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# DEVELOPMENTS IN ISLAMIC FAMILY LAW: IMPLICATIONS FOR GENDER EQUALITY AND FREEDOM OF RELIGION IN KENYA

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*This paper discusses the major statutory and case law changes (positive and negative) which impacted the practice of Islamic family law (IFL) in the past 10 years. The beneficial modifications included the strong acknowledgement of IFL tenets in the Marriage Act, the Matrimonial Property Act and the Children Act. But this past decade also witnessed the apparent alteration of Islamic Inheritance Law through judicial interpretation. Similarly, a wrong interpretation of the principle of equality in the constitution and the Children Act have led some Muslim men to contest their wives' claims for child custody on account of the latter's inability to provide for the children. Through the lenses of multiculturalism, Muslim feminism and global critical race feminism, a purposive reading of the constitution and the literal reading of the statutes, this paper appraises these legal developments through the prism of the freedom of religion and gender equality.*

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## I. Introduction

The last 10 years have witnessed significant developments in the application of Islamic Family Law (IFL) in Kenya. The enactment of the Matrimonial Property Act,<sup>1</sup> the Marriage Act,<sup>2</sup> and the Children Act<sup>3</sup> has bolstered Muslims' spousal rights and those of their children. Moreover, the superior courts' increased recognition of the Kadhis' Courts' jurisdiction in children's cases<sup>4</sup> has facilitated the dual constitutional dictates of freedom of religion and speedy resolution of cases. Similarly, the publication of the Kadhis' Courts Bench Book in 2020<sup>5</sup> as well as the online reporting of Kadhis' courts' decisions on the Kenya Law website has made this intricate law accessible to many court users. But amid these positives, the Court of Appeal's decisions in 2019<sup>6</sup> which was affirmed by the Supreme Court in 2023<sup>7</sup> extended inheritance shares to children born outside marriage has unsettled the practice of IFL in the country. So has the wrongful interpretation of the constitutional and statutory provisions which give mothers and fathers equal responsibility to provide for their children.<sup>8</sup>

Both Court of Appeal decisions, for example, have laid bare an ongoing intolerance to the recognition of some IFL tenets. Since the enactment of the MPA in 2013, critics have labelled the inclusion of Islamic marital laws as unfavourable treatment of Muslim women.<sup>9</sup> Critics take the position that article 45(3) of the Constitution, which guarantees equality in marriage, must translate into identical shares of matrimonial property, thereby faulting IFL which pegs ownership of property in marriage to each spouse's contribution. Critics also fault the recognition of Islamic marriage, specifically, the legal recognition of polygamous marriage under the Marriage Act as discriminatory against Muslim women.<sup>10</sup>

1 (Cap 152) Laws of Kenya.

2 (Cap 150) Laws of Kenya.

3 (Cap 141) Laws of Kenya. This law was enacted in 2022. It repealed the initial 2001 legislation.

4 See the recent High Court decision in *AYM v HIK* [2023] KEHC 27191 (KLR).

5 On file with the author. Many IFL practitioners too have copies.

6 See *CKC & another (Suing through their mother and next friend JWN)* [2019] eKLR.

7 See *Fatuma Athman Abud Faraj v Rose Faith Mwawasi & 2 others* [2023] Civil Appeal No E043 of 2022 (Mombasa) (unreported), affirmed by the Supreme Court in *Fatuma Athman Abud Faraj v Rose Faith Mwawasi & 2 others*, SC Petition No.E035 of 2023 (decided 30 June 2025).

8 See The Constitution of Kenya 2010, Art 53(1); Children Act 2022, ss 31(2) (a), 32(1).

9 See IDLO and UN Women, 'Strengthening Gender Equality in Law: Mapping Discriminatory Laws against Women and Girls in Kenya' (IDLO and UN Women 19 April 2024) 39–40; Man-Kwun Chan and Annette Mbogoh, 'Strengthening Women's Voices in the Context of Agricultural Investments: Lessons from Kenya' (IIED Land, Investment and Rights Series, International Institute for Environment and Development and Kenya Land Alliance 2016) 19; Human Rights Watch and Federation of Women Lawyers (Kenya), 'Once You Get out, You Lose Everything': *Women and Matrimonial Property Rights in Kenya* (Human Rights Watch 2020) 24.

10 UN Committee on the Elimination of All Forms of Discrimination Against Women, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention: Eighth Periodic Report of States Parties Due in 2015 (Kenya)' [2016] UN Doc CEDAW/C/KEN/8, [30] [206]; Equality Now, 'Gender Inequality in Family Laws in Africa: An Overview of Key Trends in Select Countries' (Equality Now 2024) 58; IDLO and UN Women (n 9) 38.

While the majority of Muslim men and women celebrate Kenya's recognition of IFL as compatible with their right to freedom of religion and belief (FoRB), these ongoing debates call for elaboration of the place of the rights of women and children in IFL. This paper addresses this question from both the prisms of IFL and mainstream statutory family law. Through a purposive reading of the Constitution, a literal reading of relevant statutes and a thematic reading of the *Qur'an*, the paper exposes the conflicts (real and imagined) between IFL and mainstream statutory family laws. The paper then offers an understanding which a legal practitioner (both bar and bench) can employ to meet the ends of justice amid these conflicts.

The paper adopts the three minority theories of multiculturalism, Muslim feminism and global critical race feminism to support the continued operation of IFL tenets in the country. Guided by these theories, the paper argues that justice is plural. And for justice to reign in a plural society, like Kenya, minorities' perspectives must reflect in that society's normative structures.<sup>11</sup> Put differently, our laws must "relinquish their abstract rationality and incorporate minorities' perspectives."<sup>12</sup> Often, these mainstream statutory laws represent the majority views<sup>13</sup> which are either vestiges of Judeo-Christian values<sup>14</sup> or secular notions. By recognising the application of IFL, therefore, the mainstream statutory law respects the important religious values of Kenyan Muslims. Such recognition also allows both Kenyan Muslim men and women to observe their sense of sexual equality which may be different from the version which is understood as the Western-oriented or global ideal. As Barlas<sup>15</sup> and Nussbaum<sup>16</sup> opine separately, feminism exists too in religious communities.<sup>17</sup> But "religious people see the good reasonably differently."<sup>18</sup>

This paper is divided into 10 sections. Following this introduction, the paper first discusses four developments in the practice of IFL in the country over the last decade before demonstrating how these developments may be viewed as negative depending on one's understanding of the right to equality. Section two addresses the Court of Appeal's extension of inheritance to children sired outside marriage and the implication of this variation of the Islamic inheritance law to the Muslim community. Section three discusses the explicit recognition of polygamy by the

11 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Reprint, Clarendon Press 1996) 6.

12 Moza Ally Jadeed, 'The Inheritance Rights of Muslim Women in Kenya: Reality or Rhetoric?' (PhD Thesis, University of Nairobi 2020) 27.

13 Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 Int J Const Law 712, 719.

14 The Committee of Experts on Constitutional Review, 'The Preliminary Report of the Committee of Experts on Constitutional Review: Issued on the Publication of the Harmonised Draft Constitution' (17 November 2009) 42.

15 Asma Barlas, *'Believing Women' in Islam Unreading Patriarchal Interpretations of the Qur'an* (University of Texas Press 2002) xiii.

16 Martha C Nussbaum, 'A Plea for Difficulty' in Joshua Cohen and others (eds), *Is Multiculturalism Bad for Women? Susan Moller Okin with Respondents* (Princeton University Press 1999) 107.

17 See also Azizah al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women's Rights' (1997) 12 American University International Law Review 1, 3.

18 Jadeed, 'Muslim Women Inheritance' (n 12) 91.

Marriage Act and, implicitly, the Constitution by virtue of Article 45(4) which recognizes marriages concluded under traditional and religious systems, and the discomfort this presents for some women's rights advocates. Section four discusses the freedom introduced by the Matrimonial Property Act for Muslims to choose to manage their marital property in accordance with IFL. Section five laments the wrongful understanding of the principle of equal parental responsibility under Article 53 of the Constitution and the Children Act by Muslim husbands, which understanding results in denial of custody to wives when the latter are unable to maintain the children. Section six discusses how women's rights advocates, the Court of Appeal judges and Muslim men misconstrue the words 'equal' and 'equality' in the Constitution and relevant statutes to mean identical treatment instead of substantive equality. Section seven highlights the recognition of the Islamic *kafaalah* system as an alternative to adoption. Section eight heralds the publication of the Kadhis' Court Bench Book and the Kadhis' Courts Practice and Procedure Rules, and the reporting of the Kadhis' Courts decisions on the Kenya Law website. The paper suggests some recommendations to improve the practice of IFL and the observance of gender equality and FoRB in section nine, followed by the concluding section.

## II. Extension of Inheritance Shares to Children Outside Marriage

The Court of Appeal (CA) in 2019 ruled that children born out of wedlock can inherit from their deceased Muslim father. Seated in Mombasa, the three-judge bench in *CKC & another*<sup>19</sup> ruled unanimously that IIL did not apply in this case because the children were not Muslims. The CA thus remitted the case to the High Court to be adjudicated under the Law of Succession Act (LSA). And indeed in 2022, the High Court distributed the estate to the deceased's son and daughter in identical shares.<sup>20</sup> The court anchored its decision on sections 3(2) and 29(a) of the LSA, which identify children as the deceased's dependants and therefore automatic beneficiaries of his estate – regardless of the circumstances of their birth.<sup>21</sup>

Briefly the facts of this case were that SCH cohabited with a non-Muslim woman, JWN, for about 20 years and begot a daughter and a son. During their cohabitation, SCH and JWN lived in a house donated by SCH's father. SCH's father died in 2004 and SCH, his mother and brother became the administrators of this estate. SCH thus moved the Kadhis' court to determine the shares of the already identified heirs. But before the Kadhis' court could make its determination, SCH died. SCH was Muslim and was buried according to Islamic rites. SCH's brother next prosecuted the case to conclusion and the Kadhis' court determined SCH's share as 9.21% of his father's vast estate. The Kadhi's court also pronounced that JWN was ineligible to inherit

19 CKC (n 6).

20 *In re Estate of Chuba Bakari Hamisi (Deceased)* [2022] [37].

21 *ibid* [25]–[27] and [32]. Because the children's mother made no claim to the estate, the Court awarded her nothing.

SCH's share because she was never married to him. Consequently, her two children were also excluded from SCH's estate because they were born out of wedlock.

JWN contested the Kadhis' court decision before the Principal Kadhi on grounds that the decision was made without affording her a hearing. In addition, she argued that IIL did not apply in her case and that of her children because they were not Muslims. The Principal Kadhi maintained that the Kadhi's court had jurisdiction to hear the case because the relevant estate was of a deceased Muslim. Nonetheless, he allowed JWN and her children to petition the HC. The Court also placed a conservatory order which restrained the distribution of SCH's share and the eviction of JWN and her children from SCH's father's house. At the HC, JWN sued on behalf of her children. She pleaded that IIL was discriminatory and unconstitutional since it excluded the children and herself from inheriting SCH's share. She urged the HC to uphold the best interests of the children and to presume her as lawfully married to SCH.

The HC found that the exclusion of JWN and her children from SCH's estate was within the Constitution. The Constitution had limited its equality provisions in respect to the application of Islamic law. The Court also found the doctrine of presumption of marriage alien to Islam. In addressing the point of illegitimacy, the Court lamented that it was outrageous to refer to a child as such in contemporary times. But the Court felt that its hands were tied since the estate belonged to a Muslim and both article 24(4) of the Constitution and section 2(3) of the LSA which permitted the application of Islamic personal law were operative. The Court argued that were it not for these provisions, it would have ruled in favour of the children.<sup>22</sup>

It is this unfavourable decision that made JWN appeal to the CA. As observed above, the CA noted that the LSA – and not IIL – applied in this case because JWN and her children were non-Muslims. The Court observed that under articles 24(4) and 170(5) of the Constitution, IIL can only derogate from the right to equality if four conditions were met.<sup>23</sup> First, IIL only applies [according to article 24(4) of the Constitution] “only to the extent strictly necessary”. Second, IIL only applies [according to article 170(5) of the Constitution] “to matters of personal status, marriage and divorce and inheritance”. Third, IIL only applies if the “persons involved (...) profess the Muslim faith”. And finally, IIL only applies if “all the parties to the dispute (...) profess the Muslim faith and submit to the jurisdiction of the Kadhis' court”. To the Court, all these conditions were absent in this case.<sup>24</sup> Therefore, IIL could not apply to JWN and her children and derogate from their right to equality.

Importantly, the Court surmised that its approach was consonant with the dictates of constitutional interpretation under article 259(1), which requires that the constitution be interpreted in a manner that advances human rights and fundamental freedoms,

22 *In re Estate of CCBH (Deceased)* [2018] eKLR [27]–[29].

23 *CKC* (n 6) [8].

24 *ibid.*

and also permits development of the law.<sup>25</sup> The court stated that its interpretation of articles 24(4) and 170(5) was one that most favoured the observance of the right to equality and freedom from discrimination. The court argued that it was also an interpretation that developed the law because it gave effect to that right. According to the Court, this interpretation also promoted the values, purposes and principles of the Constitution; and advanced the rights and freedoms in the Bill of Rights. The CA therefore ordered that the High Court adjudicate SCH's estate under the Law of Succession Act and not IIL:

"because not all claimants to his estate are Muslims, and the appellants in particular, have not submitted to the jurisdiction of the Kadhi's court. If there are any other persons who claim to be dependants of (SCH) and entitled to inherit from his estate, their claims will be heard by the High Court together with that of the appellants."<sup>26</sup>

Similarly in *Faraj v Mwawasi & 2 others*,<sup>27</sup> the CA ordered that children sired outside marriage should inherit from their biological father but within IIL. To the Court, to deny such children the "benefit which accrues to other children born in wedlock on the basis of the "sins" committed by parents" is unjustified.<sup>28</sup> It becomes so because, according to the Court, it makes the Court participate in a clear case of discrimination. The Court further opined that article 53(1) (d) of the Constitution instructed a separation between children's rights and marital issues. The Court thus surmised this IIL tenet a harmful culture because it denied a child the right to parental care and protection on the ground of the marital status of the parents.<sup>29</sup> The Court next adopted the position in the CKC case discussed above and proclaimed that it was bound by the national values and principles in article 10 of the Constitution. Since these values include non-discrimination and protection of the marginalised, the Court said it was constrained to abhor the IIL tenet which discriminated against children on account of their parents' marital status.<sup>30</sup>

But an appeal was filed at the Supreme Court against the CA's decision in *Faraj*. The Supreme Court has since affirmed the judgment of the CA.<sup>31</sup>

#### **A. Impact of Extension of Inheritance Rights to Out-of-Wedlock Children on Islamic Family Law, Gender Equality and Freedom of Religion and Belief**

The position taken by the Supreme Court in *Faraj*, and the CA in CKC is a setback to the observance of IFL, gender equality and FoRB in the country. These decisions are insensitive to the religious belief of a majority of Muslims in the country who

<sup>25</sup> *ibid*.

<sup>26</sup> *ibid* [9]. Emphasis added.

<sup>27</sup> *Faraj* CA (n 7).

<sup>28</sup> *ibid* [61].

<sup>29</sup> *Faraj* CA (n 7) [62].

<sup>30</sup> *ibid* [65].

<sup>31</sup> *Faraj* CA (n 7).



hold that children born out of wedlock cannot benefit from the intestate estate of their biological fathers. Ideally, Muslims hold their inheritance law as exceptionally important to them<sup>32</sup> and their opposition to the introduction of a universal inheritance law which contained substantive provisions that conflicted with the Islamic law between 1965 and 1990 illustrates this fact.<sup>33</sup> Therefore, the impact of the judgments in these cases do not stop at the affected families. They transcended to the homes of many other Kenyan Muslims and threw them into disarray. Indeed, while issuing stay orders against the CA decision in *Faraj*, the Supreme Court observed that the appeal was a public interest one because its outcome would have “a significant bearing on the distribution of the estates of Muslims who die intestate”.<sup>34</sup>

The close sequence of the two CA decisions catapulted the Muslim leadership in the country to act and address the resultant “spirit injury”<sup>35</sup> to the Muslim community. Immediately after the *Faraj* decision by the CA in 2023, for example, the Supreme Council of Kenya Muslims (SUPKEM) and the Jamia Mosque Committee convened several Islamic institutions, leaders and Muslim lawyers to discuss a possible enjoinder of the Muslim leadership in a preferred appeal at the Supreme Court.<sup>36</sup> Earlier in 2025, the Nairobi Kadhis’ Court Bar-Bench Committee further organised a workshop to sensitize judges and magistrates on IIL. During the workshop, the Chief Kadhi spoke of confusion among Kadhis.<sup>37</sup> The Chief Kadhi indicated that several Kadhis wondered whether to follow IIL or the CA’s decisions as required by the doctrine of *stare decisis*. The Chief Kadhi thus pleaded with the judicial officers to be sensitive to IFL whenever such matters came before them.

The impact of the CKC decision was specifically felt by SCH’s mother and other mothers in her position since she was excluded as a beneficiary of SCH’s estate. Yet under IIL, a mother is a principal heir to her deceased’s son’s or daughter’s estate.<sup>38</sup> Principal heirs are those who never miss out in the distribution of the estate – unless a bar to inheritance exists.<sup>39</sup> According to *Qur’an* 4:11<sup>40</sup> (which is one of the three *Qur’anic* verses that enlists the inheritance shares),<sup>41</sup> when the deceased leaves a child, both the mother and father get a sixth share each. When the deceased leaves

32 Jadeed, ‘Muslim Women Inheritance’ (n 12) 84.

33 *ibid* 85–86.

34 *Faraj SC (Ruling)* (n 31) [13 iv].

35 This is pain, psychological and spiritual, felt by adherents of a particular religious belief following an unfair decision. The phrase was originally coined by Wing and Smith as they described the trauma of Muslim women in France after a hijab ban. See Adrien K Wing and Monica Nigh Smith, ‘Critical Race Feminism Lifts the Veil? Muslim Women, France, and the Headscarf Ban’ (2005) 39 UC Davis Law Review 743, 779.

36 The author was a Co-convenor of a Research Committee of volunteer Muslim lawyers who were working on the grounds for enjoinder to the appeal.

37 Abdulhalim Athman, “Islamic Law: an Introduction” (a Presentation made at the Workshop on the Islamic Law of Inheritance Organised by the Nairobi Kadhis Court Bar Bench at Radisson Blu Hotel, Upper Hill) (30 January 2025, Nairobi).

38 Jadeed, ‘Muslim Women Inheritance’ (n 12) 94.

39 *ibid* 118.

40 The first number in the citations from the *Qur’an* refers to a *surah* (chapter) while the second relates to an *ayah* (verse).

41 The other two are *Qur’an* 4:12 and 4:176.



no child, the mother gets a third, and the father gets two thirds. When a deceased leaves siblings but no father, however, the mother takes a sixth. The remaining estate then reverts to the siblings. In the instant case, SCH's father had died. SCH also left no legitimate children, but he had siblings. Thus, SCH's mother's stipulated share was a sixth of the estate, and the remainder should have gone to SCH's siblings.

But SCH's mother never claimed this share when the case was being reheard at the High Court. Even if she had claimed it, she would not have got the stipulated one-sixth. She would only have been entitled to claim as a dependant under section 29 of the LSA. Not being a surviving spouse or child of the deceased, she would need to prove that she was dependent on SCH immediately prior to his death.<sup>42</sup> Requiring her to prove dependency as a prerequisite to benefiting from her son's estate is unheard of in IIL. The IIL intestate shares are automatic. They accrue to a beneficiary (immediately upon the death of the deceased) by virtue of being in a designated category of family relationship to the deceased.<sup>43</sup> In essence while the LSA downplays the "innate familial proximity between the deceased and his or her mother,"<sup>44</sup> IIL reveres it, as it does the motherhood status.<sup>45</sup> In fact, IIL's inclusion of a mother and a father in its intestate matrix was deliberate. It was meant to obliterate the pre-Islamic Arabian culture that devalued the elderly.<sup>46</sup> God concludes *Qur'an* 4:11 by stating that: "[Y]e know not whether your parents or your children are nearest to you in benefit."<sup>47</sup>

## B. The Islamic Family Law Position

The CKC and *Faraj* decisions are a setback to the practice of IFL because they vary IIL, which law Muslims believe is specifically ordained by God in strict terms<sup>48</sup> and supplemented by the *Sunnah* (Prophetic Tradition)<sup>49</sup>. As a matter of fact, IIL is drawn from the *Qur'an* (the Muslim Holy Book), the Prophetic Tradition and "the jurisprudence of the first three Caliphs."<sup>50</sup> But the corpus of IIL is contained in the *Qur'an* particularly *Qur'an* 4:11, 12 and 176.<sup>51</sup> These three provisions instruct both testacy and intestacy.<sup>52</sup> The Prophetic Tradition, on the other hand, legislates on the

42 Law of Succession Act, (Chapter 160) Laws of Kenya, s 29.

43 See Jadeed, 'Muslim Women Inheritance' (n 12) 3–4; and 136–37 which explain the fractions as fixed by God and distanced from the vagaries of human relationships.

44 *ibid* 94.

45 See for example *Qur'an* 31:14 – 15; and 46:15. *Qur'an* 4:1 postulates that: "and reverence the wombs that bore you"; Abdullah Yusuf Ali, *The Meaning of the Holy Qur'an* (11th edn, Amana Publications 2001) 183.

46 Hafiz Ibn Kathir, *Tafsir Ibn Kathir (Abridged)*, vol 2 (2/10, 2nd edn, Dar-us-Salam Publications 2003) 392–93.

47 Ali (n 45) 187.

48 See Jadeed, 'Muslim Women Inheritance' (n 12) 136–37.

49 The Prophetic Tradition means three things: the Prophet's actions; sayings (commonly known as *ahadith*); and his tacit approval of the statements and actions of others.

50 Jadeed, 'Muslim Women Inheritance' (n 12) 107. These three caliphs were Abdullah bin Uthman (popularly known as Abu Bakr As-Siddiq), Umar bin Al-Khattab and Uthman bin Khaffan respectively. They reigned between 11 and 35 AH (ie 632 and 656 AD respectively).

51 Muhammad Muizz Abdullah and others, 'Illegitimate Child Inheritance: An Analysis from Syariah Perspective' (2023) 24 International Journal of Islamic Thought, 138.

52 Jadeed, 'Muslim Women Inheritance' (n 12) 107.

bars to inheritance among other matters.<sup>53</sup> These bars include illegitimacy.<sup>54</sup> Thus an illegitimate child cannot inherit from his or her biological father.<sup>55</sup> Nor would the father inherit from this child (son or daughter) should the child predecease him.<sup>56</sup> This child, however, can inherit from his or her mother and the mother's family members, and they too can inherit from the child if he/she predeceases them.<sup>57</sup>

The basis for these tenets lies in the meaning of family in Islam. In Islamic jurisprudence, lineage is determined through a valid marital union.<sup>58</sup> The Prophet is reported to have said: "*al-walad lil firaash* [the child goes to the (owner of the) bed on which he was born)".<sup>59</sup> This means that a child belongs automatically to the man in a lawful marital union with the mother of the child, biological paternity notwithstanding.<sup>60</sup> This rule addresses two possible situations. First, where a man in a lawful marital union sires a child with his wife – the child is automatically his. Second, where a woman in a lawful marriage nonetheless gets pregnant from another man, the child automatically belongs to her husband (the owner of the bed) – unless he disowns the child through an oath of *li'an* (ie accuses his wife of adultery).<sup>61</sup>

Put differently, when a man sires a child outside marriage – he (by the operation of the law) loses lineage with that child.<sup>62</sup> He thus becomes *ajnabiyy* (a stranger) to the child.<sup>63</sup> Consequently since this man has no familial relationship with the child, no inheritance rights ensue between them.<sup>64</sup> Indeed both *Qur'an* 8:75 and 33:6 stipulate that blood relatives have prime inheritance rights between them, but only in the context of a lawful marriage. Marriage is therefore the linchpin in inheritance questions and it is regarded as an act of worship.<sup>65</sup> In establishing a

53 Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oneworld Publications 2008) 25.

54 Other impediments are: difference of religion; responsibility for the deceased's death; and estoppel (when a person negates relationship with the deceased during his or her lifetime). See generally Hamid Khan, *Islamic Law of Inheritance: A Comparative Study of Recent Reforms in Muslim Countries* (3rd edn, Oxford University Press 2008) 48-56.

55 Nur Shadiq Sandimula, 'The Status of the Rights of an Illegitimate Child According to Mazhab Asy-Syafi'i Perspective on the Development of Islamic Family Law in Indonesia' (2019) 17 *Jurnal Ilmiah Al-Syir'ah* 121, 126; Abid Hussain, *The Islamic Law of Succession* (Darussalam 2005) 250.

56 Sandimula (n 55) 126; Hussain (n 55) 250.

57 Abdullah and others (n 51) 139; Hussain (n 55) 250.

58 Edo Trisetia Hangartika, 'The Comparison of Inheritance Legal Position of Illegitimate Children Based on Islamic Law & Civil Law' (2023) 3 *Tabellius Journal of Law* 621, 622.

59 Hadith 2218 in Mohammad Ben Ismail Al'Bukhari, *Al'bukhari's Sahih: The Correct Traditions of Al'bukhari*, II (Mohammad Mahdi Al'Sharif tr, Dar al-Kotob al-Ilmiyah 2007) 41-42.

60 Hangartika (n 58) 621. Contextually, the Prophet made this statement while adjudicating a paternity question relating to a child claimed by two families.

61 This oath is administered when the man has no witnesses to the alleged adultery. He swears four times that he is telling the truth and invokes God's curse on himself on the fifth time if he is telling a lie. See *Qur'an* 24:6-7.

62 Sandimula (n 55) 122; Hangartika (n 58) 624.

63 Sandimula (n 55) 122.

64 Abdullah and others (n 51) 139. Other familial obligations such as parental responsibility and guardian's consent during marriage (if the child is a daughter) dissipates too; See also Sandimula (n 55) 126.

65 Sandimula (n 55) 122; Moza Jadeed, 'Islamic Marriages and Divorce in Kenya: Ethnocultural Diversity' (2023) 18 *JCL* 211, 222.

marriage, Muslims believe that they fulfil God's design for this temporal life.<sup>66</sup> They also follow the Prophetic Tradition.<sup>67</sup> Islam frowns upon deliberate celibacy and adulterous relations in equal measure.<sup>68</sup>

A child is thus said to be born outside marriage in any of the following three instances. First, when the child is born out of a premarital or extra-marital sexual relationship.<sup>69</sup> Second, when the child is as a result of incest or rape.<sup>70</sup> Third, when the child is born in less than six months since the marriage of the parents. While the first two instances are easily understood, the last one needs explanation. This period is deduced from the thematic reading of *Qur'an* 2:233, 31:14 and 46:15. While the first two verses enjoin breastfeeding to a maximum of two lunar years, the last one aggregates the term of pregnancy and breastfeeding to 30 lunar months. Thus, scholars excluded 24 months (two years) from 30 and arrived at the minimum gestation period or "period of viability"<sup>71</sup> as six lunar months – which approximate about 25 weeks.<sup>72</sup> Therefore a child born within less than six lunar months since the parents' marriage is presumed illegitimate.

But contemporary scholars find both the categorisation of a child as illegitimate and his removal from his father's inheritance as classical.<sup>73</sup> To them, this interpretation was valid during the early Islamic society where science and technology was unavailable to prove the blood relationship between the child and his biological father.<sup>74</sup> But in the age of science and human rights, these scholars opine that it is wrong to cut a child born out of wedlock from his father's ties. They argue that a child, whether sired within or without marriage, has intrinsic human value which cannot be eliminated by any reason including absence of marriage.<sup>75</sup> To do so is to condemn the child to the sins of his parents<sup>76</sup> which is itself contrary to the Islamic principle which negates a soul carrying the consequences of the negatives of another.<sup>77</sup> These scholars thus contend that where a father recognises a child as

66 See *Qur'an* 30:21 which describes marriage as a part of God's creation.

67 See Jadeed, 'Islamic Marriages and Divorce' (n 65) 222.

68 *Qur'an* 25:68 categorises adultery (including fornication) among major sins such as murder; *Qur'an* 17:32 describes such sexual relations as shameful and evil. See *ibid* 227–28.; See also Mohamed Mraja, 'The Reform Ideas of Shaykh 'Abdallāh Sālih Al-Farsī and the Transformation of Marital Practices among Digo Muslims of Kenya' (2010) 17 *Islamic Law and Society* 245, 275.

69 Abdullah and others (n 51) 134; Hangartika (n 58) 623.

70 Abdullah and others (n 51) 134.

71 TVN Persaud and others, 'Description of Human Development: Nash'ah Stage - the Fetal Period' in Abdul-Majeed A Zindani and others (eds), *Human development as described in the Qur'an and Sunnah* (Islamic Academy for Scientific Research 1992) 67.

72 *ibid*.

73 See Bahrudin Muhammad and others, 'The Inheritance Rights of Illegitimate Children Outside Marriage in the Perspective of Children's Rights' (2014) 14 *International Journal of Sciences*; See also Isa Abdur-Razaq Sarumi and others, 'A Polemical Discourse over the Legitimation of Illegitimate Children under Islamic Law' (2019) 27 *IJUMIJ* 151, 179.

74 Muhammad and others (n 73) 50.

75 *ibid*.

76 Sandimula (n 55) 122.

77 See *eg Qur'an* 35:18; See also Sarumi and others (n 73) 164.

his, he should be adjudged as such if no other man claims paternity over the child.<sup>78</sup> And where science further proves the paternity of the child, it should so be held and courts should allow the child to inherit upon the demise of the father. This approach, the scholars argue, is within the Islamic principle of priming benefits (*maslah*) and warding off evil (*mafsadah*).<sup>79</sup> To deny such children inheritance is to push them into financial difficulties and social stigma which defeats this principle.

These views of legitimising the status of children born out of wedlock are, however, embraced by a few Muslim scholars. This paper recommends a further study of these perspectives to map out a continued practice of IIL which is within the larger IFL.

### C. Wrongful Application of the Law

Apart from defeating the observance of IFL, gender equality and FoRB, the CKC and *Faraj* decisions also contravened several constitutional and LSA provisions. In its analysis of whether or not IIL should apply to SCH's estate, the Court invoked articles 24(4) (which qualifies the principle of equality in relation to the application of Islamic law by the Kadhis' courts); 170(5) (jurisdiction of the Kadhis' courts); and 259(1) (mode of construing the constitution). But the Court failed to note that article 24(4) only applies with respect to proceedings before the Kadhis' Court. This provision does not extend to the High Court or the Court of Appeal – unless a matter originating from the Kadhis' Court is before them on appeal.<sup>80</sup> Yet JWN's case before the High Court was a fresh petition. The consideration of article 170(5) was also irrelevant in this case since, as the CA surmised, it was the LSA which was operative when the matter was before the High Court.<sup>81</sup> The relevant consideration was which provision of the LSA was operative in SCH's estate.

It is the response to this question which made the CA violate the LSA. The CA directed the High Court to decide the case in accordance with the LSA substantive provisions in clear contravention of section 2(3) of the LSA. Section 2(3) of the LSA instructs that:

“Subject to subsection (4), the provision of this Act *shall not apply* to testamentary or intestate succession to the estate of any person who at the time of his death *is a Muslim* to the intent that *in lieu of* such provisions the devolution of the estate on any such person *shall* be governed by *Muslim law*.”<sup>82</sup>

Subsection (4) in itself provides that:

<sup>78</sup> *ibid* 169.

<sup>79</sup> *ibid* 177.

<sup>80</sup> Jadeed, ‘Muslim Women Inheritance’ (n 12) 247.

<sup>81</sup> See *ibid* 243.

<sup>82</sup> *Ibid* (emphasis added.)

“Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where *they are not inconsistent* with those of Muslim law apply in case of every Muslim dying before, on or after 1<sup>st</sup> January, 1991.”<sup>83</sup>

Therefore, in a nutshell, it is the religion of the deceased which decides whether IIL applies or not. It is not the religion of the claimants to his estate, nor their submission – or lack of it – to the jurisdiction of the Kadhis’ Court. Thus, because SCH was Muslim at the time of his death – and he had actually moved the Kadhis’ court for the determination of his father’s estate – his estate ought to have been determined according to IIL, not the LSA substantive provisions.

It seems that the CA confused the aspect of forum with that of the applicable law. To the CA, since JWN and her children petitioned the High Court vide the LSA – then the LSA ought to adjudicate SCH’s estate. Yet forum and the applicable law are two separate issues as the same Court of Appeal had ruled in a previous case,<sup>84</sup> to wit:

“There *should not be* any confusion between the *jurisdiction* of the High Court to entertain a dispute relating to testamentary or intestate succession to estates of Muslims *and the substantive law applicable* in the High Court in such disputes (...) [I]f the High Court assumes jurisdiction to the estate of a deceased Muslim, then by virtue of section 2(3) [of the Law of Succession Act], the law applicable in the High Court as to the devolution of the estate *is the Muslim law and not the LSA*. As an example, disputes relating to the *validity of a will* made by a Muslim and the *ascertainment of heirs and shares of each* will be determined in accordance with *Muslim law*.”<sup>85</sup>

### III. Recognition of Polygamous and Potentially Polygamous Marriages

Another significant development in IFL in the past 10 years was the explicit legal recognition of polygamy. While section 6(1) (e) of the Marriage Act (MA) provides for Islamic marriages, section 6(3) of the same Act describes these marriages as “polygamous or potentially polygamous.” Section 3(3) states that all marriages registered under the MA have the “same legal status”. Section 3(4) qualifies subsection 2 on equal rights and obligations of parties in marriage by stating that parties in an Islamic marriage ‘shall only have the rights granted under Islamic law’. The

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83 Ibid (emphasis added.)

84 *Noorbanu Abdul Razak v Abdulkader Ismail Osman* [2013]eKLR (Civil Appeal No 285 of 2009 Mombasa).

85 See *RB & RGO v HSB & ASB* [2014] eKLR (HC) [16]; *Nazima Janmohammed Nassar v Nasreen Kauser* [2015] eKLR (HC) 5; See also *Noorbanu Abdulrazak v Abdulkader Ismail Osman* [2017] eKLR [19] reproducing the Court of Appeal’s pronouncement. Noorbanu’s decision remains unreported. And its file is untraceable from the Mombasa Law Courts archives.

MA further provides that any of its provisions which conflict with “Islamic law and practices shall not apply” to Muslims.<sup>86</sup>

All these provisions have their basis in article 45(4) of the Constitution, which instructs Parliament to enact legislation that does two things: First, the legislation must recognise marriages concluded under any “system of religious, personal or family law”. And second, the legislation must recognise “any system of personal and family law under any tradition or adhered to by persons professing a particular religion”. The Constitution attaches a condition: that such marriages or systems of law must be consistent with the Constitution.<sup>87</sup>

#### **A. Impact of Legal Recognition of Polygamy on Islamic Family Law, Gender Equality and Freedom of Religion and Belief**

The provisions of the Marriage Act did not alter the practice of Islamic marriages as such. Prior to the enactment of this law in 2014, Muslims were contracting polygamous relationships. Perhaps the only difference introduced by the Act was the treatment of these marriages as equal in legal status to monogamous ones; and the priming of IFL provisions when they conflict with other provisions of the MA. Meanwhile, the second change guarantees Muslims the right to practice their marriage norms without censure even when some aspects of such marriages sound strange to non-Muslims. Aspects such as dispensing with the presence of both parties during the solemnisation of the marriage, and marriage between cousins, for instance, conflict with the statutory mainstream law.<sup>88</sup>

The explicit recognition of Islamic marriages as polygamous or potentially polygamous allows both Muslim men and women who wish to observe this aspect of their religion to do so. Polygamy becomes ideal to a man whose first wife may be in poor health, unable to give birth or suffers such other incapacitating condition but the husband does not wish to divorce her. But there are many other reasons for which Muslim men may marry multiple wives without necessarily being triggered by circumstances affecting an existing wife. On the other hand, some view polygamy as offering women who would otherwise not get married to a single man the opportunity to be a second, third or fourth wife. These women may be divorcees, widows or spinsters, whether younger or older. Such arrangements arguably protect the women from sexual relations outside marriage.<sup>89</sup>

86 Marriage Act 2014, s 49(3). For discussion of the ambiguity that could result from section 49(3), see discussion of the case of *Council of Imams and Preachers of Kenya, Malindi & 4 others -v- Attorney General & 5 others*, (2015) eKLR in Evance Ndong, ‘Case Review: Key Judicial Pronouncements on Constitutionality of Aspects of Family Law in Post-2014 Kenya’ [2025] Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal*, 253.

87 Constitution of Kenya, 2010, art 45(4).

88 See Jadeed, ‘Islamic Marriages and Divorce’ (n 65) 232–33.

89 Ibid 219.



## B. The Islamic Family Law Position

Islam permits polygamy under two conditions: within the maximum of four wives and the man must observe justice between or among the wives.<sup>90</sup> Where a man chooses to practice polygamy, he must observe these conditions. In fact, the observance of these conditions mutates into an act of worship in the sense that failure to do so amounts to a sin. Despite the call for justice, however, the *Qur'an* acknowledges that while a man can treat his multiple wives equally in other respects, he may not, by nature, love them identically.<sup>91</sup> The *Qur'an*, nonetheless, enjoins such a man not to totally disregard the wife to whom he is less inclined, and that he must fulfil her rights.<sup>92</sup>

## C. Wrongful Application of the Law

Despite the IFL and the MA's provisions on polygamy, critics fault the MA as unconstitutional, arguing that its recognition of polygamy offends the Constitution's guarantee of equal rights for parties to a marriage at the time of, during, and at the end of the marriage. The government (through the Gender Directorate at the Ministry of Devolution and Planning), civil society organisations and United Nations institutions fault the Act for violating article 45(3).<sup>93</sup> In its response to Kenya's eighth periodic report, for example, the CEDAW Committee recommended prohibition of polygamy to align the Act with article 45(3). The Committee further urged the government to raise awareness on "the detrimental effects of polygamy on women".<sup>94</sup>

In 2024, both the International Development Law Organisation (IDLO) and UN-Women (Kenya) echoed the CEDAW committee's observations. In particular, these two institutions called for the codification of IFL to align it with both the constitutional and CEDAW's equality provisions.<sup>95</sup> These institutions also sought the repeal of sections 3 and 49(1) of the Marriage Act, section 5 of the Kadhis' Court Act,<sup>96</sup> and article 24(4) of the Constitution.<sup>97</sup> Incidentally, the government through the Kenya Law Reform Commission is heeding these calls. The chairperson of the Commission affirmed the Commission's decision to implement the recommendations in the IDLO – UN Women Report.<sup>98</sup> The chairperson further indicated that the Commission had

90 See *Qur'an* 4:3.

91 See *Qur'an* 4:129.

92 *Qur'an* 4:129.

93 Committee on the Elimination of All Forms of Discrimination Against Women, 'CEDAW/C/KEN/8' (n 10) paras 30 and 206; Equality Now (n 10) 58; IDLO and UN Women (n 9) 38.

94 UN Committee on the Elimination of all forms of Discrimination Against Women, 'Concluding Observations on the Eight Periodic Report: Kenya' [2017] UN Doc CEDAW/C/KEN/CO/8, para 51 e.

95 Constitution of Kenya, 2010 art 27; Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) arts 1,2 and 16 ; See IDLO and UN Women (n 9) 38.

96 IDLO and UN Women (n 9).

97 Ibid 87.

98 Christine Agimba, 'Post-Enactment Assessment of Kenya's Family Laws: The Kenya Law Reform Commission's Experience and Perspective' (2nd Annual Family Law Conference, Institute for Family Studies and Ethics, Strathmore University - Nairobi Kenya, 22 November 2024).



held round-table discussions with family law practitioners on the subject. Indeed, in its just-submitted ninth periodic report to the CEDAW Committee, the government has confirmed that there is “an on-going debate about the place of polygamy in the country.”<sup>99</sup>

While Parliament would have the last say in these proposals, the Commission’s position comes as a shock to IFL practice in the country. The suggestion to repeal section 3 and 49(1) of the Marriage Act and section 5 of the Kadhis’ Court Act amounts to ouster of the practice of Islamic marriages in the country. Moreover, the removal of Kadhis’ courts’ jurisdiction (through the repeal of section 5 of the Kadhis’ Court Act) would harm Muslim women (the majority users of the courts),<sup>100</sup> a constituency whose rights also warrant protection.

What critics fail to understand is that religious marriages are also part of the constitutional freedom of religion and belief. Indeed, the UN Human Rights Committee acknowledged this fact in its General Comment 19.<sup>101</sup> In explaining the right to marry and to found a family under article 23(2) of the International Covenant on Civil and Political Rights, the Committee called on State Parties to ensure that their marriage laws:

*“must be compatible with the full exercise of the other rights guaranteed by the Covenant; thus, for instance, the right to freedom of thought, conscience and religion implies that the legislation of each State should provide for the possibility of both religious and civil marriages.”<sup>102</sup>*

Article 32(2) of the Constitution explains FoRB as the right to manifest one’s religious belief through worship, practice or observance. As explained above, polygamy becomes an act of worship for those Muslim men and women who chose to engage in it and observe the conditions imposed by IFL. To insist generally that all Muslims must be monogamous is to offend their legitimate expectation to practice what is permitted by their religion. It also amounts to compelling them to act contrary to their religious belief, which act offends article 32(4). While the right to FoRB is subject to constitutional limits, it would be difficult for critics to satisfy the requirements of article 24(1) and (2) on limitations of the Bill of Rights in order to oust polygamy.

99 UN Committee on the Elimination of All Forms of Discrimination Against Women, ‘Ninth Periodic Report Submitted by Kenya under Article 18 of the Convention, Due in 2021’ [2024] UN Document CEDAW/C/KEN/9, para 71.

100 The Committee of Experts on Constitutional Review (n 14) 42.

101 UN Human Rights Committee, ‘General Comment 19’ in *Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Treaty Bodies* (UN Doc HRI/GEN/1/Rev9 (Vol I), 2008) 19.

102 Ibid [4.] It is doubtful that the UN Human Rights Committee would go so far as to sanction everything that comes under the label of ‘religious marriage’ in the name of religious freedom, for instance, to accommodate child marriage.

#### IV. Recognition of the Freedom of Muslims to Manage their Matrimonial Property

Before the MA became law, the Matrimonial Property Act (MPA) of 2013 had given Muslims the option of applying Islamic marital property law.<sup>103</sup> Section 3 of the MPA states that a Muslim “*may be governed by Islamic law in all matters relating to matrimonial property.*”<sup>104</sup> Since this provision says nothing about the forum for hearing such cases,<sup>105</sup> both the Kadhis’ courts and the mainstream ones can try Islamic marital property questions if a Muslim presents them.<sup>106</sup> In essence, section 3 allows a Muslim to choose both the forum and the applicable law (including statutory mainstream law) in adjudicating matrimonial property issues.

##### A. The Impact of the Matrimonial Property Act on Islamic Family Law, Gender Equality and Freedom of Religion and Belief

The legal recognition of Muslims’ freedom to divide their matrimonial property according to IFL gives Muslims another layer of protection of their personal law. This position alters the pre-2014 one which insisted that once matters were brought before the mainstream courts, they had to be tried according to the English 1882 Married Women’s Property Act.<sup>107</sup>

##### B. The Islamic Family Law Position

Islam does not distinguish property rights within and without marriage. However, the absence of a distinction does not mean that Islam has no unequivocal rules on property division upon divorce. The first rule is contribution. A party must prove direct financial contribution to the purchase of or development of a property.<sup>108</sup> Where a party makes payment for other needs in the house, he or she must be expressly clear whether such payments are voluntary and charitable or subject to refund. This is important because Islam does not recognise the principle of indirect financial contribution as a means to gaining interest in the property.<sup>109</sup>

Similarly, Islam has no principle of non-monetary contribution. This is because Islam regards some of the activities enlisted in section 2 of the MPA as a wife’s duty either according to the *Qur’an* and the Prophetic Tradition or the *‘urf* (tradition) of the locality. Activities, such as companionship,<sup>110</sup> pregnancy,<sup>111</sup> caring for the

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103 The MPA received presidential assent on 24 December 2013 and commenced on 16 January 2014. The MA, on the other hand, received presidential assent on 29 April 2014 and commenced on 20 May 2014.

104 (Emphasis added).

105 *AWA v HDD* [2018] eKLR 2.

106 Moza Ally Jadeed, ‘Contemporary Matrimonial Property Rights in Kenya: A Restatement of Substantive Equality’ in Ama Hammond and Prosper Batariwah (eds), *The Law on Marital Property in Africa: Comparative Perspectives* (Talbot Publishing forthcoming).

107 See *Essa v Essa* Civil Appeal No 101 of 1995 (unreported).

108 *SWW v MAJ* [2023] KEKC 8 (KLR) [25].

109 Jadeed, ‘Substantive Equality’ (n 106).

110 *Qur’an* 2:187, 30:21 relate marriage as a source of comfort and tranquillity for the parties.

111 *Qur’an* 2:233,4:1 identify women as carriers of pregnancy.

children and managing the house<sup>112</sup> are not compensated. But it is not a wife's or a husband's duty to manage a family business. So, when a wife or a husband manages a family business, the efforts must be compensated either as work performed by an employee or a partner to the business as per the parties' intention.<sup>113</sup> Where a woman takes on tasks at home which as per the local customs are not a wife's obligation, the husband must either seek alternative help to perform these tasks, or compensate the wife. Any compensation, however, relates to the prevailing monetary value of the role. A husband may choose to offer his wife more than the prevailing monetary value, including an interest in certain properties.

Notwithstanding a wife's non-contribution to her husband's property during marriage, courts in some cases award her *mut'ah* (a conciliatory or compensatory gift) after divorce. This gift derives from *Qur'an* 2:236. It intends to comfort the woman<sup>114</sup> and to enable her "restart, reorganise and continue"<sup>115</sup> with her life without struggles. But the court must assess it according to the husband's ability to pay.<sup>116</sup> In *SWW*, the Kadhis' court awarded the former wife a conciliatory gift of Ksh.s 300,000/= despite her not pleading it. The Court noted that the woman had been married for 20 years and had made no financial contribution to the man's property. But in exercise of its inherent powers and the duty to do good and prevent injustice under the Kadhis' Court Practice and Procedure Rules, the Court made this award.<sup>117</sup>

The second rule relating to division of matrimonial property is individual property rights (separate property). Islam recognises both a man's and a woman's right to own property alone or in partnership with others. This right is not altered by marriage. Proprietary interests acquired before marriage do not transfer to the other spouse by dint of the marriage. Nor do liabilities. And in a polygynous union, every spouse retains his or her interests – whether obtained prior to or during the marriage. Where one wife jointly owns property with the husband, no other wife can claim an interest in it. Such other wife can only make a claim on the husband's estate as inheritance, and only in proportion to the share owned by him. Gifts given to either spouse remain their exclusive property. Where the gift is given to both of them, then it would be divided identically upon divorce.

112 Hadith 4724 in Muslim ibn al-Hajjāj al-Qushayrī, *English Translation of Sahīh Muslim*, vol 5 (5/7, Nasiruddin al-khattab tr, 1st ed, Darussalam 2007) 155 describes a woman as a shepherd of "her husband's house and children".

113 Jadeed, 'Substantive Equality' (n 106).

114 *MI v AA* [2018] eKLR [13].

115 *AA v HSS* [2021] eKLR 24.

116 *MAAA (Suing in his capacity as the administrator of the Estate of Abubaker Mohamed Al Amin (Deceased) v FSS* [2022] eKLR [40].

117 *SWW* (n 108) [28].

### C. Wrongful Application of the Law

Notwithstanding the MPA's position on applicability of Islamic law relating to marital property, critics charge that section 3 excludes Muslim women from the protection of the MPA and the equality guarantee in article 45(3) of the Constitution.<sup>118</sup> Therefore if women present their cases before the Kadhis' courts, they risk discriminatory verdicts because such institutions lack clear rules on dividing matrimonial property, have no female Kadhis and are exempted from applying the mainstream understanding of equality.<sup>119</sup> Human Rights Watch and FIDA-Kenya, for example, documented a report citing some Kadhis who reportedly indicated that their decisions on property were influenced by their Islamic school of thought, "their ethnic and cultural traditions, and a variety of personal factors."<sup>120</sup> The report also shared two cases at the Kadhis' courts in which women lost both personal property and that which they helped their husbands acquire or develop.<sup>121</sup> For these reasons, critics call for the repeal of section 3 of the MPA.

As has been argued at the beginning of this section, Muslim women were simply given a choice of both forum and applicable law, in adjudicating matrimonial property claims.<sup>122</sup> While the High Court in 2018 opined that IFL must apply whether that case is before a mainstream or the Kadhis' courts,<sup>123</sup> this is an incorrect position. What section 3 does is to legislate an option that was hitherto believed as inexistent. The employment of the word 'may' indicates this 'fresh'<sup>124</sup> chance. Thus since the law at the Kadhis' courts is Islamic, then the applicable law would be such. In the mainstream courts, however, the litigants will choose the law (IFL or MPA). The position in section 3 of the MPA is strikingly different from that in section 2(3) of the LSA. In the latter provision (as seen above), the applicable law is IFL in either court. Contrary to critics, too, section 3 does not enhance the Kadhis' courts' jurisdiction.<sup>125</sup> It simply operationalises article 170(3) of the Constitution. This latter provision allows Parliament to define the courts' jurisdiction as envisaged in article 170(5). This means Parliament construes matrimonial property questions as either incidental to marriage and divorce, or within the subject matter of personal status.

118 See IDLO and UN Women (n 9) 39–40; Chan and Mbogoh (n 9) 19; Human Rights Watch and Federation of Women Lawyers (Kenya) (n 9) 24.

119 IDLO and UN Women (n 9) 40.

120 Human Rights Watch and Federation of Women Lawyers (Kenya) (n 9) 25.

121 Ibid.

122 This does not rule out the possibility of a woman being subjected to pressure to opt for the forum that might be perceived as likely to be least favourable to her interests. The article simply acknowledges the correct legal position.

123 *AWA v HDD* (n 105) 2.

124 The author italicises this word because she does not believe that this is a new opportunity.

125 *MSR v NAB* [2017] eKLR (High Court) 3.

## V. Recognition of Equal Parental Responsibility

Both the Constitution<sup>126</sup> and the Children Act<sup>127</sup> enjoin both parents to take on equal parental responsibility to provide for a child, regardless of whether they are married to each other. Section 31(2) (a), for example, outlines provision to include food, shelter, clothing, medical care, education, water and sanitation facilities.

### A. The Impact of Equal Parental Responsibility on Islamic Family Law, Gender Equality and Freedom of Religion and Belief

These provisions seem to have caused confusion or fanned malice among some Muslim men against their wives. These men contest custody claims at the Children courts against their former spouses on the premise that the latter have no financial capacity to care for their children. But this approach is simply intended to frustrate the women or get back at them for the marital conflict.

### B. The Islamic Family Law Position

Under IFL, the duty to provide for a child is solely on the father.<sup>128</sup> *Qur'an* 2:233, for example, which addresses the context of divorce also explains the position during the marriage.<sup>129</sup> It reads that:

The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. But *he shall bear the cost of their food and clothing on equitable terms*. No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child. Nor father on account of his child.<sup>130</sup>

Wadud (a Muslim feminist) opines that Islam recognises that while women bear the important role of child-bearing to bring about human existence, men bear the equivalent responsibility to provide to sustain this human race.<sup>131</sup> Ordinarily, the custody of children lies primarily with the mother until the age of seven. This is the age known as age of discretion in Islam, meaning, the age at which a child can eat, cloth and clean himself/herself without help.<sup>132</sup> Thus upon this age, the child selects which parent to live with. These absolutes, however, are subject to the best interest of the child.<sup>133</sup> Thus a mother may be denied custody of the child, despite the child's tender years, if the mother is 'negligent, endangers the security of the minors or her custody is not conducive to the physical, moral and intellectual welfare of the

<sup>126</sup> Constitution of Kenya, 2010, Art 53(1) (e).

<sup>127</sup> Children Act 2022, s 32(1).

<sup>128</sup> See *Qur'an* 2:233, 65: 6 – 7.

<sup>129</sup> Jadeed, 'Muslim Women Inheritance' (n 12) 130–31.

<sup>130</sup> Emphasis added.

<sup>131</sup> Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (2nd edn, Oxford University Press 1999) 73.

<sup>132</sup> Sukyan Hassan Omar, 'The Jurisdiction of the Kadhi's Courts in Kenya on Children Related Matters' (LLM Dissertation, University of Nairobi 2015) 52.

<sup>133</sup> *SVWW* (n 108) [8].

child.<sup>134</sup> Similarly, a father may be denied custody even when the child selects him if the father's environment is non-conducive for the well-being of the child.

In *SWW*, the Kadhis' court felt inclined to grant custody to the father 'against the general rule considering the best interests of the children.' The Court noted that the mother's small house and neighbourhood was non-conducive to the schooling and overall development and welfare of the two children. The mother too had failed in the proper upbringing of an adult child who was in her custody. This adult child had since left college, was disrespectful to her father and almost committed suicide. The Court, nonetheless, directed the father to ensure that the two children were not mistreated by their step-mother. It thus ordered the children's officer to 'follow up on the children's wellbeing and development at least biannually.'<sup>135</sup>

### C. Wrongful Application of the Law

It is, therefore, wrong and sinful for Muslim men to insist on identical provision for the child from the mothers in order to give themselves an edge in custody disputes against mothers who cannot afford the maintenance. So far, Muslim scholars have reprimanded men against this emerging trend. And in *SWW*, the Kadhis' court separated the financial status of the fathers from the right to custody. The Court observed that:

The Children's Officer recommended the respondent be given custody of the minors among other reasons due to his better financial position. *The financial position of a father is not the only determinant factor in grant of custody as the father would still, according to his means, be obligated to provide for their maintenance.*<sup>136</sup>

## VI. Equality at Cross-purposes

The four developments discussed above raise broader issues about interpreting the principle of equality. Some judges, women's rights practitioners and Muslim men assume that the words 'equal' and 'equality' in the Constitution and relevant statutes mean same treatment. The women's rights advocates, for instance, espouse that articles 45(3) and 27 on equality must translate into identical treatment of men and women in a marriage. But a holistic reading of our constitution reveals that both these provisions subscribe to substantive equality, viz: the concurrent treatment of like cases alike and different cases differently.<sup>137</sup>

As Kenyans, therefore, the infusion of article 10(2) (b), paragraph 3 of the preamble, and the entire constitutional-making history should never escape our minds whenever we are interpreting the Constitution. And this is exactly what the

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<sup>134</sup> *ibid.*

<sup>135</sup> *ibid* [14].

<sup>136</sup> *ibid* [13]. (Emphasis added).

<sup>137</sup> For a full exposition of substantive equality see generally Jadeed, 'Substantive Equality' (n 106).



Constitution instructs us to do in article 259(1). Importantly, however, there is an expanding global jurisprudence which makes it necessary to reflect on the fact that the principle of equality in human rights documents – unless qualified and contextualised<sup>138</sup> – lends itself to its substantive sense.<sup>139</sup> Therefore, sections 3 and 6 of the Marriage Act which recognise polygamy are in tandem with articles 27 and 45(3) of the Constitution and there is no legal justification to repeal section 3. In fact, the government conceded in its eighth periodic report to the CEDAW Committee that article 45(4) of the Constitution which called for the enactment of the Marriage Act actually permits polygamy.<sup>140</sup>

Some women's rights advocates misconstrue the principle of equality when they call for the repeal of article 24(4) of the Constitution. The provision allows the meaning of the words 'equal' and 'equality' in the Bill of Rights to be qualified to the extent strictly necessary for the application of Islamic law in a matter before the Kadhis' courts. The purpose of including this provision in the Constitution was to achieve substantive equality for Muslim women.<sup>141</sup> The provision was introduced – not by Muslims – but by a group of women's rights advocates during the first constitutional review attempt in 2003. This women's alliance consisted of four groups: FIDA Kenya, Institute for Education in Democracy, Kenya Human Rights Commission and the League of Kenya Women Voters. These institutions had wanted a constitution that could be loosely named a "Gender Constitution". So, they championed for gender equality and women's empowerment through the prism of the principle of equality.<sup>142</sup> Because these groups wanted empowerment for every Kenyan woman, including Muslim women, they adopted the substantive strand of the principle. To them, the substantive sense of equality "regarded all women as stakeholders in policy formation and respected their different views"<sup>143</sup> instead of its "formal, universalised, and absolutist"<sup>144</sup> version. Therefore, in line

138 Article 16(1) of the CEDAW Convention, for example, unpacks "equality" as "same".

139 See generally Tanaka J in *South West Africa, Second Phase, Judgment*, ICJ Reports (1996) 6, 306 (International Court of Justice 1996); *MEC for Education: Kwazulu-Natal and Others v Pillay* 2 BCLR 99, 99 (2007); *R v Big M Drug Mart Ltd* [1985] 1 SCR 295; UN Committee on the Elimination of All Forms of Discrimination Against Women, 'General Recommendation 28' [2010] UN Doc CEDAW/C/GC/28, paras 6 and 16; UN Human Rights Committee, 'General Comment 18' in *Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Treaty Bodies* (UN Doc HRI/GEN/1/Rev9 (Vol I), 2008) paras 8 and 13; UN Committee on Economic, Social and Cultural Rights, 'General Comment No 16' [2005] E/C12/2005/4, para 6; Ian Brownlie, 'The Rights of Peoples in Modern International Law Special Issue: The Rights of Peoples' (1985) 9 Bull Austl Soc Leg Phil 104, 105; Fredman (n 13) 713 and 732; Rikki Holtmaat, 'CEDAW: A Holistic Approach to Women's Equality and Freedom' in Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press 2013) 99; Andrew Byrnes, 'Article 1' in Marsha A Freeman and others (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford Commentaries on International Law, Oxford University Press 2012) 63 and 65.

140 See 'CEDAW/C/KEN/8' (n 10) para 204.

141 Athena D Mutua, 'Gender Equality and Women's Solidarity across Religious, Ethnic, and Class Differences in the Kenyan Constitutional Review Process' (2006-07) 13 Wm & Mary J Women & L 1, 91.

142 Jadeed, 'Muslim Women Inheritance' (n 12) 92.

143 *ibid*.

144 Mutua (n 141) 91.



with their Muslim sisters' conception of rights (albeit different from the majority view) the coalition proposed article 24(4).<sup>145</sup>

The MPA's option of adjudicating Muslim marital property questions under IFL is another example of the principle of substantive equality in action.<sup>146</sup> This approach is an acknowledgment of justice as plural and respecting the fact that some Muslim women may opt for their personal law instead of the statutory mainstream law. As it turns out, the Supreme Court and the Court of Appeal's interpretation of Article 45(3) with respect to division of matrimonial property is largely in alignment with Islamic law: the article does not guarantee automatic 50:50 shares on account of the fact of marriage alone. Instead, parties receive proprietary rights commensurate to their contributions, monetary and non-monetary.<sup>147</sup>

Finally, the interpretation of the word 'equal' in both article 53(1) (e) of the Constitution and section 32(1) of the Children Act to mean identical parental responsibility for child maintenance by some Muslim men is faulty. Instead, these provisions should be read to mean substantively equal, entailing both same and disparate treatment in accordance with the parties' Islamic obligations. Thus, while Islam accords both parents identical duties in some respects, such as in religious and moral guidance of the child, it specifically obligates the father to maintain the child.

## VII. Recognition of the *Kafaalah* System as an Alternative to Adoption

First-time recognition of the Islamic equivalent of adoption in the Children Act 2022 is one of the significant developments that has -it seems- survived censure. Vide section 12, a child whose parents are unable to care for him or her has the right to social security which includes placement under alternative care services such as *kafaalah*. Under the *kafaalah* arrangement, a child is often cared for by close family members without necessarily being absorbed into the carer's lineage.

### A. The Impact of Recognition of *Kafaalah* on Islamic Family Law, Gender Equality and Freedom of Religion and Belief

While Muslims have traditionally cared for orphans, destitute and abandoned children, a majority of the carers have been hesitant to formalise these relationships in the courts as this would have amounted to adoption which IFL forbids. The recognition of *kafaalah* is thus an enhanced step in the protection of both male and female Muslim children in need of care and protection.

In order to operationalise this arrangement, section 215(b) of the Children Act requires the Cabinet Secretary in charge of children affairs to make some regulations. As of

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145 Jadeed, 'Muslim Women Inheritance' (n 12) 93.

146 Jadeed, 'Substantive Equality' (n 106).

147 See *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* [2023] KESC 4 (KLR); *PNN v ZWN* [2017] eKLR.

May 2024, the draft regulations were ready and undergoing public participation.<sup>148</sup> These regulations address aspects such as criteria and registration of a carer; conditions for placing a child in such alternative care; and how to terminate that arrangement. If passed by Parliament, these regulations would encourage more Muslims to take up and formalise their care of such children.

## **B. Islamic Family Law Position**

IFL dictates that orphaned or destitute children are best cared for by the parents' relations. Thus, the *kafil* (carer) affords the child all possible rights due to a child while still retaining the child's own family identity. Put differently, while the child enjoys parental care from this person – the child does not assume the carer's lineage. The child (if born within wedlock) retains his/her family name and does not inherit from the carer.

This Islamic system of caring for children of others emanates from both the *Qur'an* and the Prophetic Tradition. First, the *Qur'an* repeatedly enjoins that orphans are a responsibility of the whole Islamic community.<sup>149</sup> And the Prophet stated that he will be a neighbour of anyone who cares for an orphan (whether a relative or not) in Paradise.<sup>150</sup> Second, the *Qur'an* negates adoption. *Qur'an* 33:4-5 specifically address this point. They partly read:

*“nor has He made your adopted sons your sons. Such is (only) your (manner of speech) by your mouths. But Allah tells (you) the Truth, and He shows the (right) Way.*

*Call them by (the names of) of their fathers: that is juster in the sight of Allah. But if ye know not their father's (names, call them) your Brothers in faith, or your Mawlas (i.e wards).”*<sup>151</sup>

## **VIII. The Publication of the Kadhis' Court Bench Book and Reporting of Kadhis' Courts Judgements**

Three other positive developments happened in the last 10 years. These were the online reporting of Kadhis' courts' decisions, publication of the Kadhis' Court Bench Book,<sup>152</sup> and development of the Kadhi's Court Practice and Procedure Rules (KCPPrs)<sup>153</sup>. Both the Bench Book and the KCPPrs were published in 2020. But the Bench Book is yet to be launched. This Book, however, is a summation of the IFL rules on marriage, divorce, evidence, paternity, guardianship, custody,

<sup>148</sup> Draft regulations on file with the author.

<sup>149</sup> See *Qur'an* 2:177, 2:215; 4:8; 4:36 and 93:9.

<sup>150</sup> See hadith 7469 in the Book of Asceticism and Heart-Softening Reports Muslim ibn al-Hajjāj al-Qushayrī, *English Translation of Sahīh Muslim*, vol 4 (4/7, Huda Khattab ed, Nasiruddin al-khattab tr, 1st ed, Darussalam 2007) 384.

<sup>151</sup> (Emphasis added)

<sup>152</sup> The Judicial Service Commission, 'Kadhis' Court Bench Book' (The Judiciary of Kenya 2020).

<sup>153</sup> Legal Notice 203 of 2020.

maintenance, parental responsibility and inheritance from the *Sunni* juristic school. During a validation workshop in Mombasa, members of the *Shia* school of thought demanded an inclusion of their perspective in the Book. It seems that this view was not incorporated.

Publication of the KCPPRs, on the other hand, is a response to section 8(1) of the Kadhis' Courts Act. This provision recommends to the Chief Justice to make procedural rules which will be followed in the Kadhis' courts *in lieu* of the Civil Procedure Rules.

#### **A. Impact of Law Reporting, Kadhis' Court Bench Book and Procedure Rules on Islamic Family Law, Gender Equality and Freedom of Religion and Belief**

The publication of the intricate IFL rules in English and their contextualisation to the Kenyan legal system in the Kadhis' Court Bench Book enhances access to justice by making this information accessible to ordinary court users, practitioners and researchers. During the sensitization workshop on IIL for judges and magistrates in Nairobi,<sup>154</sup> the Head of the Family Law Division at the Milimani Law Courts (Chemitei J) sought to have the Bench Book distributed to judges and magistrates. The Chief Kadhi pleaded for support in printing so that it can be distributed to ordinary Kenyans as well. Availability of this information will boost women's access to justice (either directly or indirectly through their advocates) at the Kadhis' courts because, as indicated above, women make up the majority of users of these courts.

The KCPPRs, on the other hand, address procedural issues such as commencement of proceedings, joinder of parties, service, appearance, hearings, judgments, appeals and execution. But there has been concern among Muslim lawyers that these rules conflate both substantive and procedural IFL tenets.<sup>155</sup> While these substantive provisions are good, they nonetheless render the KCPPRs unnecessarily bulky. The Kadhis' courts have, nonetheless, implemented and cited these rules in their decisions since their enactment.<sup>156</sup>

The reporting of the Kadhis' courts' decisions also adds into the dissemination of IFL tenets. The National Council for Law Reporting reports decisions of 24 out of the 45 Kadhis' courts on its online platform, KenyaLaw.<sup>157</sup> These decisions relate to the Kadhis' courts' jurisdiction in general. Undoubtedly, these decisions elucidate the application of IFL to researchers, court users and practitioners too.

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<sup>154</sup> See n-43.

<sup>155</sup> See, for example, Rules 113 (application for interim order for custody); 114 (interim order for maintenance); 152 (divorce by *talaq*); 153 (divorce by *khul'*); 154 (divorce by *li'an*); 155 (divorce under stipulation); and 159 (gift to divorced women).

<sup>156</sup> See accompanying text to note 257.

<sup>157</sup> See eg *MEM v AD* [2015] eKLR (Divorce Cause in Garsen); *HSA v AAL* [2020] eKLR (Divorce Cause in Isiolo).

## IX. The Way Forward

Both the positive and the negative developments in the practice of IFL and the observance of gender equality and ForB in the past decade present an opportunity for explaining IFL and recommending ways to improve its practice. This section suggests how various stakeholders can participate in ensuring a smooth application of IFL in the country.

First, judicial officers could invest more in seeking solutions that exist within IFL. The Court of Appeal in the CKC decision, for example, should have taken steps to establish what alternative benefits exist for children born out of wedlock. For indeed while such children are ousted from the intestate succession matrix, they can still benefit from their biological father's property through both IIL and the larger Islamic property law in three ways: testacy arrangement; *inter vivos* gifts; and trusts. These instruments must be made by the biological father himself during his lifetime. But going forward as a country, it is important too for Muslim scholars, imams, lawyers and civil society organisations to sensitize Muslims, members of the judiciary and other stakeholders on these available instruments.

### A. *Al-waswiyah* (the testacy arrangement or will)

As indicated above, IIL provides for testacy. All the three verses which legislate on the intestate divisions insist that these shares only ensue after payment of debts and fulfilment of legacies.<sup>158</sup> But according to the Prophetic Tradition, the bequests can only be to a maximum of a third of one's property<sup>159</sup> and for the benefit of persons outside the intestate arrangement.<sup>160</sup> Despite its seemingly minute nature, this one-third bequest enables the deceased to benefit persons who share no lineage with him or her, as well as those relations who are likely to be ousted from the intestate distribution.<sup>161</sup> Thus because a child born out of wedlock is ineligible for the fixed shares, the biological father should consider making a bequest in favour of that child.<sup>162</sup> Depending on the size of the biological father's wealth and the nature<sup>163</sup> of his likely lawful heirs (if any), this child may benefit more if the whole one-third permitted in a will goes to him or her.

158 Jadeed, 'Muslim Women Inheritance' (n 12) 110.

159 See Hadith 4209 in the Book of Wills in Muslim ibn al-Hajjāj al-Qushayrī (n 150) 365.

160 Hafiz Ibn Kathir, *Tafsir Ibn Kathir (Abridged)*, vol 1 (1/10, 2nd edn, Dar-us-Salam Publications 2003) 490; Hafiz Ibn Kathir, *Tafsir Ibn Kathir (Abridged)*, vol 4 (4/10, 2nd edn, Dar-us-Salam Publications 2003) 368. Jadeed, 'Muslim Women Inheritance' (n 12) 4, 110 and 112 explain the purpose of these two limitations.

161 Apart from the bars to inheritance, some relatives may miss out from the fractions because of the existence of others who are nearer (in blood) to the deceased than themselves. Jadeed, 'Muslim Women Inheritance' (n 12) 119–20 discusses this doctrine of exclusion.

162 Abdullah and others (n 51) 141.

163 Ideally none knows who will die first in a family. So any of the heirs mentioned in the three verses is a possible beneficiary.

## **B. Hibah (inter vivos gift)**

*Hibah* is a gift which a property owner gives to another out of love.<sup>164</sup> Unlike a bequest, which is restricted to one-third of the estate, the size of the gift is unlimited.<sup>165</sup> The only condition for the operation of the gift is delivery and acceptance of possession of the property.<sup>166</sup> A biological father can, therefore, gift a particular property to the child born out of wedlock directly or to the child's representative for the child's benefit, including defraying the child's present or future expenses. This father can also open a *hibah takaful* (a deferred gift, to take effect at a future date) account in an Islamic financial institution and make savings for a specified benefit for this child. This could be with respect to the child's education, medical or such other maintenance need.<sup>167</sup> Thus, upon the demise of the father, this account would not form part of the estate.

## **C. Waqf (endowment or trust)**

A trust is an arrangement whereby property is set aside for the benefit of another through a deed. Ordinarily the deed designates a trustee who manages the property according to terms specified by the donor. A biological father may establish a trust fund or demarcate any of his properties as trusts for the maintenance of his child born out of wedlock until she or he becomes of age or dies. This trust is referred to as *waqf ahli* (family waqf) under the Waqf Act<sup>168</sup> because the trust seeks to benefit an individual.<sup>169</sup> In order to safeguard such trusts, the Act requires all trustees to register a trust with the Waqf Commission within three months of the establishment of the trust.<sup>170</sup> And vide section 17 of the Act, the Commission will periodically require the trustees to account to the Commission on how it manages the trust.

Second, the Chief Justice can liaise with the Rules Committee (under the Civil Procedure Act) and the Kenya Law Reform Commission to amend both the KCPFRs and the Kadhis' Court Act by transferring the substantive content of the Rules to the Act. In fact, Parliament may also amend the Civil Procedure Act and include a Kadhi as a member of the Rules Committee to ensure that these earlier amendments are seamless.

Third, to increase access to knowledge of IFL, the National Council for Law Reporting should strive to publish the decisions from the remaining 21 Kadhis' courts.

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164 Abdullah and others (n 51) 140.

165 Jadeed, 'Muslim Women Inheritance' (n 12) 30.

166 Mustafa M Mzee, 'Islamic Law of Inheritance: The Case of Illegitimate Child and Possibility of Having Assets of Deceased Father: A Tanzanian Case Study' (2016) 45 Journal of Law, Policy and Globalization 55, 59.

167 Abdullah and others (n 51) 140.

168 (Cap 109) Laws of Kenya.

169 Ibid, s 2.

170 Ibid, s 14(3).

## X. Conclusion

This article has discussed the important legal and judicial changes relating to the practice of IFL in the country in the past decade. During this period the Marriage Act formally recognised Islamic marriages as polygamous or potentially so. The Act also affirmed that these marriages are of the same legal status as monogamous ones. In the same period, the Matrimonial Property Act gave Muslims the option of dividing their marital property according to Islamic law if they so wished. The new Children Act recognised the *kafaalah* system, offering Muslims a formal alternative to adoption compatible with IFL by retaining the child's identity and lineage. On its part, the Judiciary published the KCPPRs, the Bench Book and Kadhis' courts decisions across the country. These judicial initiatives have increased knowledge and appreciation of IFL across a wide spectrum of court users and practitioners.

The article also reflected on the uncomfortable moments of the past decade. It cited calls for amendment and/or repeal of legislative developments and constitutional provisions that enable the operation of IFL. It reflected on the far-reaching impact of the Supreme Court and Court of Appeal decisions that allowed children born outside marriage to inherit the estate of a Muslim. This article has highlighted the implications of these decisions for gender equality and Muslims' freedom of religion and belief, as well as the general practice of IFL in the country. The article has made some recommendations, such as the search for alternatives within IFL to address stalemates with statutory mainstream law. The article has also proposed amendment of the KCCPRs and the Kadhis' Court Act.

Finally, the article advocates respect for the principle of equality in its substantive sense as indispensable if we are to take seriously both gender equality and freedom of religion and belief.



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