muslim Cabinet Minister since independence. Very few Muslims are also holding senior public offices in the Government leading to a feeling of discrimination against the Muslims (the Sunday Nation 14/2/1993; The Standard 18/2/1993; the Weekly Review 26/2/1993).

The Government of Kenya should have realized that the Law of Succession Act is concerned with aspects of law which affect intimately the lives, social morals, religious and
moral beliefs of people (Freud 1969:557). The ill-conceived imposition of the Law of Succession on the Muslims had caused the alienation of the community from the Government. Kasunnu and Salacuse (1967:64) had rightly remarked that the Law of Succession Act in Kenya was "ill-conceived in its application and was inadequately drafted, therefore, was anachronistic and conflicting in modern conditions". The Law of Succession Act failed to be effective and capable of being enforced to the Muslims due to its incompatibility with the Muslims' way of life. Policy makers in Kenya failed to note that for any law to be effective and capable of being enforced, it should respect the way of life of the people it is supposed to serve. The Law of Succession Act failed in this respect, thereby causing its opposition from the Muslim community in Kenya.
1. Estate is the movable and immovable property left by a deceased. The property left is then divided up among the people who are entitled to inherit from the deceased, i.e., heirs.

2. Section 5 (1) of the Law of Succession Act provides that every person who is of sound mind and not a minor may dispose of all or any of their free property by will. The same section allows an individual to declare by a will how succession to his or her estate shall devolve. In this regard, the said section of the Law of Succession provide that through a will, one can declare that succession to his or her estate shall be governed by a law of his or her choice. Muslims opposed these provisions because they could result to a conflict between the Law of Succession and the Sharia. For instance, property belonging to minors can not devolve in accordance with the Islamic Law of Succession since such minors are excluded from making wills by the Law of Succession. Muslims who may fail to write the will due to a problem such as ignorance, would have their property devolving in an un-Islamic way thereby breaking the law of God. A Muslim may die suddenly intestate thereby making his or her property devolving in accordance with a non-Islamic law in a case where the Law of Succession Act which would be applicable to the deceased in such a case.
CHAPTER SIX

6:0 CONCLUSIONS, OBSERVATIONS AND RECOMMENDATIONS

6:1:0 Conclusions

The foregoing study involved an examination of the response of the Muslims to the Law of Succession in Kenya. The study aimed at analysing the underlying factors informing Muslims in their response to the Law of Succession. In order to achieve our objectives, it entailed an examination of aspects such as (a) the structure and importance of the Islamic Law of Succession; (b) Muslims' response to the reforms in the Sharia; (c) the experience of the Muslims under varied colonial and post colonial legal systems and finally the reaction of the Muslims towards the Law of Succession Act.

The study demonstrates that the Sharia can only be reformed within the context of Islam. The study further demonstrates that any legislation which is not in conformity with the tenets of Islam is unacceptable to the Muslims.

The study further demonstrates that the British colonialists in Kenya respected the Sharia. Several ordinances introduced by the colonialists facilitated the
development and the application of the Sharia in the colonial and post colonial periods in Kenya. Thus the experience of the Kenyan Muslims under the colonial legal system was better than under the post colonial legal system.

The study concludes that the Law of Succession Act is at variance with the Sharia and is thus unacceptable to the Muslims. Muslims are uncompromising to the Law of Succession Act due to its infringement on the Islamic faith and practices. The study further reveals that religious, legal, social, political and economic factors were important in informing Muslims in their objection to the application of the Law of Succession Act on them.

6:2:0 Observations

It has emerged from the study that the Law of Succession Act is unacceptable to the Muslims. The proponents of the Law of Succession Act failed to note that the Islamic Law of Succession is of divine origin and therefore, incapable of change by man. The "Uniform" Law of Succession failed to respect the religious beliefs and practices of the Muslims. Proponents of the Law of Succession Act failed to realize that before any personal law can be accepted by the people it is supposed to serve, it must be just and capable of
being enforced. In that regard, the study revealed that the Law of Succession failed to be compatible with the Muslim beliefs and way of life. As a result, it was opposed by the Muslims.

The proponents of the Law of Succession Act failed to be guided by the principle of toler ance. This principle lacked on the part of the Commission on the Law of Succession and the Government of Kenya as they recommended and enforced the Law of Succession Act on the Muslims respectively. The proponents of the Law of Succession Act should have realized that imposing the Act on communities and religious groups such as the Muslims was a threat to National unity and to the security of the country.

It also emerged from the study that subjecting all communities and groups equally to the Law of Succession Act in Kenya was in bad taste when one considers the fact that Kenya is composed of a multiplicity of communities and religious groups. Each community or religious group should be allowed to be governed by personal laws of their choice as long as they (personal laws) are not contrary to "natural justice and equity".
The study revealed that the proponents of the Law of Succession Act had laudable and positive objectives but that the recommendations made in that regard rendered the Act to be incapable of being effective and enforceable. The shortcomings of the Law of Succession Act were as a result of its failure to respect the traditional customs and religious beliefs of the people it was supposed to be subjected to. The Commission on the Law of Succession should have noted that traditional customs and religious beliefs and practices have a very strong hold on succession among groups such as the Muslims and several African communities. The study also observes that Muslims would prefer to be governed by personal laws which are not alien but which respect their religious beliefs and practices.

It has emerged from the study that it was ill-conceived and unwise to impose the Law of Succession Act on all the Kenyans regardless of their cultural and religious backgrounds. Derrett (1970:65) had foreseen this shortcoming on the part of the Commission on the Law of Succession as he notes that "the commission on the Law of Succession attempted what was nearly impossible, namely to propose with reasons, a New Code of Succession Law for all Kenyans, irrespective of their race, religion.....". A "Uniform" Law of Succession Act can only be effectively
enforced where there is only one consolidated community which is the same culturally, linguistically, religiously and in respect to other ways of life. Great flexibility is needed in matters of personal status such as succession, even in areas with consolidated communities and cultural units.

The study also observes that the state should respect the freedom and fundamental rights of individuals and communities. The state should not interfere with such rights and freedom through legislations which are unpopular such as the Law of Succession Act. In this regard, the study notes that the Law of Succession Act was a constitutional breach and an infringement of the Muslim's rights and freedom to worship. This aspect was noted by President Daniel Arap Moi in August 1990 when he stated that the Law of Succession Act was in conflict with the tenets of Islam and therefore, requested the National Assembly to amend the Act with an aim of exempting Muslims from the Law of Succession Act (Daily Nation 13/8/1990).

Reforms or repeals of the personal status laws should only be introduced where it has been confirmed beyond reasonable doubts that such laws do not contradict the Constitution or "are opposed to natural justice". A repeal
or reform of personal laws should also reflect the wishes of the people they are supposed to serve through such ways as respecting their religious and traditional ways of life. Reforms and repeals of personal laws should be undertaken only after thorough referendums. Such referendums should respect the wishes of the people who are supposed to be served by the laws under discussion.

The study has demonstrated that the Law of Succession Act failed to respect Muslims' way of life. Muslims objected to the Law of Succession Act because it offended their religion which encompasses their way of life.

Finally, the study has observed that, Muslims, like other Kenyan citizens and religious groups, had every right to try to influence the direction of public affairs, especially in personal matters such as of succession.

6:3:0 Recommendations

The study has raised a number of questions which require further research. The present study confined itself to an examination of the response of the sunni Muslims to Law of Succession. It is, therefore, recommended that an
examination of the response of the Shia Muslims to the Law of Succession should be carried out. It is also recommended that an examination of the impact of African traditional customs and culture on the Islamic Law of Succession and vice-versa should be carried out. A follow-up research on the response of non-Muslims to the Law of Succession is also recommended. The latter aspect would show how different African communities and individuals reacted to the Law of Succession Act when the latter Act repealed the preceding various customary Laws of Succession. Such a research would also show the impact of the Law of Succession Act on the traditional/customary way of life in relation to succession.

The other main aspect which need to be addressed to is the aspect of the development and application of the Sharia during the colonial and post-colonial periods. Such a study would look at the extent and impact of the application and development of the Sharia on the Kenyan societies, vis-a-vis, colonial and the post colonial periods. This aspect would, for instance, show the impact and effects of legislations such as the Law of Succession Act on the development and application of the Sharia in Kenya. It may also show the impact of the development and application of the Sharia on the Kenyan societies.
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" 8th 1981
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KNA 13 PC/NYZ/3/18/29 Appointment of Kadhi (1957-60).

(B) LIST OF ORAL RESPONDENTS

The undermentioned were interviewed in the course of the study. The list is however not all inclusive. Some respondents, for instance, sought anonymity for various reasons.

Abdi Muhammed.

Abdillahi, Nassir.
Abdulrahman Ali.  

Ahmed N. Muhammed.  

Ahmed Khalif.  
Interviewed in Nairobi on 5.9.1991.

Aisha Abdi.  
Interviewed in Nairobi on 5.9.1991.

Ahmed Yusufu.  

Amin Muhammad.  
Interviewed in Mombasa on 15.11.1991.

Awadh M.  
Interviewed in Nairobi on 17.4.1993.

Badama, M.  

Bakari Mwakijana.  

Farida Muhammad.  

Gibson Kamau Kuria (Lawyer).  
Interviewed in Nairobi on 13.3.1993.

Jabali, M.  

Janet Kabeberi.  

Joseph Makokha (Lecturer).  

Josephine Achieng.  

Kamau J. Waweru.  
Mary Kamau.

Mtupa (Dr.) (Lecturer).
Interviewed in the course of the research in Nairobi.

Muhammed Bakari (Prof.) (Lecturer).
Interviewed in the course of the research in Nairobi.

Muhammed Jahazi.

Muhammed Mawana (Instructor, Islamic Religious Education, Vol 1).

Muhammed N. Abdi,

Murtaza Jaffer (Lawyer - Former Director, Kituo cha Sheria).

Nthamburi, Zablon (Prof.) (Lecturer).
Interviewed in the course of the research in Nairobi.

Orengo, J.O (Lawyer).

Ramadhan Salim.

Interviewed in Nairobi on 4.4.1993.

Swaleh Kanyeki (Lawyer).
Interviewed in Nairobi on 18.7.1991.

Willy Mutunga (Lawyer).
Interviewed in Nairobi on 18.11.1991.
### Glossary

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alim (Pl. Ulama)</td>
<td>A learned Person/Scholar.</td>
</tr>
<tr>
<td>Aswaba</td>
<td>(Agnatic relatives) - They are relations whose relationship is traced through paternal relatives.</td>
</tr>
<tr>
<td>Bayt-al-Mal</td>
<td>(Muslim treasury) - The place where the estate of Muslims who die without heirs is kept. The produce from the Bayt-al-Mal can be used for religious purposes such as Sadaqa. (See Sadaqa below).</td>
</tr>
<tr>
<td>Dhul-ardhami</td>
<td>Distant relatives (Kindred).</td>
</tr>
<tr>
<td>Fatwa (Pl. Fatawa)</td>
<td>A formal legal ruling/opinion/decree given by an official person appointed or at least competent to give such rulings/opinions. Such an official must be a learned Muslim and of sound mind.</td>
</tr>
<tr>
<td>Hadith (Pl. Ahadith)</td>
<td>Refers to the traditions of the Holy Prophet, Muhammad (PBUH). It includes the sayings and deeds of the Holy Prophet and his companions. The term Sunna is also used in the research synonymously with the term Hadith.</td>
</tr>
<tr>
<td>Hanbali School</td>
<td>One of the four Sunni Schools of law.</td>
</tr>
<tr>
<td>Hanafi School</td>
<td>One of the four Sunni Schools of law.</td>
</tr>
<tr>
<td>Hiba</td>
<td>The ordinary gift in Islamic law in contrast with Sadaqa which is a gift made with an aim of obtaining heavenly rewards. Hiba can be given to an individual at any time in the lifetime of the giver other than during the latters death sickness.</td>
</tr>
</tbody>
</table>
Ithna Ashari - (The twelvers) - Refers to one of the Shia sub-groups (sects) in Islam.

Kadhi/Qadi - The Sharia Judge/Magistrate. He is normally appointed by the Government to look after Muslims' affairs related to personal status law. During the colonial period in Kenya, the Kadhi Court was categorized as of second class.

Liwali - Mudirs and Liwalis were local government officials appointed as headmen and magistrates to look after Muslim Community affairs during the colonial period in the protectorate of Kenya and Zanzibar. They presided over cases involving the Sharia especially in matters related to personal status law. Liwali courts were categorized as second class courts while Mudir's courts were of third class.

Maliki - One of the four Sunni Schools of law.

Mosque - Muslim's place of worship.

Murdir - (See Liwali above).

Qadi (Pl. Qadar) - (See Kadhi above).

Qiyas - Analogical deduction.

Quran - Muslim's Holy Scriptures.

Sadaqa - Charitable gifts/Acts of charity such as giving of alms to the disadvantaged members of the society.

Shafii - One of the four Sunni Schools of law.

Sharia - Muslim Law/Islamic Law.
Shia (Shii or shiite) - One of the Muslim groups (sects).

Sunna (Pl. Sunan) - (See Hadith above).

Sunni - Followers of the Sunna or the traditions of the Muslim community based on the example of the prophet and the four rightly guided Caliphs. The Sunnis are the followers of the mainstream or orthodox Islam.

Sura (Pl. Surat) - A chapter of the Holy Quran.

Talfiq - Patching - It is a method used in Islamic law reform. A part or section of an Islamic school(s) of law or of a jurist is taken and combined with a part(s) of another school(s) to form a single view(s). Views adopted must conform to the tenets of Islam.

Ulama - (See Alim above).

Umma - Muslim community.

Waqf/Wakf (Pl. Awaqf) - Endowment.

Waqf ahri - Family endowment made for the benefit of the family of the endower.

Waqf Khayri - Public endowment - Public endowment can be made for the purposes of religion such as provision and upkeep of cemeteries, Mosques and for the benefit of the disadvantaged members of the society. Waqf is also regarded as an aspect of Sadaqa (See Sadaqa above).

Wasi - The executor or probator appointed by the testator to execute or probate a will. The Wasi probates a will on behalf of the legatee.

Wasiyya - Will.
Dear Madam/Sir

The researcher is conducting a research for a Master of Arts Degree Thesis titled "The response of the Muslims to the Law of Succession in Kenya (1920-1990)". This questionnaire is intended to help him in obtaining the views of Muslims and non-Muslims on the response of the Muslims to the law of succession. Your co-operation will be greatly appreciated. Any additional information can be written on separate paper(s) or space. Thank you.

1. Name ---------------------------------(Optional)
2. Occupation ---------------------------------
3. Religion ----------------------------------
4. Sex --------------------------------------
5. Highest level of Education attained ----------
6. a) Why is succession so important to Muslims?
   b) Are there any shortcomings of the Islamic Law of Succession? If yes, which and how do they affect Muslims?
7. a) In your opinion, did the British Colonial Government respect the Sharia in Kenya? If no, can you give some examples to show that the British Colonial Government did not respect the Sharia.

b) What are your views on the British Colonial Governments categorization of the law of succession into Hindu, African, Statutory and Islamic Laws of succession?

c) Why do you think the British Colonial Government was unwilling to impose a uniform law of succession on Kenyans in general?

8. a) Do you think the Sharia has been given a fair representation in the colonial and post colonial legal systems in Kenya? Why?

b) To what extent do you think the Sharia can be applied in our legal system? Give specific aspects which you think should be added in our legal system in relation to the Sharia.


b) Were the Muslims given a fair representation and hearing during the deliberations on the Law of Succession? Why?

c) Why was the "uniform" law of succession which was enacted in July 1981 not acceptable to the Muslims?

d) Were Muslims consulted before and after the drafting of the Law of succession Bill and Act? If yes, how and what was the impact of the consultations?
e) Are there any views of the Muslims which are reflected in the "uniform" law of Succession Act? If yes, which?

10. a) Is it possible to reform the Islamic Law of succession? If yes, how can it be reformed? If no, why?

b) What are your views on the reforms which were carried in some aspects of the Sharia in countries such as Sudan, Morocco, Turkey and Somalia?

11. a) Do you think the Islamic Law Succession is affected by other Islamic aspects such as Hiba (gift) and Wakf, since one can use these aspects to disinherit some of the heir(s). If yes, which are the safeguards used to avoid abuse of such aspects?

b) Is it possible to incorporate and apply Islamic legal aspects of other Sunni schools but which are opposed to the Shafii school? If yes, can this method be applied in Kenya or is it applied in cases where Muslims litigants would be favoured by opinions of schools other than Shafii in Kenya?

12. Which reasons, in your opinion, have led to the recent decision by the Government of Kenya to exempt Muslims from the "uniform" law of succession Act?

13. If you have any additional information to say on the law of succession or any other matter connected with the research, please do.
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QUESTIONNAIRE FOR NON-MUSLIMS

Dear Madam/Sir

The researcher is conducting a research for a Master of Arts Degree Thesis titled "The response of the Muslims to the Law of Succession in Kenya (1920-1990)". This questionnaire is intended to help him in obtaining the views of the Muslims and Non-Muslims on the response of the Muslims to the law of succession. Your co-operation will be greatly appreciated. Any additional information can be written on a separate paper(s) or space. Thank you.

1. Name ----------------------------------- (Optional)
2. Occupation -----------------------------
3. Religion -------------------------------
4. Sex -------------------------------------
5. Highest level of Education attained ------------

6. a) What is your attitude towards the application of Sharia in Kenya?

b) Do you think the Sharia is given a fair representation in the Kenya legal system? If yes, how? If no, why?
c) Which aspects of the Sharia do you think should be incorporated in the Kenyan legal system and which should not be incorporated? Why?

d) In your opinion, should the Government interfere with private or personal Law of the Muslims in areas like inheritance, marriage and divorce?

If yes, to which extent should it interfere with these laws? If no, why?

7. a) Was the Kenyan Government justified in setting the commission on the law of succession and the subsequent enactment of the law of succession in 1981? Why?

b) Which are the main shortcomings of the "Uniform" Law of Succession Act?

c) Why do you think Muslims were opposed to the "Uniform" Law of succession?

d) Were Muslims justified in their opposition to the Law of Succession? Why?

8. a) Are there shortcomings in the application of the "Uniform Law of Succession? Which?

b) Which are the main shortcomings of Islamic Law of succession if any?

c) Why do you think there have been very few or non-existence legal squabbles over succession among Muslims.
9. a) Which reasons, do you think contributed to the exemption of the Muslims from the "Uniform" Law of Succession?

b) Do you think it was fair for the Muslims to be exempted from the "Uniform" Law of Succession? Why?

10. Do you support the argument of a former Attorney-General, that a "Uniform" Law of succession would lead to Unity and rapid development in Kenya? Why?

11. If you have anything else to say about the Law of Succession or any other matter connected with the research, please do.