THE INHERITANCE RIGHTS OF MUSLIM WOMEN IN KENYA: REALITY OR RHETORIC?

A Thesis Submitted in Fulfillment of the Requirements for the Degree of Doctor of Philosophy in Law at the University of Nairobi, Kenya

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Declaration

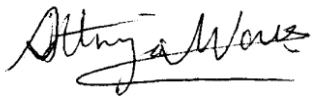
This thesis is submitted in fulfillment of the requirements for the award of the degree of Doctor of Philosophy (PhD) in Law at the University of Nairobi. It is my original work and has not been submitted for examination to this or any other university.

Moza Ally Jadeed

G80/97261/2015

Date: …27 November 2020….

This thesis has been submitted with our approval as the Supervisors:



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Prof. AttiyaWaris

Date: …27 November 2020…

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Dr. Celestine Musembi

Date: …November 27th 2020..

Dedication

To all the Muslim women in Kenya with whom I share my primary identity

Acknowledgments

The realisation of this thesis is a result of concerted efforts. Many people have stood by my side while I was doing the research. I want to recognise them for their sacrifice, time, kindness, support and love.

First, I would like to thank my family (my mother, young brother Omar and sister Munira) for their support and love during my study. These people sustained my progress in different ways. Mum absolved me from house chores so that I could concentrate on the research. I now want to re-learn how to prepare several meals. She also repeatedly followed up on my progress as she sympathized with me whenever I burnt out. Muny, as we fondly call her, was awesome. Regardless of her being in a different town from me, Muny kept calling to encourage me to soldier on with the process. She looked forward to the day I would be 'free again' and no longer glued to my laptop and books. And I remain grateful for her prayers too. Omar behaved as if he was also doing the PhD. He felt my pain as I struggled with legal and data analysis and developing independent judgment of the relevant aspects of *Sharii'ah*. One day when he mistakenly heard that I had finished the thesis, he was about to hug me to express his congratulations. This gesture was a deep expression of his happiness for me because we hardly hug. And I recognise it. I also thank him for his time as he dropped off and picked me up at the Moi International Airport and Malindi Airport during my field research.

Next in line are my friends. I have many, but some were special. I, therefore, want to celebrate ustadha Alwiya Ahmed, Fatma Fareed, Zeinab Juma and Amina Athman. These sisters occasionally called me to find out on my progress. They always had kind words for me and would encourage me that the end was near. Some opened up their homes for me to go and unwind, sometimes for days. Ali Mahmoud, a legal colleague, has also been amazing. Apart from his encouragement, Ali was a call away whenever I needed a book or a case to work with. And if he did not have it, he reached out to his contacts. Ali Dzimba is both family and a friend. I appreciate his support since the start of this PhD program. Despite being based in the United Kingdom (UK), Ali called me regularly to check on how I was doing. And he continuously affirmed that I would finish the studies. He also never said 'No' whenever I asked him to ship my books from the UK which I had purchased online from the UK and the United States.

My colleagues at the School of Law (Mombasa Campus) were also outstanding. I particularly want to thank Dr. Sarah Kinyanjui. When our offices stood opposite each other, I had unbridled access to her. I would therefore go in and share with her my difficulties in writing the thesis. And in her soft-spoken voice, Dr. Kinyanjui would advise me and uplift my spirit. I never went wrong with following her advice. I similarly want to recognise Dr. Annette Mbogoh, Dr. Jane Adogo, Dr. Mercy Deche, Dr. Mwanakitina Bakari and Dr. Wamuti Ndegwa. At some point, we were all writing our PhDs. These colleagues have since finished their studies and this development encouraged me that I could also do it. But importantly, I cherish the conversations we had over the process. I benefitted from every chat I had with any of them. For instance, Dr. Mbogoh introduced me to Dropbox (a storage app) – and my work has always been safe and I can access it through my cell phones. Dr. Deche reminded me of Thesaurus so that I could work with synonyms of frequently used words. And I have always been to the Thesaurus on Collins Online Dictionary. Dr. Ndegwa and Dr. Bakari, thank you for constantly checking on me. Dr. Adogo, I would always remember the hearty laughs we had about the PhD program. I also want to thank Anita Shah and Fredrick Oduor for repeatedly inquiring on my progress. Simon Ngare was exceptional. Whenever I needed a case which I could not find at the Mombasa Law Courts, Mr. Ngare gladly got it for me from Nairobi.

A majority of the respondents in this study were helpful. I am humbled by the immense knowledge on Islamic inheritance law that I gained from both male and female Muslim religious leaders. Many of these leaders could not hide their delight because I was taking on this study which they found momentous to the Kenyan Muslim community. And they readily loaned me their books so that I could do further reading on the subject. I want to particularly thank ustadh Mahmoud Ahmed of Lamu who saw me as his true daughter and remained in contact to encourage me through this journey which he described as phenomenal. I am also grateful for the graciousness of the judges, the Kadhis and the Public Trustees. I felt comfortable inquiring on their experiences and predispositions on the reigning legal issues in this study. Their responses pointed out the significance of this research in their practice. And I would keep my promise to send them copies once this process is entirely over. Meanwhile, I also want to appreciate my fellow lawyers for their insights. Their experiences and perspectives enriched this study enormously. More importantly, however, I would like to

thank the ordinary men and women who allowed me to probe into their personal and communities' stories. I learnt a lot and I am completing this journey as a better women's rights lawyer.

My meetings with some of these amazing respondents and analysis of the data would have been impossible without the help of the research guides and research assistants respectively. I am therefore very grateful to Qamar Kassim and later Mariam Hussein of Garissa; mama Nigar Sultana of Mumias; and Abdallah Bini of Pate for meeting me up with these respondents. I was amazed by your patience and enthusiasm as I conducted the interviews and the focus group discussions. I also loved your spontaneity in arranging my schedule and getting me further or alternative beneficial respondents. The research assistants in Garissa: Mahbub Abdi, Abdirahman Hussein and Abdirahman Ahmed were helpful in sorting out 100s of the Kadhis' court files to identify succession ones for survey. I was particularly enthused by the research assistants in Mombasa: Seidu NoorMohamed, Fatma Barayan and Mariam Bakari. Ms. NoorMohamed and Ms. Barayan, then my immediate-former students, camped at the Kadhis' court for a week as they went through piles of succession cases to extract relevant information. They then went to the High Court, including its archive, to look for relevant decisions. And when their search there was unsuccessful, Ms. NoorMohamed and Ms. Barayan gladly accepted to review reported cases from across the country on the online reporter at the Kenya Law website. And when I asked them to type my hand-written recorded data, Ms. NoorMohamed and Ms. Barayan agreed despite it being largely scribblings. Ms. Bakari, on her part, transcribed accurately 49 audio-recorded data which amplified some of the hand-written one. To date, I am still mesmerised by her prowess.

The collection of this data and its transcription was facilitated by a number of institutions. First, I would like to thank the National Commission for Science, Technology and Innovation (NACOSTI) for authorising the carrying out of this research. Both its introduction letter and research permit gained me access to the research sites. Second, I am grateful for the reception I got from the County Commissioners and the County Directors of Education of Garissa, Mombasa, Kakamega and Lamu Counties. Their call for their officers and constituents to cooperate with me made my research experience memorable. Third, I am truly indebted to the partnership between the Norwegian Programme for Capacity Development in Higher

Education and Research for Development (NORHED) and the University of Nairobi and particularly its Kenyan principal, Professor Patricia Kameri-Mbote, for supporting my field expenses. Professor Mbote further invited me to a week-long PhD Seminar at the Southern and Eastern African Regional Center for Women's Law (SEARWCL) at the University of Zimbabwe in 2016 and 2017 to meet other NORHED beneficiaries and share our experiences. I loved the collegiality of the PhD learners, graduates and faculty at SEARWCL. I also learnt a lot. Dr. Ngeyi Kanyongolo, the Dean at the Faculty of Law at the University of Malawi, particularly educated me on how to engage with the data at a PhD-level during an evening walk in the suburbs of Harare. The trainings on the principle of equality and socio-economic rights by Professor Anne Hellum of the Faculty of Law at the University of Oslo emboldened my arguments in this thesis. And Professor Julie Stewart, the Director of SEARWCL, awed me. During my first visit at SEARWCL, Professor Stewart collected for me over 30 works relating to Muslim women from the library so that I could choose what was beneficial and even borrow it. Finally, I want to thank the management of the University of Nairobi for granting me a two-year study leave to enable me to both carry out my field work and write this thesis peacefully.

Overall my supervisors remain the rock behind this achievement. Both Professor Attiya Waris and Dr. Celestine Musembi have stuck with me throughout the entire program. They have sharpened my thoughts and groomed me into a meticulous scholar in their detailed comments of my numerous and lengthy drafts of the individual chapters and the complete thesis; and through the periodic supervision sessions (physical and online). They were also kind to lend me their books and to send me any relevant source that they came across. More importantly, however, I appreciate their coming to understand my struggle with wellness which was negatively impacting on my progress. They allowed me to dictate my schedule. And this arrangement eased the inherent-PhD pressure on me, made me love and fully embrace the program.

I also want to celebrate myself for this milestone. It is not a mean feat. I have read a lot throughout the better part of my life. But this program pushed me to the core. I thought by brain out as I analysed the law, the data, *Qur'aanic* precepts and maintained transition in my writing. I have since developed a lot of respect for every genuine PhD holder and I would do the same for myself. More importantly, however, I am thrilled that this thesis fulfills my two

lifetime dreams. First, it starts out my scholarly journey of being a bridge between conventional and Islamic understanding of women's rights. When I projected my international women's rights advocacy career into this field slightly over 10 years ago, some of my colleagues at the Women's Law & Public Policy Fellowship (WLPPF) at the Georgetown University Law Center found this thought irreconcilable. But as a member of both categories of law, I have remained determined to uncover their convergence. Second, this thesis satisfies my personal quest of establishing whether Islam truly discriminates against women on matters inheritance. I developed this interest when I was in my first year and first semester of law school at Moi University. There was an interdisciplinary students' symposium. I made a presentation on IIL and glossed over the reasons behind the disproportionate shares between some males and females. Exactly two decades later, today, I seem to have a concrete answer.

Finally, all thanks and gratitude go to the Almighty. He has sustained me during this tumultuous journey. There are days that I laughed. And there are days that I cried. At some point, I never saw the end coming. But God enabled me to remain patient and diligent. He inspired me innumerably on how to overcome my challenges. And when I had a writer's block, God provided me with wisdom from sources I could never have imagined. I thank Him and I will continue to exalt Him for His Mercy and Guidance.

Abstract

This thesis sought to establish whether Muslim women in Kenya actually enjoy their inheritance rights as decreed in the *Qur'aan* and protected by the 2010 Constitution and the Law of Succession Act. The study's findings suggest that it is probable that a significant proportion of Muslim women in Kenya do not enjoy either their explicit stipulated inheritance fractions or the implicit family maintenance from the males who receive more inheritance than them. This is because, first, the syncretic practice which interweaves ethnic customs with Islam overshadows *Sharii'ah* or overlooks it. Second, ignorance of Islamic Inheritance Law (IIL) among Muslim women, men and religious leaders as well as legal practitioners (both bench and bar) results in wrongful application of this law. Finally, the probate institutions are plagued with various barriers which hamper women's eventual actual enjoyment of their rights. The study was premised on three assumptions, including that ignorance of IIL across Kenya's ethnic and socio-legal communities contributed significantly to the disentitlement of Muslim women's stipulated inheritance shares. The study employed both desk and field research. Through in-depth interviews and focus group discussions, the study interrogated both the application of IIL in the country and Muslim women's inheritance experiences. This was done mainly in Lamu, Mombasa, Garissa and Kakamega counties, which areas represent the socio-economic dispersion of *Sunni* Muslims in the country. The research further abstracted information from relevant determined inheritance cases at the Kadhis' courts and the High Court. The study mainly recommends acquisition or improvement of knowledge of IIL and women's rights among Muslim men and women, children, legal practitioners (both bench and bar) and extra-judicial probate officers. It contributes to the jurisprudence on the principle of equality in the country. It is grounded on three interrelated minority rights theories which collectively reflect the uniqueness of Kenyan Muslim women. These are Multiculturalism, Global Critical Race Feminism (Intersectionality) and Modified Muslim Feminism.

Key words: *Sharii'ah*, equality, minorities, women's rights, justice

A Guide on the Arabic Transliteration

The transliteration of the Arabic words and phrases in this study differs from many works because the researcher is a Swahili speaker. Like the Arabic language, the Swahili language is rich and offers a more precise pronunciation of the former language than its English counterpart. In fact, some Swahili words derive from the Arabic language. Table 1 below summarises this study's system of transliteration.

Table 1: The Study's System of Arabic Transliteration

Arabic Alphabet	Transliteration
ا	A
ب	B
ت; ة	T ; H
ث	Th
ج	J
ح	H (soft)
خ	Kh
د	D
ذ	Dh (soft tongue)
ر	R
ز	Z
س	S
ش	Sh
ص	Sw
ض	Dhw
ط	Tw
ظ	Dh (heavy tongue)
ع	‘ (nasal a)
غ	Gh
ف	F
ق	Q
ك	K
ل	L
م	M
ن	N
و	W
ه	H (strong)
ء	’
ى	Y
Short Vowels	
Arabic	**Transliteration**
◌َ	A
◌ِ	I
◌ُ	U
◌ّ	Doubling a letter
Long vowels	
◌ٰ ; (◌َ + ~)	Aa
ي ; (◌ِ+~)	Ii
و ; (◌ُ+ ~)	Uu

Glossary of Arabic and Swahili Words

Arabic Words and Phrases

ajnabiyy	stranger
al-Answaar	the helpers or allies literally, herein the *Madinah* Muslims who gave refuge and stood by the emigrant *Makkan* Muslims
al-'ayn	the evil eye
al-hadiith (plural *ahaadiith*)	Prophetic saying or utterance
al-Muhaajiruun	the migrants
al-wildayni	dual parents
an-nisaa'i	the women
aql	intellect or reason
aqrabinaa	relatives or kindred
aqwa	stronger or more powerful
asaatidha (single *ustadh*)	male religious teachers
'*aswabah* (but often written as '*asabah*)	consanguinity or agnation, herein agnates or consanguine relations
ayah	verse
da'awah	invitation literally, herein propagating Islam
darsah	learning or a lesson, commonly used to refer to a learning session.
dhawul-furuudhw or *ahlul faraaidhw*	heirs at law, commonly referred to as Sharers or *Qur'aanic* heirs
dhulm or *dhulamah*	injustice or wrong, herein abrogating another's right(s)
dhwaruriyyaat	necessities, necessaries or exigencies, herein human interests whose absence makes life impossible, chaotic and destructive
diin	religion
ibn Aadam	literally child or children of Adam, contextually human being
iiman	belief
Eid-ul-fitwr	a day which celebrates the end of the Islamic fasting month (*Ramadhwan*)
fala wasiyyatah liwarthi	so there is no will for a deserving heir
faraaidhw (singular *fardhw*)	prescribed shares or religious obligations, herein the intestate fractions

fatwa	a legal or advisory opinion
fiqh	jurisprudence, herein the exegesis of both the *Qur'aan* and the *Sunnah*.
haajaat	needs or requisites, herein the conveniences of life which otherwise make life difficult
haajj	pilgrimage to *Makkah*
hajb	block or make inaccessible literally, herein to cut off or exclude
hajb hirmaan	complete exclusion
hajb nuqswaan	partial exclusion
haraam	ill-gotten
hasad	envy
hibah	a gift
hijaab	a curtain or a screen literally, herein the veil or covering
Hijriyyah	Islamic calendar
Hijrah	migration
hirmaan	stripping, debarring or disentitlement
hukmu (plural *ahkaam*)	a ruling, a holding, a decision or an award
‘*ibaadah*	worship or devotion
‘*iddah*	a woman's prescribed waiting period after divorce or death of her husband
ihsaan	kindness or benevolence
ijmaa'i	consensus, herein jurists' consensus
ijtihaad	independent opinion, herein the science of individual reasoning of *Qur'aanic* precepts and the Prophetic *Sunnah* to address issues (actual or hypothetical) which were not specifically dealt with during the revelation of Islam.
‘*illah*	cause or reason
'ilmul mirath	the knowledge on inheritance
imaam (plural *a'immah*)	a Muslim leader especially in religious matters
irthi or *miiraath*	inheritance
jaahili	an ignorant person or community
jaahiliyyah	ignorance, benightedness (or darkness), herein the pre-Islamic era
jilbaab	gown or loose garment

kadda	to work hard
khalifah	successor, herein God's trustee
khul'a	divorce at the instance of a wife in return of monetary compensation, often the paid dowry
khumuur or *khimaar*	veil
libaas	garment or clothing
maal	property or possessions
madrassah (plural *madaaris*)	a school or learning institution
ma'ahad	an institute
ma'arifatu diin	religious knowledge
maqaamul ab	the father's place or position
maqaaswid ash-Sharii'ah	objectives or intents of the *Sharii'ah*
masaajid (single *masjid*)	mosques
mu'aammalat'	dealings, intercourse, transactions, behaviour or conduct; herein someone's rights (in relation to his or her obligations)
muakhkhar	deferred portion of dowry
mu'umin	the believer
naf'a	benefit
nafs	a soul, a human being or life
Naibul Kadhi	deputy magistrate
nasl	progeny
nikaa-h	marriage
qadhwii	a judge or magistrate, herein umpires applying God's law
qiyaas	reasoned analogy
razaqa	to provide with the means of subsistence or to bestow upon
sahili	the coast or coastline
sawm	fasting
shahadah	bearing witness (ie expressing one's belief) in the Oneness of God and Prophet Mohamed (PBUH) as His Messenger
Sharii'ah	law and/or Islamic law
shirk	associating partners with God, herein associating God's attributes with His creations

sulh	peacemaking or conciliation
shuyuukh (single *sheikh*)	leaders, in Islamic jurisprudence it means male Muslim scholars
Sunnah	(Prophetic) practice or tradition
Sunni	orthodox Muslims
surah	a chapter of the Holy *Qur'aan*
swadaqah	charity, herein voluntary charity
tahsiiniyyaat	embellishments or improvements in life
tafsiir	an explication, herein *Qur'aanic* exegesis
takhaaruj	consensual estate distribution outside *Sharii'ah* portions
takliif	duty or obligation
ta'lil	justification or explanation, herein the logical relationship between a precept and its effect
tawhiid	Oneness or Unity of God
Thalatha Twa'ifah	
(but often written as *Thelatha Taifa*)	three communities or tribes
thumunu or *thumun*	an eighth
Tis'a Twa'ifah	nine communities or tribes
Twa'ifah (but often written as *taifa*)	a group, community or people
twalaq raj'iyy	repudiatory or revocable divorce
'ulamaa'a (single *'alim*)	scholars
ulu-l-arhaam or *dhawul-arhaam*	maternal relatives, commonly referred to as Distant Kindred
ustadhaat (single *ustadha*)	female Muslim religious teachers
usuul al-fiqh	principles of reasoning in Islamic jurisprudence
waqf	an endowment
zakaah	alms, herein it signifies the compulsory annual alms to identified recipients against specified amounts of Muslims' wealth
zakaatul fitwr	an obligatory staple food charity which is offered to the poor before the prayer of *eid-ul-fitwr*
zinaa	adultery or fornication

Swahili Words and Phrases

Arabuni	*Arabian*

atadhulumika	suffering an injustice
boma	an immediate or extended family or the homestead where any of these families is situated
buhusha	a loose clothing carrying bundled up clothes equivalent to today's suitcase
dhambi	a sin or sins
hati	an attesting document
hawangetesana	for not troubling each other
imani	faith literally. It also means being merciful or hopeful. Herein, it means compassion.
itikadi	a strongly-held practice
juu	up
kazi	job
kimbelembele	being outspoken literally. But its usage is often derogatory and means being greedy or uncaring
Kiswahili	the Swahili language literally, herein the practices of the waSwahili
kofia	cap
kukimbia urathi	abandoning one's potential inheritance right through death
kuridhiana	agreeing with one another ungrudgingly literally, herein indulging one another
kusameheana	forgiving one another
kusikitiana	feeling pity or showing kindness
kustahmiliana	being patient with one another literally, herein accepting what each other's inheritance fraction
lishakomaa limetoka kitambo.	
lina mizizi	has been around for ages. It is deep-rooted
mahadimu	serfs
mashamba (singular *shamba*)	farms literally, herein rural areas
mbora wao	the best among them
mchungaji	a care taker
mjini	town
milia	an open verandah
mnyonge	weak literally, herein one who has been deprived of her right or has suffered an injustice

mtaa (plural *mitaa*)	a neighbourhood
nyumba kubwa	big house literally, but its usage is contextual and may mean either the first wife or her family (ie her children and herself)
pauni mbili	two pounds
sanduku	a storage box mainly made of wood and commonly used by the waSwahili to keep valuables
serikali	the government or its mainstream structures (ie the institutions and laws)
sheikh wa mji	the Island's *sheikh*
sumni or *sumuni*	a corruption of the Arabic word *thumun*
tunavumilia tu	we just persevere patiently
uadilifu	justice or fairness
visiwani	multiple small islands, but contextually backward areas
vyuo (single chuo)	*Qur'aan* schools
wazee	the elderly, literally. Herein, parents and parents' parents' (how high so ever).

List of Abbreviations

AH	After *Hijrah*
CAP	Chapter
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRF	Critical Race Feminism
CRFs	Critical Race Feminists
CRS	Critical Race Scholarship or Scholars
CRTs	Critical Race Theorists
CUC	Court Users' Committee
FGD	Focus Group Discussion
FM	Frequency Modulation
GCRF	Global Critical Race Feminism
GCRFs	Global Critical Race Feminists
GR	General Recommendation
HC	High Court
HHS	How High So Ever
HLS	How Low So Ever
IIL	Islamic Inheritance Law
IPL	Islamic Personal Law
KC	Kadhis' Court
KCPPRs	Kadhis' Court Procedural & Practice Rules
KP	Khyber Pakhtunkhwa
LSA	Law of Succession Act
MFs	Muslim Feminists
MSC	Mumias Sugar Company
NACOSTI	National Commission for Science, Technology and Innovation
NGEC	National Gender and Equality Commission
NGOs	Non-governmental Organisations
NSSF	National Social Security Fund
PBUH	Peace Be Upon Him
SOJAR	State of the Judiciary and Administration of Justice
SUPKEM	Supreme Council of Kenyan Muslims

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1.0 CHAPTER 1: INTRODUCTION

1.1. Background to the Study

> *When my husband died in 2001, I got into a dispute with his family over his burial place. I wanted him buried in my compound. The family insisted on burying him on the family land. We went to the High Court and I won the case. Then the tussle on inheritance started. My brothers-in-law had two intentions: either for my co-wife to get a larger share than mine or to bar me from getting it. My late husband's estate constituted his employment terminal benefits, the National Social Security Fund (NSSF)*[1] *and the Co-operative Society*[2] *contributions, and a sugarcane crop on a leased half-an-acre plot. I had three daughters, two sons, and another daughter from my husband's previous marriage. My co-wife had a son only. My brothers-in-law were frustrating me because of the burial place dispute. I hired a lawyer. They also got one. We returned to the High Court. The court gave my co-wife and me 40% and 60% of the benefits respectively. Though I received 60%, 20% of my share went to my husband's daughter from his previous marriage. I got tired during the process. It was expensive. I lost time. My children suffered. I was leaving them alone in the house. I got the 60% of the employment terminal benefits. But I never got the payments out of the NSSF and the Co-operative Society. I also did not get the proceeds of the sugarcane crop. When harvested in 2001, the crop yielded Ksh.s 47,000/= and my brothers-in-law took it. Both the NSSF and Co-operative monies, on the other hand, were transferred to the Public Trustee. As of 2008, the NSSF money was Ksh.s 88,000/= and the Co-operative one was Ksh.s 64,000/=. But it seems that the money is finished on Public Trustee's fees. My co-wife said this was better than me getting it. But I do not blame anyone for not getting it. I got tired.*[3]

This is an example of the experiences Kenyan Muslim women continue to encounter when they pursue their inheritance. They risk or even suffer exclusion from their deceased relatives' estates because of a non-*Sharii'ah*[4] ground. When they approach the probate

[1] This is a compulsory government's retirement scheme wherein every public servant contributes into monthly for his or her own benefit upon retirement or the benefit of his or her dependants upon his or her death. See generally the National Social Security Fund Act (No 45 of 2013).

[2] This is a formal voluntary grouping either at the workplace or outside (but connected to the members' occupation) whose aim is to improve the welfare and economic situation of its membership. The members often make periodic contributions which they can later withdraw as a lump sum on a suggested date and/or use it as a security to borrow loans from the cooperative. See generally the Cooperative Societies of Kenya (No 12 of 1997).

[3] A participant in an FGD with women (Shibale, Mumias, Kenya, 8 November 2015) [hereinafter FGD 6].

[4] Arabic word meaning law and/or Islamic law. In this thesis, this term signifies Islamic law. All the meanings of Arabic words in this study, unless contained in a quote, are derived from Rohi Baalbaki, *Al-Mawrid: A Modern Arabic-English Dictionary* (7th edn, Dar El-IlmLilmalayin 1995). Where necessary, however, the study obtains the definitions of terminologies in Islamic jurisprudence from Muhammad Rawwas Qal' ajy, *Encyclopedia of Fiqh Scholars' Jargon: Arabic - English* (3rd edn, Dar An-Nafais 1988). Several authors write the transliteration of this Arabic word differently. Some use '*Shari'ah'*, '*Sharî'ah'* or '*Sharia'*. Others write it as '*Shari'at*' or '*Shariat*'. These variations signify a continued struggle to get the proper

institutions for justice, these women sometimes receive smaller shares than those stipulated by *Sharii'ah* or undivided ones which have been mixed up with the shares of other heirs. Often, this journey for claiming one's rights is protracted, expensive and emotionally draining such that some women give up their rights midway. And women's ignorance of their religion and mainstream rights contribute to this fatalistic attitude.

Yet like their corresponding males, Muslim females in their individual identities as mothers, wives, daughters and sisters of a deceased began to enjoy inheritance rights[5] 14 centuries ago.[6] According to the *Qur'aan*, the Muslim Holy Book and the primary source of Islamic law, the enjoyment of inheritance is for both men and women – whether the deceased's property is small or large.[7] In fact, the Sacred Text stipulates specific shares for the deceased's diverse male and female relatives[8] so determinately that God invokes His

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equivalent of the Arabic pronunciation. Unless quoting another text, this study shall employ the version of '*Sharii'ah*'.

[5] Inheritance (*irthi* or *miiraath* in Arabic) is the property acquired by others because of the owner's death. Interview with Isa Ismail, Kadhi (Nairobi, Kenya, 16 December 2015) [hereinafter Interview 128]; Majdah 'Amir, *Facilitating the Science of Inheritance in Islamic Law* (2009) 8; Abid Hussain, *The Islamic Law of Succession* (Darussalam 2005) 43; Hamid Khan, *Islamic Law of Inheritance: A Comparative Study of Recent Reforms in Muslim Countries* (3rd edn, Oxford University Press 2008) 39. Any property which devolves to others without linking the transfer to its owner's death is another property arrangement, regardless of how people name it. The accompanying text to note 209 identifies some of these other property tools.

[6] The precepts on inheritance were revealed in *Madinah* (also written as Medina), the second Muslim city after *Makkah* (also written as Mecca), in the third year of the Muslim calendar (*Hijriyyah*) similar to 624 AD. Interview with Hammad Kassim, Retired Chief Kadhi of the Republic of Kenya (Mombasa, Kenya, 21 October 2015) [hereinafter Interview 44]; Interview with Mwanarusi Chitenga, Ustadha, Madrasatul Inaba (Mombasa, Kenya, 16 January 2016) [hereinafter Interview 71]; Interview with Abdallah Khatib, Principal, College of Islamic Studies – Kikambala (Mombasa, Kenya, 16 January 2016) [hereinafter Interview 124]; Khan (n 5) 230. The computation of the Islamic calendar commenced on the year Prophet Muhammad (Peace Be Upon Him: PBUH) and other early Muslims migrated from *Makkah* to *Madinah* to flee persecution from the pagan Arabs. That migration (*Hijrah* in Arabic) bore the name of the Islamic calendar: '*Hijriyyah*' in Arabic. And Islamic years are named after it. For example, 3 AH mean 3 years 'After *Hijrah*'. It is presently approximately 1441 AH. Both *Madinah* and *Makkah* are found in present Saudi Arabia.

[7] See *Qur'aan* 4:7. Appendix 1 reproduces this *ayah* (Arabic term for verse). The first number in *Qur'aanic* citations refers to a *surah* (Arabic word for a chapter of the Holy *Qur'aan*) while the second relates to an *ayah* (plural *ayaat*). All the translations of the *Qur'aan* in this study are derived from Abdullah Yusuf Ali, *The Meaning of the Holy Qur'an* (11th edn, Amana Publications 2001).

[8] See *Qur'aan* 4:11, 12; and 176. See also Interview 44; Interview 97; FGD 13; Zainab Chaudhry, 'The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law' (1998) 3 J Islamic L 511, 515; Mary F Radford, 'Inheritance Rights of Women under Jewish and Islamic Law' (1999) 23 BC Int'l & Comp L Rev 135, 151, 163–64; Mohammad Mustafa Ali Khan, *Islamic Law of Inheritance : A New Approach* (2nd ed, Kitab Bhavan 2000) 12.

wrath against any person who would transgress these fractions.[9] And these fixed inheritance portions subsist whether the beneficiary is (re)married, single, rich or poor.[10]

The purport of these largely and deliberately intestate rights is to ensure that women, unlike in pre-Islamic Arabia,[11] benefit from a deceased relative's estate.[12] The traditional laws of succession in pre-Islamic Arabia (where Islam was originally revealed) excluded women. '[I]nheritance descended exclusively through the mature adult males nearest in degree to the decedent; women could not inherit, in fact, they were inherited by the men, and marital relatives (ie spouses) could never succeed.'[13] Thus Baderin surmises that:

> [T]he Islamic rules of inheritance actually make it impossible for certain heirs (which include women), from being completely ousted by testators who, in the absence of the Qur'aanic fixed shares, could have easily disinherited whoever they wish (including women) completely from inheritance.[14]

[9] See the concluding words of *Qur'aan* 4:11, 12 and 176. See also the admonition in *Qur'aan* 4:14 which continues *Qur'aan* 4:13. See further Interview with Farhan Fahad (Pate, Kenya, 21 November 2015) [hereinafter Interview 97]; Interview with Abdiya Suo, Women's Rights Activist (Amu, Kenya, 20 December 2015) [hereinafter Interview 115]; Interview with Ahmed Mohdhar, Chief Kadhi of the Republic of Kenya (Mombasa, Kenya, 15 October 2015) [hereinafter Interview 40]; Interview with Rashid Ali Omar, Deputy Chief Kadhi (Nairobi, Kenya, 17 February 2016) [hereinafter Interview 129]; Focus Group Discussion with women (Amu, Kenya, 20 December 2015) [hereinafter FGD 13]; Siraj Sait and Hilary Lim, *Land, Law and Islam: Property and Human Rights in the Muslim World* (Zed Books 2006) 109; Omar Ha-Redeye, 'The Role of Islamic Shari'ah in Protecting Women's Rights' in (Fifty-sixth Session of the Commission on the Status of Women, New York, SSRN 1 September 2009) 13 <https://papers.ssrn.com/abstract=1526868> accessed 23 May 2018.

[10] Interview 124.

[11] Interview 115; Radford (n 8) 137 and 176.

[12] See the explicit words of *Qur'aan* 4:33. While many Muslim scholars limit *'ilmul miiraath* (Arabic phrase for the knowledge on inheritance) to the intestate regime, this research construes inheritance to be both intestate and testate because the three main inheritance passages (ie *Qur'aan* 4:11, 12; and 176) and *Qur'aan* 4:33 recognise both systems. See eg Abu Ameenah Bilal Philips, *Funeral Rites in Islam* (2nd edn, IIPH 2005) 25–26; Nazeem MI Goolam, 'The Position of Females in the Islamic (Sunni) Law of Inheritance' (LLM Dissertation, International Islamic University Malaysia 1994) 4. In *Kamran Mohamed Noorani v Emrana Coral Walla* [2014] KC Civil Suit No 103 of 2014 (Nairobi) the court found the scope of inheritance wide and it includes wills, *waqf* (Arabic word for trusts), *hiba* (Arabic word for a gift) and the distribution of an estate.

[13] Chaudhry (n 8) 529. See also Radford (n 8) 165; Hussain (n 5) 25.

[14] Mashood A Baderin, 'A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?' (2001) 1 Human Rights Law Review 265, 283–84. See also Interview with Nabila Moosa, Ustadha (Mombasa, Kenya, 11 October 2015) [hereinafter Interview 39]; Interview 115; FGD 13. Mbote also posits that it is factual that, '[W]ills made by men tend to favour male heirs'. Patricia Kameri-Mbote (ed), *The Law of Succession in Kenya: Gender Perspectives in Property Management and Control* (Women and Law in East Africa, 1995) 13.

In essence, *Sharii'ah* precluded predicating the deceased's relatives' property rights 'on the vagaries of relationships'[15] such as prejudice and greed.

But women may also benefit from the permissible testamentary disposition. All the three precepts embodying the intestate fractions similarly recognise an individual's limited testamentary power. A Muslim can bequeath a maximum of a third of his or her property during his or her lifetime.[16] This testamentary recognition balances a Muslim's freedom to transfer his or her property as s/he chooses and the responsibility to his or her lawful heirs under the *Qur'aanic* arrangement.[17] Thus women who are ineligible to the intestate distribution, naturally[18] or by circumstances,[19] may benefit from a bequest.[20]

[15] Sait and Lim (n 9) 109. See also ibid 112; Ali Khan (n 8) 208.

[16] Interview with Abdallah Bwanapwani, Chief, Pate Location (Pate, Kenya, 20 November 2015) [hereinafter Interview 92]; Interview with Hamadi Mwamtuza, Advocate of the High Court (Mombasa, Kenya, 2 November 2015) [hereinafter Interview 69]. It is the Prophetic tradition explicating the bequests in *Qur'aan* 4:11, 12 and 176 which fixed this size. Any legacy above the permissible one-third, just like any variation to the intestate portions, must be endorsed by the intestate heirs. Interview 69; Khan (n 5) 1 and 231; Hussain (n 5) 387; Chaudhry (n 8) 548.

[17] *Saifudean Mohamedali Noorbhai v Shehnaz Abdehussein Adamji* [2011] eKLR 4; *Noorbanu Abdulrazak v Abdulkader Ismail Osman* [2017] eKLR [20]. Esposito and DeLong-Bas note that it marks the 'inviolate right' of the heirs to the deceased's estate. John L Esposito and Natana J DeLong-Bas, *Women in Muslim Family Law* (Syracuse University Press 2001) 43. See also Interview 115; Noel James Coulson, *Succession in the Muslim Family* (Cambridge University Press 1971) 1–2; Goolam (n 12) 12. In Islamic conception of property, the absolute ownership of property is with God. Humans only own it as His trustees. They thus must appropriate it, including during inheritance, within His Guidance. Sait and Lim (n 9) 109 and 110; Goolam (n 12) 8–9; Ali Khan (n 8) 203 and 211. *Qur'aan* 2:188 and 28:77 (among other verses) enjoin how a Muslim can expend his or her wealth. S/he cannot facilitate bad ends. The accompanying texts to notes 413 and 414 explain humans' general trusteeship (vicegerency) on earth.

[18] Such as relatives who are non-Muslims; illegitimate and adopted children; grandchildren and charitable initiatives. Preliminary interview with Hammad Kassim, Retired Chief Kadhi of the Republic of Kenya (Mombasa, Kenya, May 23, 2013); FGD 13; Sait and Lim (n 9) 113 and 114; JND Anderson, *Islamic Law in the Modern World* (Stevens & Sons 1959) 80. See also *Qur'aan* 4:8.

[19] Not all the specified beneficiaries charge the estate at once. Interview with Maulid Kale, Scholar (Mombasa, Kenya 27 December 2015) [hereinafter Interview 123]; Anderson, *Modern World* (n 18) 62. There are principal heirs and those whose presence exclude others. Sub-section 3.3.1 narrates these intestate rules.

[20] The legacy cannot benefit females (and males) who are intestate heirs. Radford (n 8) 168. Several Muslim key informants reiterated a segment of a Prophetic saying or utterance (*al-hadiith*, plural *ahaadiith* in Arabic) banning bequests to identified heirs, viz: *fala wasiyyatah liwarthi* (Arabic phrase for 'so there is no will for a deserving heir'). See eg Interview with Abdallah Ateka, National Chairman, Council of Imaams & Preachers of Kenya (Kakamega, Kenya, 11 November 2015) [hereinafter Interview 86]; Interview 69. See further attending text to note 846. *Ahaadiith* are Prophet Muhammad's (PBUH) pronouncements which he made to instruct a religious edict or explain a particular *Qur'aanic* precept. They constitute part of the Prophetic *Sunnah* (Arabic term for practice or tradition), the second source of *Sharii'ah*. See further note 122. Muslims, however, loosely employ the Arabic word *Sunnah* to indicate the Prophetic Tradition.

Despite these dual guarantees of women's testate and intestate succession, there are 'contemporary behavioral [sic] manifestations in certain Muslim localities'[21] around the world which deny women the right to inherit their stipulated portions, partially or wholly. The upsurge of Islamic extremists in Egypt, the West Bank (in Palestine) and parts of Israel, for example, preclude women from establishing financial independence (through prohibition of work and exclusion from public life).[22] Thereafter, these women's male relatives easily coerce the females into giving up their inherited wealth in return for a guarantee of continued financial support.[23] Thus the first government survey on ownership and access to resources which took place in 1999 revealed that only a quarter of Palestinian women received inheritance.[24] But a majority of these women who got this inheritance (67% in West Bank and 48% in Gaza) did not receive their prescribed *Qur'aanic* shares.[25]

Similarly, the introduction of a Muslim voice in colonial India in the 20th Century saw the ascension of *'ulamaa'a* (single *'alim*)[26] to a political class and the erosion of women's inheritance rights.[27] The Muslim scholars' subsequent proposal to codify Islamic inheritance law (IIL) into the Indian Muslim Personal Law (*Shariat*) Application Act of 1937 denied women, paradoxically, the right to succeed agricultural land because the resultant law exempted the application of *Sharii'ah* to agricultural lands.[28] Yet agricultural land formed '99.5% of all property in India'.[29]

[21] Ḥammūdah'Abd al-' Āṭī, *The Family Structure in Islam* (American Trust Publications 1977) 267.

[22] Radford (n 8) 183.

[23] ibid; Lynn Welchman (ed), *Women's Rights and Islamic Family Law: Perspectives on Reform* (Zed Books 2004) 150.

[24] Welchman (n 23) 150.

[25] ibid.

[26] Arabic word for scholars, herein 'legal and theological interpreters of the *Qur'aan* and *ahadeeth'*. Vrinda Narain, 'Women's Rights and the Accommodation of Difference: Muslim Women in India' (1998–99) 8 S Cal Rev L & Women's Stud 43, 47.

[27] ibid.

[28] Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (Sage Publications 1992) 46.

[29] Narain (n 26) 48.

Continued reigning of tribal customs in some communities has further excluded women from inheritance such that their shares are included in the males'.[30] This position is admitted by many countries with either Muslim majority or significant Muslim minority populations. Gabon, Guinea, Guinea Bissau, Kazakhstan, Lebanon, Nigeria, Turkey and Uganda are some of the nations that confirmed this reality in their State Reports before the Committee on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[31] The countries posited that 'powerful local customs and traditions'[32] (and not religious discrimination) are the reason behind existing discrimination within families. In other Muslim countries such as Pakistan, however, culture and religion have mixed up so much such that there is confusion as to what is Islamic and what is tradition 'and how (if at all) to delineate their separate jurisdictions.'[33]

In Kenya where there is a significant Muslim minority population,[34] the syncretic practice which interweaves custom with Islam is also one of the factors that displaces women's stipulated succession rights.[35] Strong unfavourable tribal inheritance norms which deny

[30] Nayer Honarvar, 'Behind the Veil: Women's Rights in Islamic Societies' (1988) 6 Journal of Law and Religion 355, 382.

[31] See Sisters in Islam, *CEDAW and Muslim Family Laws: In Search of Common Ground* (Musawah 2011) 14.

[32] ibid.

[33] Anita M Weiss, 'Interpreting Islam and Women's Rights: Implementing CEDAW in Pakistan' (2003) 18 International Sociology 581, 593.

[34] Kahumbi Maina, 'Christian-Muslim Relations in Kenya' in Mohamed Bakari and Saad Yahya (eds), *Islam in Kenya: Proceedings of the National Seminar on Contemporary Islam in Kenya* (Mewa Publications 1995) 116; Attiya Waris, 'Making a Mountain out of a Molehill: The Protection of the Right to the Freedom of Religion of the Muslim Religious Minority in Kenya's Constitution' (2007) 14 Int'l J on Minority & Group Rts 25, 39; Joseph Wandera, 'Muslims, Christians and State: The Contest for Public Space in Kenya' [2008–09] Annual Review of Islam in Africa 17, 17; Mohamed Mraja, 'Kadhi's Courts in Kenya: Current Debates on the Harmonised Draft Constitution of Kenya' in Abdulkader Tayob and Joseph Wandera (eds), *Constitutional Review in Kenya and Kadhis Courts: Selected papers presented at the Workshop, 20 March 2010, St Paul's University, Limuru, Kenya* (Center for Contemporary Islam University of Cape Town 2011) 37.

[35] According to the 2009 National Census, Muslims make 11.2% of the country's 38,412,088 Million population. Kenya National Bureau of Statistics, 'The 2009 Kenya Population and Housing Census: Counting Our People for the Implementation of Vision 2030' (Population and Household Distribution by Socio-Economic Characteristics, August 2010) 28 and 396. The Kenya National Bureau of Statistics, however, called for a repeat polling in four counties, three of which have substantive Muslim population (ie Mandera, Garissa and Wajir) because their data revealed exceedingly inconsistent population growth rates compared to those of the rest of the country and the neighbouring areas. See ibid iv and 29. Politicians from these areas challenged this call in court and to date no such repeat poll has been conducted. The recent 2019 Census, however, estimates Muslims at 11% of the population. But a closer look at the census results gives inconsistent figures of 10.9% and 10.8% because Volumes I and IV of the Census Report estimate the country's population at 47,564,296 and 47,213,282 respectively. See Kenya National Bureau of Statistics, '2019 Kenya Population and

women inheritance (generally) and the significant property in their communities (in particular), dictate the course of many Muslim homes in the country. Because these traditions are powerful and pervasive, they come first when adjudicating inheritance regardless of the deceased's family's knowledge of IIL or practice of Islam. Thus, for instance, different tribal communities invoke their not-so-differentiated customs[36] to exclude women (as widows, daughters, sisters and/or the deceased's mother) from either land (among agricultural and agro-pastoral tribes) or livestock (among pastoral nations[37]).

Other factors which prevent Kenyan Muslim women from receiving their stipulated inheritance shares include widespread ignorance of IIL and practice challenges within the probate systems (both judicial and extra-judicial[38]). The unfamiliarity of IIL among both Muslim men and women; some Islamic religious leaders, some probate officials (eg judges, Public Trustees and those in charge of the informal systems), and lawyers, for example, result in these women inheriting under unfavourable customary laws, the Law of Succession Act (LSA)[39] or not inheriting at all. And while some women receive their decreed inheritance in the probate institutions, some of these processes are plagued with barriers which defeat a majority of women's enjoyment of their inheritance. These challenges range from expensive, protracted and technical court processes; geographical distanced courts; inability to enforce

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Housing Census Volume I: Population by County and Sub-County' (Kenya National Bureau of Statistics November 2019) 7; Kenya National Bureau of Statistics, '2019 Kenya Population and Housing Census Volume IV: Distribution of Population by Socio-Economic Characteristics' (Kenya National Bureau of Statistics December 2019) 422. The Muslim leadership has discredited these census results. See 'Leaders Dispute "doctored" Census Numbers', *The Friday Bulletin: The Weekly Muslim News Update* (877th edition, Nairobi, 28 February 2020) 1 and 7.

[36] Eugene Cotran, 'The Unification of Laws in East Africa' (1963) 1 The Journal of Modern African Studies 209, 213–14.

[37] Makau Mutua describes the pre-colonial African tribes as nations. See Makau W Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 VA J INT'L 339, 347. See also Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Reprint, Clarendon Press 1996) 11. But this description is removed from the contemporary conceptualization of states. 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, 6. Instead it means 'a people or a culture'. Kymlicka, *Multicultural Citizenship* 11. See also note 300 where the 12 waSwahili tribes called themselves '*taifa*' (a derivative of the Arabic word '*twa'ifah*' which means a group, community or people).

[38] These include family, grassroots administrative officials like the village elders, the chiefs, Assistant Deputy County Commissioner (former District Officer) and the Deputy County Commissioner (former District Commissioner).

[39] Law of Succession Act (Chapter 160). This is the general piece of legislation which governs succession matters (testate or intestate) in the country including administration of the estates. See section 2 (1).

decisions; to distribution of partial or unvalued estates; and wrongful application of the inheritance laws.

This displacement of Kenyan Muslim women's inheritance rights happens even when the Constitution,[40] the LSA and the Kadhis' Courts Act[41] guarantee the application of IIL. The constitution, for example, establishes the Kadhis' courts (ie specialized judicial institutions) which determine limited questions of *Sharii'ah* including those relating to succession when all parties are Muslims and accept the courts as their adjudicating forum.[42] It has also limited its equality provisions in the Bill of Rights[43] to ensure that 'the application of Muslim law before the Kadhis' courts (…) in matters relating to (…) inheritance'[44] takes place. On its part, the Kadhis' Courts Act reiterate the subject-matter jurisdiction of the courts established by the constitution.[45] This legislation also recognises the concurrent jurisdiction of the High Court and the Magistrates' Courts to hear Muslims' inheritance cases.[46]

The LSA, on the other hand, ensconces the application of IIL to both Muslim testate and intestate estates. First, it excludes its substantive provisions from applying to any property of a Muslim who dies as such.[47] Second, it permits its provisions relating to the administration

[40]The Constitution of Kenya (2010).

[41]Kadhis' Court Act (Chapter 11).

[42] See article 170(5). These courts constitute part of the subordinate courts in the country. See article 169 (1) (b). But the courts have existed in the country (even before the delineation of its territory as such) and applied IIL since the 7th Century. See Ahmed Idha Salim, 'The Impact of Colonialism upon Muslim Life in Kenya' (1979) 1 Institute of Muslim Minority Affairs Journal 60, 60; Marc J Swartz, 'Religious Courts, Community, and Ethnicity among the Swahili of Mombasa: An Historical Study of Social Boundaries' (1979) 49 Africa: Journal of the International African Institute 29, 32; Abdulkadir Hashim Abdulkadir, 'Reforming and Retreating: British Policies on Transforming the Administration of Islamic Law and Its Institutions in the Busa'idi Sultanate 1890-1963' (DPhil Thesis, University of the Western Cape 2010) 5, 7 and 10; Neville Chittick, 'A New Look at the History of Pate' (1969) 10 The Journal of African History 375, 375, 379 and 390; Kelly Michelle Askew, 'Female Circles and Male Lines: Gender Dynamics along the Swahili Coast' (2003) 46 Africa Today 67, 67; Pravin Bowry, 'Looking for Way Forward on Muslim Law', *The Standard*, Opinion (Nairobi, 21 May 2014); Arye Oded, *Islam and Politics in Kenya* (Lynne Rienner Publishers 2000) 12; Randall L Pouwels, 'The Medieval Foundations of East African Islam' (1978) 11 The International Journal of African Historical Studies 201, 207; Mohamed Hyder, 'Kenya's Religious Minorities: Fears and Prayers' in *Report of the Constitution of Kenya Review Commission: Technical Appendices* (Constitution of Kenya Review Commission 2003) vol 5(2), 503.

[43] This relates to articles 27 (equality and freedom from discrimination) and 45 (family).

[44] Article 24 (4).

[45] See section 5.

[46] Ibid.

[47] See section 2 (3).

of estates[48] to apply to Muslim estates on condition that those provisions are consistent with IIL.[49] Third, while it recognises the High Court as the subsisting probate court,[50] the LSA announces emphatically the Kadhis' courts as the Muslim probate courts and grants the courts further powers to determine any such 'other question arising under'[51] the Act in relation to Muslim estates.[52] Fourth, it recommends to the Chief Justice to consult with the Chief Kadhi and make rules which would facilitate 'better'[53] the Kadhis' courts' authority under the Act.[54]

1.2. Statement of the Problem

Despite successive constitutional and legislative provisions guaranteeing the application of IIL in the country, many Muslim women continue to lose out on their stipulated inheritance rights. When an estate is distributed at the family level or another extra-judicial probate forum, often the deceased's natal family's ethnic customs (not *Sharii'ah*) is used. Sometimes, a fusion of both IIL and the customs is followed and the family believes it is dividing the property according to IIL. Only women who come from families which are educated religiously and committed to the practice of Islam receive the correct entitlements. Yet the family and such other extra-judicial system such as the village elders and the chief constitute a majority of women's primary avenues for resolving property issues. When the estate is distributed at the courts, on the other hand, save at the Kadhis' courts, the mainstream courts also often employ the LSA or the deceased's natal family's ethnic customs.

[48] These are the Probate and Administration Rules (commonly referred as P&A) provisions. They are found in Part VII of the LSA and its Fifth, Sixth and Seventh Schedules.

[49] See section 2 (4). In *Rashid Zahran v Azan Zahran & 4 others* [2011] Civil Appeal No 55 of 1999 (HC), 12, the High Court in Mombasa found section 2(4) of the LSA 'directory and not mandatory'.

[50] Interview 126. See section 47 of the LSA.

[51] See section 48(2).

[52] Ostensibly, this additional mandate derives from section 66(3) of the Constitution of Kenya (1963) (Repealed). Section 66(3) [just like its equivalent section 179(3) of the original independence constitution] had permitted Parliament to enact a law that would confer further jurisdiction and powers to the courts as long as those powers and jurisdiction conformed with the constitution.

[53] See section 50A.

[54] But to date these rules have not been published. *Fauzi Said Ali & 3 Others v Said Ahemed Ali (Deceased) & Another* [2014] eKLR 9.

The employment of ethnic customs or the LSA instead of IIL in the affected probate processes is informed by many factors. These include: privileging the ethnic customs; ignorance of IIL; misconstruing the heirs' choice of the ordinary courts as an abandonment of *Sharii'ah*; and treatment of IIL as discriminatory. IIL is particularly regarded as discriminatory against women, the deceased's non-Muslim relatives and the widow. Since IIL grants some men double inheritance shares compared to some female within the same category of familial relationship, it is treated as favouring men. Again, since IIL does not benefit the deceased's non-Muslim relatives – regardless of their close blood-proximity – it is regarded as discriminating on account of religion. Furthermore, since the deceased's mother's share exceeds that of the widow when the deceased has left a child, critics surmise that IIL disregards the widow, particularly her proximity with the deceased during their marriage.

These factors and perspectives, however, misconceive IIL and its application in the country. They further represent a narrow understanding of both the concept of family in Islam and the substantive strand of the principle of equality upon which IIL is founded. The continued disentitlement of Muslim women of their guaranteed Islamic inheritance rights erodes the constitution and the LSA. It is also an abrogation of these females' property rights and a travesty of gender justice.

1.3. Assumptions

Guided by the background to this study and the problem statement, this research is founded on the following assumptions:

1. Ignorance of IIL across the Kenyan ethnic and socio-legal communities contributes significantly to the disentitlement of Muslim women's stipulated inheritance shares.
2. Observance of ethnic traditions which are unfavourable to women denies Muslim women their inheritance rights.
3. Structural barriers in the probate institutions in the country negatively impact on women's actual enjoyment of their inheritance rights.

1.4. General and Specific Objectives of the Research

The general objective of this study, therefore, is to establish whether Muslim women in Kenya actually enjoy their inheritance rights as decreed in the *Qur'aan* and protected by the 2010 Constitution and the Law of Succession Act. To achieve this, the researcher will be guided by the following specific objectives:

1. To delineate the concept of sexual equality in Islam and relate it to Muslim men's and women's inheritance rights.
2. To analyse the contextual application of IIL in Kenya.
3. To assess the extent of ignorance of IIL in Muslim families and among probate officers (judicial and extra-judicial) and its impact on women's inheritance rights.
4. To establish the extent to which a deceased Muslim's ethnicity, locality and economic disposition influence his or her female relatives' enjoyment of their stipulated *Sharii'ah* inheritance portions.
5. To explore other factors which contribute to the failure to effect women's entitlements as stipulated in IIL.
6. To suggest appropriate interventions and strategies for addressing instances of disentitlement of Kenyan Muslim women.

1.5. Research Questions

Oriented by these Research Objectives, this study sought to answer this question: do Muslim women in Kenya enjoy their inheritance rights as stipulated in IIL? To establish the response to this overall question, the research interrogated several specific questions whose answers assisted in providing the main one. These were:

1. How does Muslim sexual equality theory explain the disparate shares between males and females in certain categories of divisions?
2. What is the contextual application of IIL in Kenya?
3. To what extent does a deceased Kenyan Muslim's ethnicity, locality or livelihood (among other identities) determine whether his/her family will honour the portions stipulated for female relatives under IIL?

4. To what extent does ignorance of IIL in Muslim families and among probate officers (judicial and extra-judicial) impact on women's inheritance rights?
5. What other factors contribute to the disentitlement of women's actual Islamic inheritance proportions?
6. How can disentitlement of Kenyan Muslim women be addressed effectively?

1.6. Conceptual Framework

Many critics have concluded that IIL is discriminatory because it accords to some women smaller shares than their corresponding male relatives.[55] They thus label it as devoid of gender justice. Yet at the root of this criticism is a failure to understand the concept of justice broadly, and more specifically, gender justice under Islamic jurisprudence.[56] This criticism similarly represents a narrow understanding of equality – which understanding renders equality as no more than sameness[57] – a position that has been critiqued from the vantage point of substantive equality. This thesis, therefore, finds it useful to delineate several words and phrases that repeatedly feature in it. These are Muslim women's rights, gender justice, equity and non-discrimination.

'Gender justice' means employing the law to eliminate or to avoid reinforcing the inequalities and inequities between men and women.[58] Thus, in a system where justice is responsive to gender, both men and women are guaranteed enjoyment of their rights (whether social, economic, political, civil or cultural)[59]. This means that, not only do propitious laws to

[55] See eg Urfan Khaliq, 'Beyond the Veil: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah' (1995–96) 2 Buff J Int'l L 1, 1; Radford (n 8); Narain (n 26) 51; Sisters in Islam (n 31).

[56] Azizah al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women's Rights' (1997) 12 American University International Law Review 1, 3–4; Ziba Mir-Hosseini, 'Beyond "Islam" vs Feminism' (2011) 42 IDS Bulletin 67, 67.

[57] Gerald Torres, 'Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice--Some Observations and Questions of an Emerging Phenomenon' (1990–91) 75 Minn L Rev 993, 1001; Ansar al-Adl, 'Concept of Gender Equality in Islam (Part 1 of 2): Physiology' (*The Religion of Islam*, 18 December 2006) <https://www.islamreligion.com/articles/458/concept-of-gender-equality-in-islam-part-1/> accessed 26 May 2018; Sylvia Law, 'Rethinking Sex and the Constitution' (1984) 132 University of Pennsylvania Law Review 955, 1009–10.

[58] Laura Turquet and others, '2011 - 2012 Progress of the World's Women: In Pursuit of Justice' (Progress of the World's Women, UN Women 2011) 9.

[59] ibid. Gheaus and Seguino share separately the forms of gender justice. See Anca Gheaus, 'Gender Justice' (2012) 6 Journal of Ethics and Social Philosophy 1, 4–5; Stephanie Seguino, 'Toward Gender Justice: Confronting Stratification and Unequal Power' (2013) 2 Géneros 1, 6–7.

both men and women exist on paper, but also that the 'infrastructure of justice'[60], ie the police and the courts uphold these laws. Gender justice is thus seen by many writers and development practitioners as the product of the processes of gender equality.[61]

Equity, on the other hand, means fairness. It is often employed (by States and organisations) as a principle to level the playing field between men and women. Thus the phrase 'gender equity' refers to '*fair* treatment of men and women according to *their respective needs*'[62] and realities. This may mean 'equal treatment, or treatment that is different but considered equivalent in terms of rights, benefits, obligations and opportunities'.[63]

The phrase 'non-discrimination' – which literally means absence of discrimination – is interchangeably used with the word 'equality'[64] such that an 'equal protection' clause in international human rights instruments and domestic constitutions is sometimes referred to as a 'non-discrimination' provision.[65] But what exactly constitutes 'equality' is a protracted philosophical debate.[66] It has absorbed philosophers, jurists, scholars and legal practitioners for very long resulting in a multitude of theories. In feminist philosophy alone, there are over 11 estimations of what equality intimates. These include liberal, radical, cultural, Marxist, socialist, Muslim and critical race (also known as intersectionality).[67] And each protagonist believes her or his inquiry explains this principle best.

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[60] Turquet and others (n 58) 8.

[61] See Caren Levy, 'Gender Justice and Development Policy: Is "Gender Mainstreaming" up to the Challenge?' (UCL Development Planning Unit, London, 10 September 2009).

[62] UN Committee on the Elimination of All Forms of Discrimination Against Women, 'General Recommendation 28' [2010] UN Doc CEDAW/C/GC/28, para 22. Emphasis added.

[63] ibid.

[64] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 Int J Const Law 712, 715.

[65] Interights, *Non-Discrimination in International Law: A Handbook for Practitioners* (Interights 2011) 14; UN Committee on Economic, Social and Cultural Rights, 'General Comment No 16' [2005] UN Doc E/C12/2005/4, para 10.

[66] 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) 53; Fredman (n 64) 712.

[67] Mary Becker and others, *Cases and Materials on Feminist Jurisprudence: Taking Women Seriously* (West Pub Co 1994) excerpts the works of some of the leading proponents of these legal positions. See also Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 U Chi Legal F 139; Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (2nd edn, Oxford University Press 1999).

This study, however, embraces the meaning of equality which is enunciated by human rights Treaty Bodies and leading contemporary international human right lawyers, viz: substantive equality, because it reflects the holistic application of this principle. The Treaty Bodies hold, for example, that the equality of sexes called for by international human rights instruments[68] is 'substantive equality'.[69] Substantive equality portends treatment of individuals in different situations differently.[70] It 'encompasses two distinct ideas – equality of results and equality of opportunity.'[71] 'Equality of results' also known as equality of outcomes[72] 'requires that the result of the measure under review must be equal.'[73] This principle recognises that 'identical treatment can, in practice, reinforce inequality' because of past or on-going differences 'in access to power or resources.'[74] 'Equality of opportunity', on the other hand, means that 'all individuals must have an *equal opportunity'* or chance 'to gain access to the desired benefit' taking into account their different starting points.[75]

In essence, for substantive equality to be achieved there must be neither direct nor indirect discrimination.[76] Direct discrimination refers to different treatment which is

[68] See Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 993 TS 3, articles 55(c) and 56; Universal Declaration on Human Rights (adopted 10 December 1948) UNGA Res 217 (AIII) (UDHR), articles 2 and 7; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), articles 2, 3 and 26; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), articles 2 and 3; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter), articles 2 and 3; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 13 September 2000, entered into force 25 November 2005) 1 Afr Hum Rts LJ 40, arts 2 and 8; and the entire Convention on the Elimination of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) (CEDAW Convention).

[69] See 'CEDAW/C/GC/28' (n 62) paras 9 and 16; Committee on Economic, Social and Cultural Rights (n 65) para 6; UN Committee on the Elimination of All Forms of Discrimination Against Women, 'General Recommendation No 25' in *Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Treaty Bodies* (UN Doc HRI/GEN/1/Rev.9 (Vol. II), 2008) paras 6–8; 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/Rev.9 (Vol. I), 2008) paras 8 and 13.

[70] Interights (n 65) 17.

[71] ibid.

[72] ibid.

[73] ibid.

[74] ibid.

[75] ibid. Emphasis added. See also David A Strauss, 'The Illusory Distinction between Equality of Opportunity and Equality of Result' (1992–93) 34 Wm & Mary L Rev 171, 173.

[76] 'CEDAW/C/GC/28' (n 62) para 16.

primarily (ie intentionally) predicated on a proscribed ground such as race, ethnicity, religion, age or sex. In the context of women, for example, direct discrimination denotes 'different treatment explicitly based on grounds of sex and gender differences.'[77] Indirect discrimination, on the other hand, arises when an otherwise neutral treatment or rule nonetheless impacts negatively on a protected category because of failure to observe the underlying subtleties among those concerned by the rule or treatment.[78] The CEDAW Committee observes that indirect discrimination 'occurs when a practice, rule, requirement or condition is neutral' in so far as it relates to men and women, but 'impacts disproportionately' against women because 'pre-existing inequalities are not addressed' by the neutral measure.[79]

Thus substantive equality means 'relative equality, namely the principle to treat equally what are equal and unequally what are unequal'.[80] It does not portend 'absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances'.[81] Substantive equality is hence different from formal or juridical equality. This latter form of equality demands sameness or identical treatment between individuals 'without regard to the broader context within which such treatment occurs.'[82]

In the context of women, juridical equality means treating the sexes similarly in both the private and the public realms.[83] Thus it necessitates crafting or reforming the law such that women enjoy similar rights to education, property ownership and employment (including

[77] ibid.

[78] Interights (n 65) 18.

[79] 'CEDAW/C/GC/28' (n 62) para 16.

[80] Tanaka J in *South West Africa, Second Phase, Judgment,* ICJ Reports (1996) 6, 306 (International Court of Justice 1966).

[81] Tanaka J in ibid at 306. The Kenyan Constitutional Court enunciated a similar verdict in the *Federation of Women Lawyers (FIDA – K) & 5 others v Attorney General* [2011] eKLR 19–24.

[82] Interights (n 65) 17. MacKinnon, a white radical feminist, calls this form of equality as 'treating likes alike'. Catharine A MacKinnon, 'Sex Equality under the Constitution of India: Problems, Prospects, and "Personal Laws"' (2006) 4 Int J Const Law 181, 181. See also Patricia Cain, 'Feminism and the Limits of Equality' (1989) 24 Ga L Rev 803, 803.

[83] Women theorise this position (in academia and litigation) through liberal feminism. Renown liberal feminists include Ruth Bader Ginsburg, Herma Hill Kay, Wendy Williams, Nadine Taub. Cain (n 82) 829. The pioneers of this thought, however, were Mary Wollstonecraft and Harriet Taylor. See generally John Stuart Mill and Harriet Taylor Mill, *The Subjection of Women* (The Floating Press 2009); John Stuart Mill and Harriet Taylor Mill, *Essays on Sex Equality* (University of Chicago Press 1970); Mary Wollstonecraft, *A Vindication of the Rights of Woman With Strictures on Political and Moral Subjects* (2002).

professional jobs, equal pay and equal conditions of work) like men.[84] Though this formal or liberal perspective has made considerable gains for women,[85] commentators dismiss it as purely a strategy of assimilating women to men[86] and of ignoring 'women's differing physique and physiology'.[87]

The varied constructions of the principle of 'non-discrimination' are relevant to the discourse on Muslim women's rights. Because of the reported discriminatory experiences of women in various Muslim societies, locally and abroad, many have questioned or explained the place of women in Islam. In this age, practices such as dissimilar inheritance shares between men and women in the same level of family relationship; veiling; and stoning to death of convicted adulterers and adulteresses sound outdated and in gross violation of human dignity.

But Muslim women – just like men – have multiple rights provided within Islam. These rights include the rights to life, justice, freedom, basic necessities of life, protection from arbitrary arrest, equality, security of property, and freedom of conscience.[88] Most importantly, women enjoy these rights on an equal footing with men. The point is this: what seems negative treatment against women is less than obvious.[89]While part of such treatment is indeed negative (eg forced marriages and female genital mutilation), it is far removed from Islam and is a pure idiosyncrasy of those committing it.[90] Other seemingly indifferent treatment is however within Islamic conception of rights and is intended to serve a *Sharii'ah* purpose. It is not discriminatory in nature.[91]

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[84] United Nations Development Programme, 'Human Development Report 1995' (Human Development Reports, Oxford University Press 1995) 100; Ruth Ginsburg and Barbara Flagg, 'Some Reflections on the Feminist Legal Thought of the 1970's' (2015) 1989 University of Chicago Legal Forum 9, 9, 14–15.

[85] Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987) 35.

[86] Cain (n 82) 831; Ginsburg and Flagg (n 84) 17.

[87] Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson 1985) 174.

[88] See Moza Ally Jadeed, 'Islam and Human Rights: An Examination of the Islamic Penal Law' (LLB Dissertation, Moi University 2003) 9–17.

[89] Honig (n 287) 37.

[90] Wadud (n 67) ix–x; Ziba Mir-Hosseini, 'The Construction of Gender in Islamic Legal Thought and Strategies for Reform' (2003) 1 Hawwa 1, 21.

[91] Barlas (n 2) 146.

Undoubtedly, Islamic perspective on human rights differs from its conventional counterpart because of the former's outlook on 'the duality of interests between the individual and the state.'[92] That is to say, first, while the mainstream global human rights regime places responsibility on the State to respect, protect and fulfill its citizens' rights, Islam lays this emphasis on the individual and the plurality of individuals (*ummah* in Arabic) and not necessarily a specialised political body.[93] The *Qur'aan* recurrently refers to a community of believers (ie 'O ye who believe'[94]) and sometimes 'O mankind'[95] to instruct both the individual and the nation (of individuals). While this inclination does not negate the concept of political leadership in Islam, it stresses the responsibility to respect, protect and fulfill human rights on the individual and society.[96]

Second, while the '[W]est emphasises individual rights and interests (…) Islam gives priority to collective good in the event where the latter conflicts with the interests of the individual.'[97] In the upshot, human rights in Islam are valid if they safeguard the five essentials of life (*dhwaruriyyaat*[98]). These are: religion (*diin*), life (*nafs*[99]), intellect ('*aql*), progeny (*nasl*), and private property or wealth (*mal*).[100] Therefore, the individual, the community and the State, if any, must guard these essentials before asserting or denying a right.

1.7. **Theoretical Framework**

[92] Mohammad Hashim Kamali, *The Dignity of Man: An Islamic Perspective* (2nd edn, Islamic Texts Society 2002) xiv.

[93] ibid; Esposito and DeLong-Bas (n 17) 1.

[94] See eg *Qur'aan* 49:1, 2, 6, 11 and 12.

[95] See eg *Qur'aan* 4:1 and 49:13.

[96] Kamali, *Dignity* (n 92) xv.

[97] ibid.

[98] Arabic word for necessities, necessaries or exigencies. Contextually, these are human interests whose absence makes life impossible, chaotic and destructive. Chaudhry (n 8) 522 and 524; Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oneworld Publications 2008) 33. Other human interests include the *haajaat* (Arabic word for needs or requisites, herein the conveniences of life which otherwise make life difficult); and the *tahsiiniyyaat* (Arabic word for embellishments or improvements, herein, 'the embellishments of life without which life is neither impossible nor hard' but their attainment makes it desirable). Chaudhry (n 8) 522.

[99] The Arabic word '*nafs*' literally means a soul or human being. But contextually, the term means life.

[100] Chaudhry (n 8) 522; Kamali, *Shari'ah* (n 98) 33.

This study is situated at the intersection between three theories: multiculturalism, critical race feminism and modified Muslim feminist thought. These three minority rights inquiries address collectively the Kenyan Muslim women's unique quest for justice in inheritance matters because a Kenyan Muslim woman bears multiple minority identities. She is a woman, a Muslim and a member of her often patriarchal family, clan or ethnic tribe. Thus the conception of the principle of equality in these three socio-political realities assists in assessing whether Kenyan Muslim women receive their appropriate inheritance.

1.7.1 Modified Muslim Feminism

Muslim feminism is a theory of sexual equality grounded on the *Qur'aan* and propounded by Muslim women from various parts of the world.[101] Describing themselves as 'believing women'[102], not secularists,[103] Muslim feminists (MFs) posit that the *Qur'aan* sanctions equality between men and women which equality is demonstrable in both the sameness and specificity of the sexes. But that patriarchy, present and past, read inequality of the two through inaccurate *tafsiir*[104], adulterated Prophetic sayings and infusion of local customs.[105] It also alienated the female voice from development of religious knowledge. MFs now fight to reclaim their equal space with men in interpreting the Holy Text.[106] They also challenge women's continued experiences of discrimination in Muslim societies by re-reading (or re-interpreting) the *Qur'aan* anew and broadcasting its actual egalitarian message.

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[101] Present proponents of Islamic feminism come from Egypt, Iran, Malaysia, Morocco and the United States. Renowned Muslim feminists include Amina Wadud, Asma Barlas, Azizah al-Hibri, Riffat Hassan, Margot Badran, Fatima Mernissi, Leila Ahmed and Ziba Mir-Hosseini.

[102] That is, those conforming to the teachings of Islam. See generally Asma Barlas, *'Believing Women' in Islam Unreading Patriarchal Interpretations of the Qur'an* (University of Texas Press 2002); Mir-Hosseini, 'Strategies' (n 90) 21; Amina Wadud, 'Islam Beyond Patriarchy Through Gender Inclusive Qur'anic Analysis' in Zainah Anwar (ed), *Wanted: equality and justice in the Muslim family* (Musawah 2009) 101.

[103] That is, those who call for absolute replacement of *Sharii'ah* with Western law because the former is inimical to gender equality. Esposito and DeLong-Bas (n 17) x; Margot Badran, 'Engaging Islamic Feminism' in Zainah Anwar (ed), *Wanted: equality and justice in the Muslim family* (Musawah 2009) 30.

[104] Arabic word for an explication, herein *Qur'aanic* exegesis.

[105] Barlas (n 102) 3; al-Hibri, 'Law and Custom' (n 56) 5–9; Mir-Hosseini, 'Strategies' (n 90) 8.

[106] Badran (n 103) 30. They fault the universal assumption that male patriarchal explication of Islam is definitive. See al-Hibri, 'Law and Custom' (n 56) 3–4; Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (Yale University Press 1992) 149.

While they acknowledge Western feminists' efforts in women's emancipation struggles, MFs identify themselves as best fit to lead the challenge where it relates to Muslim women[107] because mainstream feminism is itself 'monolithic, absolute and exclusive of Islam'.[108] According to MFs, the West which is often associated with Judaism and Christianity is self-righteous and abstracts dignified ideals from Islam.[109] It monopolises human rights and democratic values[110] as if these three religions bear no commonalities (despite their Middle Eastern origin)[111] and as if Islam were localized in a particular geography.[112] Yet Islam is transnational.[113] It also embodies gender justice and is competent to participate in the global discourse of this principle.[114] MFs thus explicate sexual equality within an Islamic paradigm[115] and attribute patriarchal tendencies[116] to the assimilationist rhetoric that forces

[107] al-Hibri, 'Law and Custom' (n 56) 4.

[108] Barlas (n 102) xiii. Barlas finds dominant feminist thinking as self-righteous and dismissive of multiple perspectives of justice including Islam. ibid. Only Western values seemingly answer to the true calling of justice. See Ahmed (n 106) 165–66.

[109] Barlas (n 102) xiii. Ahmed notes that the West treats other cultures other than its own inferior, even barbaric. See generally Ahmed (n 106) 149–60. See also Mohamed Bakari, 'Muslims and the Politics of Change in Kenya' in Mohamed Bakari and Saad Yahya (eds), *Islam in Kenya: Proceedings of the National Seminar on Contemporary Islam in Kenya* (Mewa Publications 1995) 250.

[110] Ahmed states that when Europeans colonized Muslim countries in the 19th century, they used Western feminism rhetoric to attack the veil and other customs relating to women. Ahmed (n 106) 151–54 and 167. Presently, MFs' use of the words 'antipatriarchal', 'sexual inequality' and 'liberation' renders them 'Muslim apologists' before mainstream feminists and other non-Muslim Westerners. Barlas (n 102) xii.

[111] Barlas notes that both the collective geographical locus and the scriptural relations of the three faiths explain the correspondence, sometimes, of their dictates. Barlas (n 102) xii–xiii. In fact *Qur'aan* 29:46 alludes to some commonality of the three religions. See also Maina (n 34) 116 and 119; Pouwels (n 42) 202.

[112] Barlas (n 102) xii–xiii.

[113] Miriam Cooke, 'Multiple Critique: Islamic Feminist Rhetorical Strategies' (2000) 1 Nepantla: Views from South 91, 96–98. That is why its religious practices such as the *haajj* (Arabic word for pilgrimage to *Makkah*) or the one-month compulsory fasting in the ninth Islamic month (*Ramadhwan*) ie *sawm* are observed worldwide and in unison. ibid 96–98.

[114] See Wadud (n 102) 100–01; al-Hibri, 'Law and Custom' (n 56) 3.

[115] Cooke notes that Islamic feminism unveils the significance of dual loyalties, viz: Islam and women's rights. Cooke (n 113) 92. Thus, Mir-Hosseini disputes the overriding Western perspective that feminism only flourishes in the absence of religion or when religion is made a private affair of the theorist. See Mir-Hosseini, 'Beyond' (n 56) 68.

[116] See Azizah Y al-Hibri, 'Is Western Patriarchal Feminism Good for Third World/ Minority Women?' in Joshua Cohen and others (eds), *Is Multiculturalism Bad for Women? Susan Moller Okin with Respondents* (Princeton University Press 1999) 44.

Muslim women to embrace secular perspectives that are inconsistent with their Islamic faith.[117]

As they do so, however, MFs admit losing 'total objectivity'[118] at some point. Imbued by their modernist approach,[119] MFs miss out on some *Qur'aanic* provisions and interpret others narrowly. The interpretation of the female *hijaab*[120] (the veil or covering), for example, is one of these misreadings.[121] MFs also challenge the *fiqh*[122] developed by male scholars including those of between the first and fourth Islamic centuries[123] yet the Prophet (PBUH) declared these four generations as the best followers of Islam after his.[124] Attributing fallibility to this classical jurisprudence defies the Prophetic teachings and unsettles MFs' belief.[125]

This study, therefore, adopts the MFs' inquiry to the extent that it, first, calls on women's participation in explicating *Sharii'ah*; and, second, its conception of sexual equality as both sameness and specificity of the sexes. Hence the usage 'modified Muslim feminism'

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[117] Wadud notes that patriarchy is purely domination. It is thus not a preserve of men. It is also happens when certain people (male or female) privilege 'one way of doing things, one way of being and one way of knowing' over others. Wadud (n 102) 101. See also Jane Flax, 'Race/Gender and the Ethics of Difference: A Reply to Okin's "Gender Inequality and Cultural Differences"' (1995) 23 Political Theory 500, 503.

[118] Barlas (n 102) 25–26.

[119] MFs describe their work as: post-modern female voices and sensibilities shaped by contemporary realities. See ibid 25; Wadud (n 67) x.

[120] An Arabic word which means a curtain or a screen literally. Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (Mary Jo Lakeland tr, Reprint edition, Basic Books 1992) 85. Veiling is a duty shared by both sexes. See *Qur'aan* 24:31 and 33:59.

[121] While some MFs negate generally the sanction of women's *hijaab*, others historicize the application of the *ayah* on women's full veil to the nascent Muslim community. See eg Barlas (n 102) 53–58; Mernissi (n 120) 85–101; 180–88. Yet the context upon which the verse was revealed pertains today. The veil is a crucial subject in the conversation on sexual equality.

[122] Arabic word for jurisprudence. Herein the word means the exegesis of both the *Qur'aan* and the Prophetic *Sunnah*. The Prophetic *Sunnah* means three things: the Prophet's sayings (*al-sunnah al-qawliyah*) or *ahaadiith*; deeds (*al-sunnah al-fi'iliyyah*); and his tacit approval of the statements and actions of others (*al-sunnah al-taqririyyah*). Hussain (n 5) 27; al-Hibri, 'Law and Custom' (n 56) 6; Esposito and DeLong-Bas (n 17) 5; Khan (n 5) 6.

[123] That is seventh and 10th centuries.

[124] Abdullahi A An-Na'im (ed), *Islamic Family Law in A Changing World: A Global Resource Book* (Zed Books 2002) 5.

[125] Muslims treat the Prophetic *Sunnah* as revelation from God. *Qur'aan* 53:3 – 4 absolve the Prophet of expressing personal whims. Instead he relates 'inspiration sent down to him'. Ali (n 7) 1377. See also *Qur'aan* 75:17 – 19 read together with *Qur'aan* 16:44, among other precepts, indicating that the Prophet's Mission was to explicate the revelation. In *Qur'aan* 4:65, God vows that one only becomes a believer if s/he follows the Prophet's edicts.

(MoMF). This is because despite its appreciation of MFs' explication of sexual equality, this study maintains fidelity to the *Qur'aan* and the Prophetic *Sunnah* in explaining Islamic tenets.

This research now applies the modified MFs' philosophy to locate Muslim women's inheritance rights in the gender justice discourse. But since MFs' inquiry is limited to interpreting the law and juxtaposing it to practice, this study further engages its equivalent critical philosophy[126] (the critical race feminism)[127] to explore the factors that cause the actual disentitlement of Kenyan Muslim women's inheritance rights.

1.7.2 Global Critical Race Feminism

Critical race feminism (CRF) or intersectionality and later global critical race feminism (GCRF) is a theory that tries to address the realities of minority women (also known as women of colour[128]) the world over. It first developed among African-American female scholars towards the end of the 20th Century to theorise on how gender and race intersect to marginalise black women in the United States.[129] Oriented by critical race scholarship (CRS)[130] as well as radical feminism but nonetheless feeling sidelined by both, critical race feminists (CRFs) developed the intersectionality paradigm.[131] Other women of colour later

[126] See Barlas (n 102) 58–62 where she identifies herself as a critical scholar.

[127] In fact, Muslim feminism can be termed a subset of critical race feminism. See Adrien Katherine Wing (ed), *Global Critical Race Feminism: An International Reader* (NYU Press 2000) where al-Hibri is one of the contributors.

[128] This is a 'socio-political designation' referring to all non-white women. Adrien Katherine Wing, 'Introduction: Global Critical Race Feminism for the Twenty-First Century' in Adrien Katherine Wing (ed), *Global Critical Race Feminism: An International Reader* (NYU Press 2000) 2. It consists of women of African (both continental and of the diaspora), Caribbean, Asian, Latin American and indigenous descent. ibid; Marlee Kline, 'Race, Racism, and Feminist Legal Theory' (1989) 12 Harv Women's LJ 115, 115.

[129] Renowned critical race feminists include Adrien Wing, Kimberle Crenshaw, Mari Matsuda, Angela Harris, Deborah King, Angela Davis and Judy Scales-Trent.

[130] CRS or critical race theory was an epistemology of non-white legal scholars, male and female, who used critical legal analysis to address racial discrimination in the United States from 1970s. CRS was opposed vehemently to the assimilationist narrative of Blacks' non-conformity to 'dominant societal terms' touted by mainstream perspectives of justice. John O Calmore, 'Critical Race Theory, Archie Shepp, and Fire Music" Securing an Authentic Intellectual Life in a Multicultural World' (1991–92) 65 S Cal L Rev 2129, 2137–41. It thus developed its theory to offer alternative aspects of justice viz: a just society ought to satisfy the inherent varied dimensions of its people.

[131] CRFs' recognition of minority women as a polity is best represented in Wing's famous quote against both dominant feminism and CRS, viz: 'our anti-essentialist premise is that identity is not additive (…) Black women are not white women plus color, or Black men, plus gender.' Wing, 'Introduction: GCRF' (n 128) 7.

joined CRF[132] and it has since mutated into a global 'feminist solidarity'[133] of minority women.[134] Through CRFs' story-telling[135] and multidisciplinary approaches,[136] therefore, this study will explore how the multiple identities of Kenyan Muslim women (such as ethnicity, geography and related livelihoods) conflate to influence these women's inheritance experiences.

Generally, CRFs counter 'an essentialised normativity'[137] of white elite women's liberation for all women. To these intersectionalists, dominant feminist approaches – which are largely theorized by white upper and middle-class women – concentrate on gender oppression alone when the negative experiences women undergo occur amid their several identities such as race, colour, class, age and ethnicity.[138] Consequently, these supremacist inquiries sideline women of colour even when they invoke the category 'woman'.[139]As members of the marginalised women,[140] CRFs (and GCRFs collectively) now theorise on

[132] See eg Patricia A Monture, 'Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah' (1986–88) 2 Can J Women & L 159; Parita Trivedi, 'To Deny Our Fullness: Asian Women in the Making of History' [1984] Feminist Review 37.

[133] Angela Davis, 'Foreword' in Adrien Katherine Wing (ed), *Global Critical Race Feminism: An International Reader* (NYU Press 2000) xii.

[134] See generally Adrien Katherine Wing (ed), *Global Critical Race Feminism: An International Reader* (NYU Press 2000) which collects over 30 works from diverse non-white women. A few white women, however, also theorise on intersectionality. See eg Kline (n 128); Elizabeth V Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Beacon Press 1988); Flax (n 117).

[135] CRFs build up their theory by narrating how minority women's different socio-economic and political features conflate to make them more vulnerable – than other women – to male dominance. Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241, 1244.

[136] CRFs incorporate several branches of knowledge such as history, political science, economics, anthropology and women's studies to their epistemology because law cannot solely address segregation issues. Wing, 'Introduction: GCRF' (n 128) 6.

[137] April Few-Demo, 'Integrating Black Consciousness and Critical Race Feminism Into Family Studies Research' (2007) 28 J FAM ISS 452, 470. See also generally Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 Stanford Law Review 581.

[138] Leti Volpp, 'Feminism versus Multiculturalism' (2001) 101 Columbia Law Review 1181, 1199. Kline admits this critique but adds that their sole focus on 'gender' in no way absents 'simultaneity' in their oppressive experiences. Rather because the colour of their skin privileges them, Caucasian feminists are able to ignore their race since 'it does not in any way correlate with an experience of oppression and contradiction.' They see themselves merely as women, not white. Kline (n 128) 123.

[139] Crenshaw (n 135) 1244; Adrien Wing and Christine Willis, 'From Theory to Praxis: Black Women, Gangs, and Critical Race Feminism' (1999) 11 Berkeley La Raza Law Journal 1, 3; Harris (n 137) 589; Spelman (n 134) ix.

[140] MFs and CRFs are largely members of the minority women they theorise on. See Few-Demo (n 137) 470; al-Hibri, 'Law and Custom' (n 56) 3–4.

these women by highlighting the 'simultaneity'[141] of their oppression.[142] This study, therefore, also identifies with this epistemology in its critique of the mainstream's singular and narrow focus on gender equality which is often abstracted from interwoven markers of identity.

1.7.3 Multiculturalism

Multiculturalism, on the other hand, is a liberal conception of minority rights.[143] Propounded by male and female white liberal theorists[144] and minorities,[145] multiculturalism posits that for a plural society (state) to achieve justice, it must recognise both individual and group human rights in its normative structures.[146] According to multiculturalists, while liberal democracies often recognise cultural diversity through the protection of universal individual civil and political rights, 'some forms of cultural difference can only be accommodated through special legal or constitutional measures, above and beyond the common rights of citizenship.'[147] Otherwise, the law would be unjust because – although posturing as neutral – the law often essentialises the dominant group.[148] Thus absent of group rights, minorities would exercise their individual rights – which rights are often enjoyed in association with others – according to the dictates of the majority.[149] Yet such majoritarian perspectives conflict with those of the minorities.[150]

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[141] Kline (n 128) 123.

[142] ibid. Women of colour do not suffer sexual discrimination separately from racial, age or other forms of segregation. Their attacks are often multi-faceted. Thus Crenshaw, for example, enjoins both feminist and critical race scholars to intertwine race and gender when inquiring on minority women instead of treating these variables differently. See generally Crenshaw (n 135).

[143] Kymlicka, *Multicultural Citizenship* (n 37) 23.

[144] Kymlicka notes that multiculturalism counters traditional liberal thought which assumed that all citizens, minorities and majorities, 'share the same language and national culture'. Will Kymlicka, 'Liberal Complacencies' in Joshua Cohen and others (eds), *Is Multiculturalism Bad for Women? Susan Moller Okin with Respondents* (Princeton University Press 1999) 33.

[145] Susanne Wessendorf and Stephen Vertovec, 'Assessing the Backlash against Multiculturalism in Europe' (2009) 09–04 Max Plank Institute Working Papers, 13. Key proponents of this philosophy include Kymlicka, Joseph Raz, Charles Taylor, Chandran Kukathas and Ayelet Shachar.

[146] Kymlicka, *Multicultural Citizenship* (n 37) 6.

[147] ibid 26.

[148] Interview with Joshua Mwakireti, Judge, High Court (Nairobi, Kenya 17 February 2016) [hereinafter Interview 130]; Fredman (n 64) 719.

[149] Kymlicka, *Multicultural Citizenship* (n 37) 5.

[150] ibid.

Multiculturalists, therefore, require the unique interests of every group (minority or majority) in a country to reflect in that country's laws and institutions.[151] And one way of doing this, is to recognise the marital, divorce and inheritance systems of the minority populations.[152] Without these group rights, multiculturalists opine, minorities 'will feel harmed – and indeed will be harmed – even if their civil, political and welfare rights are respected.'[153] When the law and its institutions fail to reflect people's important values, feelings of betrayal and marginalisation emerge.[154] And these sentiments damage the cohesiveness of a group, whether a community of women or the larger nation-state, even if they share some commonalities.

The religious identity of Muslims (men and women collectively) constitutes them into a distinct group in multiculturalism. This fact then necessitates their recognition in the normative structures of any majority non-Muslim country. This study, therefore, employs the multiculturalism philosophy to justify the inclusion of IIL in Kenya's constitutional and statutory instruments.

1.7.4 Multicultural, Intersectional and Modified Muslim Feminist Approaches to Equality (MIMoMFAE)

Despite their different niches, the three theories demand pluralism in justice. Their individual epistemologies counter the monolithic perceptions of justice of both the mainstream and the privileged in a nation-state.[155] Instead they enjoin concurrent recognition

[151] Interview 130.

[152] Multiculturalism is multiple. Kymlicka, *Multicultural Citizenship* (n 37) 10; Wessendorf and Vertovec (n 145) 7–10; Aileen McColgan, *Discrimination, Equality and the Law* (Hart 2014) 189–90. It has broad and fine categories. It, however, includes the following political and socio-economic measures: accommodating dietary restrictions, dress codes, time off work for prayers, the production of public materials in various languages, adopting inclusive curricula in schools and granting autonomy or self-government to 'territorially concentrated cultures'. Kymlicka, *Multicultural Citizenship* (n 37) 10. See also McColgan 189–90; Wessendorf and Vertovec (n 145) 7–10.

[153] Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (1st edn, Oxford University Press 2001) 32–33. See also Hyder (n 42) 505; Barlas (n 102) 2 and 20; al-Hibri, 'Patriarchal Feminism' (n 116) 44–45.

[154] Kymlicka, *Politics in the Vernacular* (n 153) 33 and 36. Writing on France's ban of *hijaab* in public schools, for example, Wing and Smith enlists that this prohibition brought about frustration, depression, physical and emotional injury; abandoning school; incomplete studies; unemployment; and humiliation among young and old French Muslim women. 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, 779–88.

[155] Few-Demo (n 137) 470. According to McColgan, 'mainstream' does not necessarily mean numerical superiority. It refers to those with more power. See McColgan (n 152) 193.

of the similarities and differences among citizens, between the sexes and between women. CRFs, for example, decry that mainstream feminism is blind to the innumerable identities between women, which 'intragroup differences'[156] vary women's experiences of discrimination in the society. They also counter the critical race theorists' blanket same treatment of male and female minorities. The CRFs' epistemology thus transcends both mainstream feminist and CRT approaches which theories separately essentialise women and minorities respectively.[157]

MFs, on their part, deconstruct both the patriarchal exegesis of the *Qur'aan* by male jurists and the demeaning sexual differentiation theories propelled by mainstream feminism. Believing in the sexual equality introduced by the *Qur'aan* and explicated by the Prophetic *Sunnah*, MFs nonetheless decry the paternalistic contemporary gendered views of these two elemental sources of *Sharii'ah*.[158] According to MFs, the development of Islamic jurisprudence was/is both patriarchal and predominantly male.[159] They contend that classical jurists developed non-egalitarian jurisprudence influenced by the circumstances of their time and space – which construction was passed with modifications from one generation to another and has culminated in the personal codes and practices of contemporary Muslim States and communities respectively.[160]

And during this process, women's access to the arena of Islamic jurisprudence was drastically reduced despite their earlier involvement and contribution to it during and immediately after the Prophetic time.[161] The exclusion of the female voice in this *ijtihaad*[162]

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[156] Crenshaw (n 135) 1242; Kline (n 128) 116–17 and 122.

[157] Trent, a self-described white-black American female lawyer, posits more clearly the reason behind CRFs' inquiry:

> In a society which sees as powerful both whiteness and maleness, black women possess no characteristic which is associated with power. They are therefore treated by society in a manner which reflects a status different from, and lower than, both black men (who have the status ascribed to maleness) and white women (who enjoy the status ascribed to whiteness).

Judy Scales-Trent, 'Black Women and the Constitution: Finding Our Place, Asserting Our Rights' in Patricia Smith (ed), *Feminist Jurisprudence* (1st edn, Oxford University Press 1993) 282. See also Flax (n 117) 506.

[158] See Mir-Hosseini, 'Strategies' (n 90) 4.

[159] al-Hibri, 'Law and Custom' (n 56) 7.

[160] Barlas (n 102) 7; Mir-Hosseini, 'Strategies' (n 90) 10.

[161] Barlas (n 102) 6–7; Wadud (n 67) x. Al-Hibri notes that women of the Prophetic time 'included business women, poets, jurists, religious leaders and even warriors.' al-Hibri, 'Law and Custom' (n 56) 5.

whether intentional or not, Wadud argues, perhaps explains its marginalisation and present degradation of a woman both 'as a human being and as *khalifah*[163]'. MFs now re-interpret the *Qur'aan* and extract the sexual egalitarian trajectory embedded in the Holy Text.[164] They further encourage their Muslim sisters to seek 'both legal and religious'[165] knowledge in big numbers to equip them with 'the logic of *usul al-fiqh*[166]' necessary to make them *Qur'aanic* exegetes.[167] Such qualifications, MFs surmise, will enable Muslim women to locate gender justice in Islam 'without guilt.'[168]

MFs' recourse to their religion[169] to explain gender justice and not any of the existing strands of mainstream feminism is precipitated by the conventional understanding of this principle.[170] To MFs, dominant feminist approaches project either the sameness or differences of the sexes.[171] And in both instances they use man (not both) as the referent such that the woman is always the unequal 'other'.[172] This characterization of the sexes, MFs argue, sways mainstream feminism to read all sexual differences as inequalities and to elevate sexual difference above all other forms of difference. Yet this is a distorted view of differentiation because 'treating women and men differently does not always amount to

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[162] Arabic word for independent opinion. Contextually, this word means the process (or science) of individual (personal) reasoning of *Qur'aanic* precepts and the Prophetic *Sunnah* to address issues (actual or hypothetical) otherwise not specifically dealt with during the revelation of Islam. The significance of *ijtihaad* in Islam, therefore, is its continued development of the law (as new realities emerge). Its 'impropriety', however, is often appraised by its compatibility to these two elemental sources of *Sharii'ah*. Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society 2003) 468. See also Khan (n 5) 9.

[163] Arabic word for successor. Herein it means God's trustee. Wadud (n 67) x. MFs construe the innumerable *Qur'aanic* provisions relating to the creation of humans and their industry on earth as evidence of the ontological identity of men and women.

[164] Badran (n 103) 30.

[165] al-Hibri, 'Law and Custom' (n 56) 34.

[166] ibid. Arabic phrase for principles of reasoning in Islamic jurisprudence.

[167] Wadud (n 102) 101–02.

[168] al-Hibri, 'Law and Custom' (n 56) 5 and 34. That is, without fear of being labeled apostates by Muslims and apologists by Westerners. Wadud, for example, regrets that since her first publication of *Qur'aan* and Woman in 1992, she has suffered 'name calling and character assassinations' by being referred to as 'Western' meaning anti-Islam, and 'feminist' signifying (anti-male). Wadud (n 67) xviii.

[169] Badran (n 103) 30.

[170] al-Hibri, 'Law and Custom' (n 56) 3–4.

[171] Liberal feminists argue on the sameness of the sexes while cultural feminists recognise women's unique differences from men. See accompanying texts to notes 542 - 561 below.

[172] Barlas (n 102) 131.

treating them unequally, nor does treating them identically necessarily mean treating them equally.'[173]

Multiculturalism, on its part, deconstructs the difference-blind rules or institutions in a plural country. To multiculturalists, these normative structures must fade because they are not neutral – after all. They mirror the identity and culture of the majority.[174] Thus for such a society to achieve comprehensive justice,[175] its laws must relinquish their 'abstract rationality'[176] and incorporate minorities' perspectives.[177] After all, '[L]egal differentiation by itself is (…) a common and expected feature of the law.'[178]

1.8. Literature Review

Much of the literature on Muslim women's inheritance rights centers on the debate of their discriminatory or emancipatory nature rather than whether the women in question do indeed inherit their *Qur'aanic* portions.[179] Contemporary scholars from both the East and the West dedicate their works to either the positives or the negatives of the dissimilar shares between men and women.[180] Very few writings assess the actual experiences of the female beneficiaries. This part now reviews this existing literature for relevant pointers from which to situate concretely the disentitlement of Kenyan Muslim women of their stipulated portions under IIL.

1.8.1. Muslim Women's Inheritance Rights

[173] ibid xii and 5. See also generally, Oyeronke Oyewumi, *The Invention of Women: Making an African Sense of Western Gender Discourses* (1st edn, University of Minnesota Press 1997). Scott, a white American historian, for instance, notes that 'equality is not the elimination of difference, and difference does not preclude equality'. Joan W Scott, 'Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism' (1988) 14 Feminist Studies 33, 38.

[174] Kymlicka, *Politics in the Vernacular* (n 153) 32.

[175] ibid 33; Kymlicka, *Multicultural Citizenship* (n 37) 6.

[176] Hilary Charlesworth and others, 'Feminist Approaches to International Law' (1991) 85 The American Journal of International Law 613, 613.

[177] SamuelMbithi Kimeu, 'Historical and Legal Foundations of the Kadhi's Courts in Kenya' in Abdulkader Tayob and Joseph Wandera (eds), *Constitutional Review in Kenya and Kadhis Courts: Selected papers presented at the Workshop St Paul's University Limuru Kenya* (Center for Contemporary Islam University of Cape Town 2011) 28.

[178] Anver M Emon, 'The Paradox of Equality and the Politics of Difference: Gender Equality, Islamic Law and the Modern Muslim State' in Ziba Mir-Hosseini and others (eds), *Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Process* (IB Tauris 2013) 238.

[179] See generally Narain (n 12); Radford (n 5); Sisters in Islam (n 18) and Al-Būṭī (n 218).

[180] Ahmed (n 103) 167.

Islam introduced women's inheritance rights 14 centuries ago when the religion was proclaimed to Prophet Muhammad (PBUH) in the then Arabia (present Saudi Arabia).[181] Chaudhry asserts that Islam granted women an independent, legal and spiritual identity.[182] As a legal entity, she posits, a Muslim woman owns and manages her own property; and assumes status as an inheritor in a scheme of fixed shares.[183] Both Narain and Hussain separately agree with Chaudhry that IIL countered the seventh-century Arabian customs which excluded women from inheritance; and secured women's socio-economic rights.[184] To Hussain, for example, women, henceforth, ceased to be 'inheritable'[185].

Radford shares the above views. As she contrasts IIL with its Jewish counterpart, Radford opines that the former provides women with specific shares in both their spouses' and natal relatives' properties while the latter has limited allocations for women.[186] Citing Coulson[187] on the transformative nature of IIL, Radford notes that Islam emphasized on the nuclear family ties and thereby elevated the position of women in this group.[188] Fleming supports Radford's view and adds that it is IIL's improvement of women's status in society and its 'partial shift from tribal to family succession'[189] which has made the law stand the test of time.[190]

On their part, Sayeh and Morse observe that Islam made this improvement before the West or such other culture could do so.[191] Radford supports their position and notes that

[181] Leila P Sayeh and Adriaen M Jr Morse, 'Islam and the Treatment of Women: An Incomplete Understanding of Gradualism' (1995) 30 Tex Int'l L J 311, 330. Khan estimates that the initial verses on female inheritance, *Qur'aan* 2:180, (ie the 'Verse of Bequests') was revealed in the second year of *Hijrah* (632 AD) while the present *Qur'aan* 4:12 was promulgated in the third year (633 AD). Khan (n 1) 230. Sub-section 3.2.2 discusses the initial Islamic arrangement on inheritance.

[182] Chaudhry (n 8) 512–13.

[183] ibid 515.

[184] Narain (n 26) 51; Hussain (n 5) 25.

[185] Hussain (n 5) 25.

[186] Radford (n 8) 159.

[187] Coulson (n 17) 29.

[188] Radford (n 8) 151.

[189] John G Fleming, 'Changing Functions of Succession Laws' (1978) 26 The American Journal of Comparative Law 233, 235.

[190] ibid 234–35.

[191] Sayeh and Morse (n 181) 330.

Western women had no right to inherit property up to the sixteenth century because of the rule of primogeniture which favoured the first-born son.[192]

But the liberating perspective of *Sharii'ah* is not shared by many. Khaliq, for example, espouses that *Sharii'ah* subjects women to a great deal of discrimination in numerous areas including inheritance law.[193] According to Narain, because males generally inherit twice as much as the females in the same degree of familial relationship, IIL subjugates women within the patriarchal family and community.[194] Radford joins Narain in this line of thought too. Appreciating that IIL offered a prelude to women's enjoyment of identical access to inheritance as males, Radford (nonetheless) dismisses this law as only providing 'a limited form of inheritance'[195] that does not compare with modern times females' entitlements. She posits that present women not only have a right to inherit but married women are also the first beneficiaries to their matrimonial properties.[196]

Sisters in Islam concur with Radford's opinion and assert that contemporarily the argument that men inherit more because they bear the responsibility to maintain their families does not stand.[197] To Sisters in Islam, the realities of men and women have changed such that there are increased nuclear families and less support for extended relations.[198] It, therefore, becomes mere theoretical to expect male relatives to support their female counterparts.[199]

Sisters in Islam further note that, today, women have assumed these financial roles.[200] But despite their contribution to family support, women still receive less shares than men;[201] and the law still lacks accountability to ensure that those males who receive greater shares

[192] Radford (n 8) 135.

[193] Khaliq (n 55) 14.

[194] Narain (n 26) 51.

[195] Radford (n 8) 137.

[196] ibid 135.

[197] Sisters in Islam (n 31) 38.

[198] ibid 39.

[199] ibid.

[200] ibid.

[201] ibid 28.

fulfill their familial duties.[202] Sisters in Islam thus cite Muslim scholars' advice to families to gift women part of their property during the families' lifetime in order to circumvent the inheritance laws as an indication that IIL shortchanges women.[203]

Chaudhry concedes that the lifestyles of men and women have presently varied in several Muslim societies.[204] But even then, she argues, such change does not call for a subjective or localized amendment of the law.[205] Even then, Chaudhry adds that, the change must observe the general objectives of *Sharii'ah*.[206] The change must preserve the well-being of both the community and the individual and it must also preserve the individual's five interests of life.[207]

While she agrees that *Sharii'ah* provides tools for increasing women's inheritance, Chaudhry warns that these mechanisms are not part of IIL but constitute other forms of property ownership.[208] These methods include: *hiba* (*inter vivos* gift), *waqf ahli* (family endowment), *muakhkhar* (deferred portion of dowry) and consent of other heirs.[209]

An inter vivos gift entitles a living property owner to dispose of some or all his property.[210] Because this disposition can be made to anyone including heirs apparent, Chaudhry argues that a person can gift his or her potential heiresses.[211] She, however, cautions that such transfer cannot be made to defeat the principles of 'fairness, justice and the prohibition of doing harm to others.'[212]

A *waqf*, on the other hand, is the 'detention of a specific thing in the ownership of the (…) appropriator and the devoting (…) of its profits or usufruct in charity on the poor or

[202] ibid 39.

[203] ibid.

[204] Chaudhry (n 8) 544–45.

[205] ibid 545.

[206] ibid.

[207] ibid.

[208] ibid.

[209] ibid 546–48.

[210] ibid 546.

[211] ibid.

[212] ibid.

other good objects.'[213] Chaudhry notes that such endowment may be made for the benefit of the general Muslim community or relatives.[214] Thus in the latter case, potential female heirs and their descendants can also be substantially provided for.[215]

As for *muakhkhar*, Chaudhry posits that the dowry that a Muslim bride receives from the groom can be divided 'into two parts – the prompt portion (*muqaddam*), and the deferred portion (*muakhkhar*).'[216] Whereas the prompt portion is received at the celebration of the marriage, the deferred portion is received during the marriage.[217] If it remains unpaid until the groom's death, the deferred portion becomes a debt to his estate.[218] Thus Chaudhry observes, to increase the share of a widow, a couple could agree to defer a bigger portion of the dowry when entering the marriage.[219]

Finally, Chaudhry opines that since heirs can consent to relinquish part or the whole of their shares in favour of other heirs; or increase another heirs' shares, they can further use this mechanism to augment their female relatives' shares of inheritance.[220]

On his part, Al-Būṭī responds to Sisters in Islam's argument of changed lifestyles by distinguishing a moral incentive from a legal obligation.[221] He contends that whereas a woman may be morally obliged to support her husband and other relatives, it is a legal duty for a man to support his family, immediate and extended under *Sharii'ah*.[222] While he acknowledges a woman's kind gesture to fend for her family, al-Būṭī notes that such benevolence cannot replace a father's, a husband's or a son's duty to provide for his family because it is not guaranteed that every woman would be inclined to do so.[223]

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[213] Esposito and DeLong-Bas (n 17) 44.

[214] Chaudhry (n 8) 547.

[215] ibid.

[216] ibid 547–48.

[217] ibid 548.

[218] ibid.

[219] ibid.

[220] ibid.

[221] Muhammad Said Ramadan Al Buti, *Women Between the Tyranny of the Western System and the Mercy of the Islamic Law* (Nancy Roberts tr, 2nd edn, Dar al-Fikr 2006) 158.

[222] ibid 160.

[223] ibid.

Al-Būṭī also views that if Islam had placed the legal obligation to provide financial support for the households on women, necessity would force them to seek gainful employment, despite the work being unsuitable or uncomfortable, and/or neglect their prime duty of care-giving.[224] While he clarifies that Islam permits women to engage in legitimate and useful employment, Al-Būṭī notes that by giving them freedom from economic obligation, Islam grants women the freedom to choose a job which is the most suitable, convenient and conducive to the dignified life which they are entitled to.[225]

Like Al-Būṭī, many scholars such as Baderin, Miller and Badawi contend that the inheritance shares between men and women are – after all – equitable despite appearing arithmetically unequal given the sexes' different financial roles under *Sharii'ah*.[226] Badawi, for example, postulates that a Muslim man remains responsible to maintain his wife, children, and sometimes his poor relatives especially the females even when the wife is working or is richer than him.[227] Thus to Badawi, one needs to understand IIL from a holistic study of Islamic family law.[228]

Responding to Radford's assertion of today's women getting better inheritance than Muslim women, Fleming notes that the apparent preference of the surviving spouse (usually the widow) in succession laws in the West does not necessarily connote women's liberation.[229] Rather, it responds to the exigencies of the present life such as guaranteeing a widow a home because of shortage of houses, increased uncaring attitudes by children towards their aged parents and increased life expectancy in the past century.[230] Fleming thus explains that children (male of female) feature negligibly in the initial succession division when one parent dies because there is no guarantee they would take care of the remaining

[224] ibid 160–61.

[225] ibid 161.

[226] Baderin (n 14) 283; Jamal A Badawi, *Status of Woman in Islam* (Foreigners Guidance Center 1980) 23; Kathleen Miller, 'The Other Side of the Coin: A Look at Islamic Law as Compared to Anglo-American Law — Do Muslim Women Really Have Fewer Rights than American Women?' (2003) 16 NY Intl L Rev 65, 120.

[227] Badawi (n 226) 23.

[228] ibid.

[229] Fleming (n 189) 236.

[230] ibid.

parent respectfully and gracefully.[231] This children's claim to inheritance, Fleming adds, only seeks to guarantee their education and maintenance before they come of age.[232]

Perhaps Fleming's assertion justifies Badawi's call for the examination of IIL from a holistic perspective of *Sharii'ah* to determine whether or not this law discriminates against women. But since such an in-depth analysis is absent from present literature on either IIL or Muslim women's human rights, this study attempts to fill this gap. It does so through Muslim feminist conception of gender justice and links some Muslim men's and women's stipulated duties and entitlements to their varying inheritance shares.

1.8.2. Are Muslim Women's Inheritance Rights a Reality or Rhetoric?

Notwithstanding *Sharii'ah*'s position on women's inheritance rights, there is evidence in several Muslim localities that Muslim women do not inherit or inherit smaller portions than those prescribed in the *Qur'aan*. Al Ati observes that recent practices in some Muslim communities have totally removed women from the estate distribution.[233] Honarvar holds similar views and posits that old customs still reign in some communities such that women's shares are taken by males.[234]

Radford, on her part, decries that though an erstwhile liberating women's property law, *Sharii'ah* is today dented by an upsurge of Islamic extremists who enact laws and make policies that disadvantage women.[235] Citing Egypt, the West Bank and parts of Israel, Radford narrates that women in these countries are precluded from establishing financial independence through prohibition of paid work and exclusion from public life.[236] Consequently, these women are easily coerced by their male relatives into giving them any inherited wealth in return for a guarantee of their continued financial support.[237] Moreover, she adds, women may be discouraged from retaining wealth inherited from their deceased

[231] ibid.

[232] ibid.

[233] al-' Āṭī (n 21) 267.

[234] Honarvar (n 30) 382.

[235] Radford (n 8) 182.

[236] ibid 183.

[237] ibid.

husbands by family members who may threaten to marry them off to other relatives in order to keep the inheritance within the family.[238]

Sait and Lim agree with Radford and note that some women in parts of South Asia such as Bangladesh renounce their inheritance rights, partially or wholly in order to secure continued support from their natal families.[239] These women fear that if they claim their shares of their deceased husbands' estates, their brothers would disassociate with them. The women would thus lose key support and protection just when they need it most, namely, in widowhood or when they need a 'safety net'[240] during times of socio-economic and physical insecurity.

Citing Moors,[241] Sait and Lim further surmise (however) that a woman's ability to inherit also depends on her class, location and family relationships.[242] Thus, for example, a rich Palestinian woman in an urban setting and whose receipt of inheritance will give her brothers social status is more likely to inherit her father's estate than her poorer counterpart or one from a rural area.[243] Similarly women from families that are highly educated in *Sharii'ah* also benefit. On the other hand, poverty and the breakdown of traditional support systems push Bangladeshi rural women to claim their inheritance rights.[244] Their wealthy Pakistani sisters in the fertile agricultural lands, however, do not pursue their rights.[245]

Balchin attributes the Pakistani women's hesitance, nonetheless, to the reigning Pakistani customary tradition of keeping property within the natal family and avoiding its alienation to strangers through females.[246] It may also be because of the fact that even if these women know of their rights and demand them, no one will listen to them.[247] Thus in the Pakistani

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[238] ibid.

[239] Sait and Lim (n 9) 121.

[240] ibid.

[241] See Annelies Moors, *Women, Property and Islam: Palestinian Experiences, 1920-1990* (Cambridge University Press 1995).

[242] Sait and Lim (n 9) 126.

[243] ibid.

[244] ibid.

[245] ibid.

[246] Cassandra Balchin, *Women, Law, and Society: An Action Manual for NGOs* (ShirkatGah 1996) 150.

[247] ibid 152.

provinces of Punjab, Sindh, Baluchistan and Khyber Pakhtunkhwa (KP) (formerly North West Frontier Province), women hardly inherit land. In KP where land is one of the instruments of honour, this norm prevails and uncles assume it if the deceased has no sons.[248] Only when a daughter chooses to be a spinster for life does she receive her inheritance share.[249]

Among the rich of Punjab and Sindh provinces (however), Balchin posits, daughters may receive other properties of identical or more value than her inheritance share in the land estate (such as a house, a car or equity in business) as compensation during their weddings.[250] This may also happen if a family mistrusts the daughter's in-laws.[251]

Balchin also notes that a majority of Pakistani women do not inherit land estates because Pakistani agricultural lands are traditionally owned communally.[252] Thus neither of the sexes receive individual shares of their deceased relative's share in the joint property. Instead, widows and daughters benefit from a stipend for their domestic needs.[253] If at all women get their individual share in the land, then it is managed by her male relatives – including her husband (whether or not he is distant from her family).[254] While some educated families may grant daughters their stipulated fractions in a land estate, the sons would still manage it. And it would remain socially unacceptable for the daughters to sell their wealth to strangers.[255]

Narain, on her part, attributes the alienation of Indian women from their inheritance and particularly agricultural land estates to the conflation of IIL and customary law in the 20th Century. Narrating how India codified IIL in the Indian Muslim Personal Law (*Shariat*) Application Act of 1937, Narain postulates that this codification only served to ascend Muslim scholars to a political class rather than to protect women as it had been presented.[256]

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[248] ibid 151.

[249] ibid 152.

[250] ibid.

[251] ibid.

[252] ibid 150.

[253] ibid.

[254] ibid.

[255] ibid 152.

[256] Narain (n 26) 47.

She explains that at that time, the British colonialists wanted to preserve their political power.[257] They, therefore, allowed Indian legislative representation and the consequent modification of personal laws.[258] The British government further acknowledged the Muslim scholars and the Muslim League (a political party representing Muslim interests) as the leaders of the Muslim community.[259] Because the scholars had previously been alienated from politics, they seized this representative opportunity and began to reform Muslim personal law in order to gain control over the community.[260] They thus reduced the role of the custom, brought the whole of Indian Muslim population under *Sharii'ah* and assigned themselves as its only interpreters.[261] These changes, however, did not alter the existing disparate rights of Muslim men and women.[262]

According to Narain, while the colonial government accepted the application of *Sharii'ah* to the entire Indian Muslim population, it nonetheless granted an exemption to the Muslim League such that IIL did not apply to agricultural lands.[263] Yet the Muslim League represented the rich landholders who followed customary inheritance laws – which laws excluded women.[264]

Ha-Redeye, on his part, faults the introduction of common law into Muslim localities in South Asia during colonialism for absenting women from inheritance.[265] He opines that common law 'actually enforced agnatic or male-preference cognatic primogeniture models of inheritance and circumvented female allocations, making the position of women even worse'[266].

Writing on a 1993 – 1995 survey of Kenyan women's inheritance experiences, Mbote (on her part) notes that most communities also follow their customary laws to distribute

[257] ibid.

[258] ibid.

[259] ibid.

[260] ibid.

[261] ibid.

[262] ibid.

[263] ibid 48.

[264] ibid.

[265] Ha-Redeye (n 9) 12.

[266] ibid.

inheritance.[267] Thus in Kisumu (among the Luos) and Kajiado (among the Maasai) Districts (in the erstwhile Nyanza and Rift Valley provinces respectively),[268] for example, women do not inherit land or livestock.[269] Instead, they acquire household goods and user rights over the land and the animals.[270] In Murang'a District (among the Kikuyu) in the central region, women only inherit land as trustees on behalf of their children.[271] By contrast, in Mombasa town at the coastal region where there is a relatively high Muslim population,[272] the respondents indicated that women's inheritance practices conform to the *Qur'aan*.[273]

From the foregoing overview of existing works, it is emerging that the disentitlement of Muslim women's stipulated inheritance is real in several parts of the world. It remains unknown, however, whether this position portends in Kenya or the situation remains as it was in 1995. But even then, that 1993 – 1995 survey did not interrogate the inheritance experiences of Muslim women in the three other research sites apart from Mombasa. It stopped at women's general experiences. This study now seeks to establish the actual inheritance experiences of Muslim women in various parts of the country.

Again, since much of the discourses on Islam and women in Africa have centered on the Northern and Western parts of this continent, justice demands developing some work relating to the experiences of Muslim women in the East African region. And this research sets out to do just that. Presently several books, articles, reports and media briefings focus on how the practice of *Sharii'ah* in various countries and regions in these sections of the globe impacts

[267] Patricia G Kameri-Mbote, 'Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences' (2002) 35 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 373, 382.

[268] The 2010 Constitution created two tiers of governance in the country: the national government and county governments (grassroots administration). The new 47 county governments replaced the hitherto eight provincial units ie North Eastern, Western, Eastern, Nyanza, Central, Coast, Rift Valley and Nairobi. Despite the 2010 Constitution abolishing the provinces, Kenyans still refer the localities within these past administrative units by their former names eg the Coast region.

[269] Kameri-Mbote (n 267) 394 and 396.

[270] ibid 396.

[271] ibid.

[272] ibid 376.

[273] ibid 395.

on women. Perhaps rightly so. Several countries in both North and West Africa have majority and significant Muslim minority population.[274]

Moreover, as earlier mentioned, Muslim Feminists' works instill a (post-modern) female voice in the interpretation of the *Sharii'ah*. But the foremost MFs (save for Wadud) stop short of extending their theory to IIL.[275] This study, however, employs this epistemology (with modifications) to demonstrate that IIL fits within Muslim Feminists' understanding of gender justice and actually does protect women's rights.

1.9. Justification of the Study

Throughout independent Kenyan history, Muslims have clamoured for the retention of Islamic personal law (IPL) in the country's legal system. A majority of non-Muslim Kenyans have not understood this Muslim obsession with a different regime of personal law when the unitary identity of Kenyans as 'Kenyan' befits universal laws and the State is secular.[276] This thesis now responds to this bewilderment by pontificating that, legally and philosophically, the clamour for the inclusion of IPL and particularly IIL in the country's mainstream legal system is legitimate. It is within the Kenyan Muslims' right to equality.

This study, is therefore, instrumental because it contributes to the jurisprudence on the principle of equality in the country. First, it unpacks the globally accepted actual meaning of the principle of equality as substantive equality. Mistakenly, many lawyers, judges and women's rights champions have for long held that the principle of equality embodied in human rights documents (local and international) was absolute equality. But it is not. Second,

[274] Sisters in Islam (n 31) 5; Pew Research Center's Forum on Religion & Public Life, 'The Future of the Global Muslim Population: Projections for 2010 - 2030' (Pew-Templeton Global Religious Futures Project, Pew Research Center 2011) 93–104 and 108.

[275] In 1999, without discussing the topic elaborately, Wadud suggested predicating future inheritance divisions on the principle of *naf'a* (Arabic word for benefit) – instead of the general 2:1 ratio in favour of males because of contemporary changed sexual roles. Wadud (n 67) 87. See further accompanying texts to notes 1037 and 1038.

[276] Many Kenyans confound the secularity of the country as intolerance to religion in public spaces. See eg *Jesse Kamau & 25 Others v Attorney General* [2010] eKLR 40; *Methodist Church (Suing through its Registered Trustees) v Teachers Service Commission & 2 others* [2005] eKLR [165]; *Republic v Head Teacher, Kenya High School & Another ex-parte SMY* [2012] eKLR 12. But the principle of separation of the religion and the State in article 8 of the 2010 Constitution does not render this conclusion. Instead, this principle prohibits the country from having an institutionalized religion in its governance. Otherwise the principle permits individual Kenyans to possess a religion of their choice and to manifest that religion through 'worship, practice, teaching or observance' individually or in groups whether privately or publicly. See article 32 of the 2010 Constitution. See also articles 27(4), (5) and 21(3).

this research also illustrates that the much criticised IIL is actually an excellent example of this substantive strand of equality.

The adoption of the 2010 Constitution generated immense celebrations among women, including Muslim women, because it heralded several positives for them. This law bears an array of civil, political and socio-economic bounties for women on a relatively leveled platform with men. For the Muslim woman, the 2010 Constitution recognises her unique identity from the larger polity of women and intersects her definition of equality into the mainstream definition. But as this thesis reveals, the engraving of rights is one thing and their observance is another. Until there are resolute efforts on the part of the government, women's rights practitioners and other stakeholders, women may not enjoy the fruits of the 2010 order. This thesis, therefore, shares knowledge on how all these players can champion the realisation of Muslim women's inheritance rights.

In particular, this research clears out the practice confusion among legal practitioners (both bench and bar) and the Kadhis over the Kadhis' courts' probate jurisdiction. By discussing the relevant constitutional and statutory provisions relating to inheritance, the study shows that, first, these courts are fully fledged probate institutions such that all lawyers, whether in public or private practice, can attend them. Second, a Kadhis' court order on distribution is competent to distribute an estate of any nature or value without being accompanied by a grant of probate or letters of administration from the Family division of the High Court.[277] Third, if a party so desires or circumstances necessitate, then a Kadhis' court can competently issue either of these probate instruments. Fourth, the High Court lacks jurisdiction to issue a vesting order to normalise a Kadhis' court order on distribution which is not accompanied by these probate instruments. Fifth, the Kadhis' court can enforce its orders including punishing for contempt any person or institution that defies these orders or behaves rudely to the Kadhi or such other person during the court proceedings.

1.10. Limitations of the Study

Despite its contribution to knowledge, this research suffers from the following limitations. First, because the researcher is a non-Arabic speaker, she misses out on

[277] These two instruments allow an applicant to administer a deceased's testate and intestate estates respectively.

expansive relevant literature which is predominantly Arabic. This shortcoming, therefore, stifles an otherwise rich discussion on IIL and the Islamic conception of human rights. To overcome this shortcoming, the researcher has relied on seminal texts on these subjects in the English language.

Second, the researcher is not a graduate of Islamic jurisprudence. Despite her concerted independent opinion, her reading of the *Qur'aan* may not be regarded as expert. This weakness may debase her analysis before Muslim scholars, traditional and modern. But to overcome this limitation, the researcher has sampled some of the renown scholars in the country for her research. She also reads the *Qur'aan* through its own suggested methodological criteria of textual holism and reading for the best meanings.[278] The researcher further relies primarily on Ali's and Ibn Kathir's translation and exegesis of the Holy Text respectively,[279] which texts Muslims commonly regard as seminal.[280]

Third, the research concentrates on inheritance law and practice relating to *Sunni* Muslims.[281] This positions the investigator favourably, being *Sunni* and therefore knowledgeable in this tradition, and able to gain the trust of informants who share her faith. In addition, a majority of Kenyan Muslims are indeed *Sunni* of *Shafi'te* juristic thought.[282] And generally, *Sunni* Muslims constitute the majority of consumers of the Kadhis' courts.[283]

[278] Barlas (n 102) 15. Sub-section 2.2.1.1 explains the approach of textual holism.

[279] See note 7.

[280] Barlas (n 102) 23.

[281] Arabic word for orthodox Muslims. There are four major Islamic juristic schools. These are: *Sunni* (the Traditionalists), *Shia* (literally the followers or supporters), *Kharijis* (the Seceders) and *Abadis* or *Ibadis* (named from one *imaam* (Arabic word for a Muslim leader especially in religious matters, plural *a'immah*), Abdullah Ibn Abad At-Tamimi). These scholarly groupings (and later sectoral persuasions) emerged after the demise of the Prophet (PBUH). While the *Qur'aan* and the Prophetic *Sunnah* remained the fundamental sources of *Sharii'ah*, the early Muslims differed epistemologically on the remaining two sources: *ijmaa'i* (Arabic word for consensus, herein jurists' consensus) and *qiyaas* (Arabic word for reasoned analogy). This division developed numerous juristic schools. Khan (n 5) 10–22 elaborates on the formation of these groupings.

[282] Interview 124; Oded (n 42) 12–16; An-Na'im, *IFL* (n 124) 55. Only four *Sunni* schools retain today. These are the Hanafi, the Maliki, the Shafi'i and the Hanbali – all named after the *imam* who led its respective exegesis. The larger *Shaf'ite* persuasion in Kenya is perhaps historical. The famous Moroccan explorer (Hajj Ibn Battuta) indicated that when he visited the East African Coast in 1331, he found Mombasa as an Island that had religious, trustworthy and righteous people following the *Shafi* jurisprudence. See Said Hamdun (ed), Noel Q King (tr), *Ibn Battuta in Black Africa* (Markus Wiener Publishing Inc 2003) 22–23.

[283] Swartz (n 42) 35.

Shia Muslims often resolve their grievances within their community dispute resolution mechanisms,[284] local and global.[285]

Finally, this study covers only four of the 47 counties in Kenya. While this sample may appear small, it has been carefully selected to represent a cross-section of the diversity of livelihoods, ethnic cultures and socio-economic contexts in which Islam is lived out across the country.

1.11. Research Methodology

1.11.1. Data Collection

The researcher employed both empirical and desk research approaches to collect data. In particular, the researcher conducted library and internet searches to survey relevant earlier works, law reports, written laws (local and foreign) and international human rights. This assessment revealed how key legal documents (including their evolution) and historical events have facilitated the observance or non-observance of IIL in the country. A review of previous research concerning Muslim localities in other parts of the world also helped the investigator to delineate possible interventions for addressing disentitlement of women. And a thematic reading of the *Qur'aan* helped to reveal the connectedness between the inheritance provisions and other precepts about the relationship between the sexes.

The researcher conducted the empirical research between October 2015 and January 2016. She first worked with the qualitative research methods of in-depth interviews and focus group discussions (FGDs) to collect the field data. The in-depth interviews were semi-structured. They were administered on both key informants and respondents. Appendix 7 annexes the interview guides which were in English. But depending on the literacy level of the respondents or key informants, these interviews were conducted in either English, Kiswahili, local languages, or a mix of these. The FGD guide was also prepared in English

[284] Interview with Jackline Polo – Kawere, Senior Legal Officer, FIDA-Kenya (Mombasa, Kenya, 22 October 2015) [hereinafter Interview 47]; Shamil Jeppie, 'Islamic Law in Africa' [2000] (6) ISIM Newsletter 26; 'Memorandum Presented to the Constitution of Kenya Review Commission by the Shia Ithna-Asheri Muslim Community' in *Report of the Constitution of Kenya Review Commission: Technical Appendices* (Constitution of Kenya Review Commission 2003) vol 5(2), 524; Swartz (n 42) 35.

[285] Waris (n 34) 37. The High Court in *TSJ v SHSR* [2014] eKLR, 2, however, noted that such ADR mechanisms cannot determine matters which are within the exclusive jurisdiction of courts, including the Kadhis' courts, unless the parties submit to the authority of the ADR-body consensually.

but administered either in Kiswahili or the local language in each site. Appendix 8 annexes this FGD guide.

Both the interview and FGD guides had an introduction of the researcher and the aim of the research. This prelude also contained the guarantee of confidentiality. A similar introduction was contained in both the Interview and FGD Informed Consent Forms. These forms sought to provide written evidence of the respondents' actual participation in the study. Appendices 10 and 10A annex the Interview and FGD Consent Forms respectively.

Therefore using both the interview and FGD guides, the researcher explored the inheritance experiences of both successful and unsuccessful heiresses. The investigator then triangulated this information with both in-depth interviews from the beneficiaries' male and female relatives, friends and neighbours; and the FGDs with the other members in the female heirs' localities. The in-depth interviews with key informants assisted the researcher to contextualise the application of IIL both generally and as is specific to Kenya.

In addition to the interview and FGD guides, this study also employed data capture forms to abstract information from relevant determined inheritance cases by both the Kadhis' courts and the High Court. In particular, the form elicited details such as names of the litigants; whether legally represented or not; identity of the court; brief facts and holding (including its basis) of the case; and when the judgment or ruling was delivered. This information helped to assess whether a particular court adjudicated the case in accordance with IIL or other relevant law. Appendix 9 annexes this form.

Thus with the aid of research assistants, the researcher visited both the Kadhis' courts' and High Court's registries in every research site. Since the Kadhis' courts' decisions are unreported and access to the concluded files in the court archives is both procedurally and practically intricate, the researcher originally limited herself to cases determined between the period of January 2008 and December 2012. This period represented two years prior to and after the adoption of the 2010 Constitution. The study sought to establish if the present constitution impacted, positively or negatively, on the application of IIL in the country. Under close supervision of the researcher, the research assistants collected cases within this time frame. In some sites, however, there were very few determined cases during this designated period. This development, therefore, necessitated a review of further cases before

or after this period. The researcher also benefitted from decided cases which some individual Kadhis, lawyers and Public Trustees had collected. A majority of these decisions were seminal in both probate practice in the country and the functioning of the Kadhis' courts.

Several government offices facilitated entry into the original research sites. First, the National Commission for Science, Technology and Innovation (NACOSTI), a statutory body mandated to facilitate research in the country, authorised the carrying out of this study in these sites. In a letter dated 27 May 2015, NACOSTI permitted the researcher to collect data up to 31 December 2016. NACOSTI also issued the investigator with a permit numbered NACOSTI/P/15/0514/6284 for doing the research. Appendices 11 and 11A are the NACOSTI letter and permit respectively.

Because NACOSTI required the researcher to report to the Registrars of the courts, the County Commissioners and the County Directors of Education of the respective study areas before commencing the research, the researcher did so. Subsequently, all the County Commissioners further allowed the researcher to undertake the study in their individual counties. They also requested their assistants and the residents of their counties to cooperate with the researcher. The Kakamega County Director of Education also issued a similar appeal.

Appendices 12, 12A, 12B and 12C annex the authorization letters from Garissa, Mombasa, Lamu and Kakamega respectively. Appendix 12D refers to the permission from the Kakamega County Director of Education.

1.11.2. Site Selection

Oriented by its three theories, this study selected four Kenyan counties for the research. These counties:- (Lamu in the Coast region; Mombasa in the Coast region; Garissa in the North Eastern region; and Kakamega in the Western region) represent the socio-economic dispersion of *Sunni* Muslims in the country. Moreover, the multiple dimensions of these research sites reveal the complexities of perceptions and practices of IIL in different Kenyan communities. But because the Kadhis' court in Kakamega had not heard any inheritance case, the researcher also visited the nearby Bungoma Law Courts in Bungoma County and interviewed both the area Kadhi and the resident Judge. Similarly because Lamu had no High Court, the researcher visited the Malindi High Court which until 2015 was the appellate court

for Lamu Kadhi's cases.[286] Nairobi County was not part of the sampled sites. It was added as a fringe research site because of it being the country's capital city so that the study could benefit from its more experienced key informants. The researcher thus only interviewed key informants from this site. No FGD or interview with ordinary men and women was conducted here.

While the original four research sites have sizeable Muslim populations,[287] these counties also bear a mix of rural-urban balance, diverse communities and livelihoods. Garissa, for example, which is predominantly Muslim (97.5%)[288] and of ethnic Somali,[289] is predominantly rural and defined by nomadic pastoralism.[290] But agro-pastoralism (ie mix of farming and livestock keeping) is also present along the river line of River Tana (Kenya's largest river).[291] And some residents of Garissa town do business (large and small).[292] The researcher thus collected data in Garissa town and the rural villages (known as *baadiya*) of Raya and Korakora.[293]

[286] Presently, the High Court in Garsen hears the appeals from these cases.

[287] Collectively, the Muslim population in these four counties stands at 27.7% of the country's Muslim population.

[288] See Appendix 4. The 2019 Census increases this estimate to 97.6%. See Kenya National Bureau of Statistics, '2019 Census Volume IV' (n 35) 422.

[289] Garissa County Government, 'Garissa County Government Integrated Development Plan' (Garissa County Government 2013) 36; Ahmed Issack Hassan, 'North Eastern Province and the Constitutional Review Process: Lessons from History' (no date); *HL Deb248*, 248 (House of Lords 3 April 1963); His Majesty's Stationery Office, 'Kenya: Report of the Northern Frontier District Commission' (HMSO 1962).

[290] FGD with men (Garissa Township, Garissa, Kenya, 30 September 2015); Interview with Faiza Khan, Executive Director, Pastoralist Women Initiative (Garissa, Kenya, 28 September 2015) [hereinafter interview 3]; Interview with Alawi Dawood, Founding Member, Garissa Civil Society Network (Garissa, Kenya, 28 September 2015) [hereinafter interview 4]; Interview with Ahmed Ismail, Executive Director, Femalekind (Garissa, Kenya, 30 September 2015) [hereinafter interview 6]; Interview with Umi Abdallah, Sub-chief, Garissa Township (Garissa, Kenya, 30 September 2015) [hereinafter Interview 9]; FGD 1; Interview with Deghwo Maalim, Boqor, Abdiwaq clan (Garissa, Kenya 11 December 2015) [hereinafter Interview 28); Garissa County Government (n 289) 16. In fact, because of its large herds of domestic animals, Garissa hosts the biggest livestock market in East and Central Africa. Interview with Osman Abdi and Abdi Guyo (Garissa, Kenya, 3 October 2015) [hereinafter Interview 13]; Interview with Amriya Billow (Garissa, Kenya, 12 December 2015) [hereinafter Interview 16].

[291] River Tana crosses Garissa as it flows from Aberdare Ranges in Nyeri County to the Indian Ocean.

[292] They trade in wholesale merchandise, retail shops for small merchandise, sale of *miraa* (*khat*), milk vending (particularly done by females), hotel and catering, transport, and rental of both residential and business premises. Interview 3; Interview 4; Interview 6; Interview 9; FGD 1; Interview 28; FGD 1; Interview with Muna Lali (Garissa, Kenya, 12 December 2015) [hereinafter Interview 21].

[293] Both Garissa town and Korakora are in Garissa Township Sub-county while Raya is in Mbalambala Sub-county.

Mombasa, on the other hand, is 37% Muslim,[294] largely urban and cosmopolitan.[295] Its main productive activities include: formal employment (private and public),[296] businesses (large and small),[297] and real estate.[298] Being the oldest town and the second largest city in the country,[299] Mombasa hosts multiple ethnic communities. These include: the waSwahili;[300] the progeny of the early Arab traders and the Indians who built the East African Railway;[301] and migrant communities from neighbouring counties and other parts of the country such as the Mijikenda[302]. Because of this diversity, the researcher collected data

[294] Kenya National Bureau of Statistics, 'Population and Housing Census: Population by Religious Affiliation and Province' (no date) <http://www.knbs.or.ke/Population%20by%20Religious%20Affiliation%20and%20Province.php> accessed 24 May 2013. The 2019 Census increases this estimate to 37.8%. See Kenya National Bureau of Statistics, '2019 Census Volume IV' (n 35) 422.

[295] Swartz (n 42) 39.

[296] The numerous government (national and county) and private establishments absorb 60% of the working group. Mombasa County Government, 'First County Integrated Development Plan 2013 - 2017' (Mombasa County Government 2013) x.

[297] These include multi-million family enterprises and small individual businesses such as small retail shops selling general merchandise; charcoal (coal) vending and groceries. Interview with Abdulswamad Khamis, Principal Kadhi (Mombasa, Kenya, 26 October 2015) [hereinafter Interview 53]; FGD with women (Mombasa, Kenya, 31 October 2015) [hereinafter FGD 4]; FGD with men (Mombasa, Kenya, 31 October 2015) [hereinafter FGD 5].

[298] This includes rental of residential and business buildings and plots (for temporary or permanent leasing).

[299] Mombasa County Government (n 296) vi.

[300] The term 'swahili' is a derivative of the Arabic word '*sahili*' which means 'of the coast'. Salim (n 42) 60; Askew (n 42) 70. Thus the waSwahili peoples are indigenous coastal inhabitants. These included the Arabs, the Baluchis and Africans (such as the Somali, the Malagasies, the Comoros and the 12 original waSwahili nations). The 12 waSwahili nations constitute both the *Thalatha Twa'ifah* (Arabic phrase for three communities tribes), often written as '*Thelatha Taifa*', which comprised of the Kilindini, Tangana and Changamwe; and the *Tis'a Twa'ifah* (Arabic phrase for nine communities or tribes) of Mvita, Jomvu, Kilifi, Mtwapa, Pate, Faza, Shaka, Bajuni and Katwa. FJ Berg, 'The Swahili Community of Mombasa, 1500-1900' (1968) 9 The Journal of African History 35, 35; John Chesworth, 'Kadhi's Courts in Kenya: Reaction and Responses' in Abdulkader Tayob and Joseph Wandera (eds), *Constitutional Review in Kenya and Kadhis Courts: Selected papers presented at the Workshop, 20 March 2010, St Paul's University, Limuru, Kenya* (Center for Contemporary Islam University of Cape Town 2011) 4; Salim (n 42) 60.

[301] For example the Memon. The Memon are former Lohana Hindus of Indian Kshatriya caste who reverted to Islam 'en mass' and migrated their original home in Sindh and settled in Halai, Akai and Nasserpuria in India. The word 'memon' is an adulteration of the Arabic word *mu'umin* (the believer). Mohamed Bakari, 'Asian Muslims in Kenya' in Mohamed Bakari and Saad Yahya (eds), *Islam in Kenya: Proceedings of the National Seminar on Contemporary Islam in Kenya* (Mewa Publications 1995) 55–56.

[302] These are the 'nine self-identifying communities' found both at the Kenyan Coast and the Tanzanian Tanga region. Katama Mkangi, 'The Perception of Islam by the Mijikenda of the Kenya Coast' in Mohamed Bakari and Saad Yahya (eds), *Islam in Kenya: Proceedings of the National Seminar on Contemporary Islam in Kenya* (Mewa Publications 1995) 109. They are: the Rabai, the Ribe, the Kambe, the Jibana, the Chonyi, the Kauma, the Duruma, the Digo and the Giriama. A plurality of the Mijikenda, however, is situated in Kilifi and Kwale Counties. ibid.

from families of different ethnic or racial background in Likoni, Mvita and Kisauni sub-counties.

On its part, Kakamega is both rural and predominantly agricultural. It has vast arable lands.[303] Its residents hence engage in farming of both subsistence crops (eg maize, vegetables, potatoes and arrow roots) and cash crops (largely sugarcane).[304] Sugarcane farming flourishes because of the presence of the Mumias Sugar Company (MSC) in one of the sub-counties, Mumias.[305] Because of this company and other establishments (private and public), Kakamega people similarly engage in employment.[306] They also do businesses (large and small) through the sale of general merchandise, construction materials and farm produce.[307]

Kakamega is home to ten (10) Luhya ethnic sub-tribes. These are: the Wanga, the Isukha, the Ndombi, the Kabara, the Kisa, the Marama, the Tachoni, the Tsotso, the Idakho and the Basonga.[308] About 5.5% of this population is Muslim,[309] and is concentrated in Mumias.[310]

[303] While a half an acre is a big piece of land for Kenyans in other parts of the country eg in Mombasa and Nairobi, it is a pittance in Kakamega. There, a person with less than 10 acres of land is considered as poor. Conversation with Bahati Mulunga (Kakamega, Kenya, 12 November 2015) [hereinafter Conversation 2; Conversation with Kassim Wanyama (Kakamega, Kenya, 12 November 2015) [hereinafter Conversation 1]; FGD with men (Kakamega, Kenya, 10 November 2015) [hereinafter FGD 8].

[304] Interview with Yahya Mudavadi, Volunteer, Mumias Muslim Community Programme (Kakamega, Kenya, 10 November 2015) [hereinafter Interview 83]; FGD 8; FGD 7.

[305] In fact, MSC is the backbone of the entire Western region economy. Sugarcane farmers from the neighbouring counties of Busia, Kisumu and Siaya also supply their produce to MSC. Interview 83; FGD with women (Mjini, Mumias, Kenya, 11 November 2015) [hereinafter FGD 9].

[306] For instance, a majority of Mumias residents works at MSC (about 2000 direct and numerous indirect employees through several outsourcing services as of 2015). Other locals are teachers.

[307] Interview with Mohammed Khamis, Imaam, Masjid Taqwa (Kakamega, Kenya 8 November 2015) [hereinafter Interview 77]; FGD with women (Amalemba, Kakamega, 11 November 2015) [hereinafter FGD 10]; FGD 8; The Department of Finance, Economic Planning & Investments, 'Kakamega County Integrated Development Plan 2018 - 2022' (County Government of Kakamega 2018) 39, 42 and 49.

[308] The remaining eight sub-tribes of the Luhya community are the Khayo, the Nyala, the Marachi and the Samia which reside predominantly in Busia; the Bukusu which live in Bungoma; and the Tiriki, the Nyore and the Maragoli of Vihiga County. Conversation 2.

[309] Kenya National Bureau of Statistics, '2009 Census Web' (n 294). The 2019 Census decreases this estimate to 4.7%. See Kenya National Bureau of Statistics, '2019 Census Volume IV' (n 35) 422.

[310] Interview with Khamisi Mwenesi, Imaam, Masjid Jamia – Mumias (Kakamega, Kenya, 7 November 2015) [hereinafter Interview 76]; Interview 77. According to a 77 year old Luhya-Segeju man, when some waSwahili traders who included Arabs, Comoro Islanders, Segejus (of Tanzania descent), Pakistanis, Somali and Barawas moved from Pangani in former Tanganyika to the hinterland of East Africa in the early 1900s, they islamicised the locals of every stop they made. When the traders reached Nairobi, King Nabongo Mumia Shiundu of the Luhya kingdom invited them to Mumia to shield his kingdom against an impending invasion by the neighbouring Luo community because the waSwahili possessed traditional firearms. The King also

The researcher thus collected data in Mumias which is home to the Wanga.[311] She also researched in Kakamega town because it hosts the county's High Court, the Kadhis' court and the Public Trustee Office.[312]

The researcher further selected Lamu county because preliminary survey indicated incidences of partial inheritance among females in its Pate village.[313] While the county is 52% Muslim,[314] Pate village is '99.9% Muslim'[315]. This village engages chiefly in farming (subsistence and commercial),[316] in both their 'town' (ie their residential sphere) and in *barani*[317]. The locals plant maize as a staple food. They also grow sesame, cowpeas, bananas,

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welcomed the Nubians from present Kibra (Kibera) in Nairobi to accompany the waSwahili. Thus King Mumia and his three brothers reverted to Islam. He further suggested marrying off of *bwibo* (Luhya word for princesses) to the waSwahili so that to retain the latter in the Luhya land. Other waSwahili married ordinary Luhya girls and continued spreading Islam in other parts of the country such as Kisumu and Eldama Ravine. The King later created settlement areas for the remaining guests. While the waSwahili were put in a place currently known as 'town' or *mjini* in Swahili; the Nubians were sent to the margins of Mumia, Nubian (present Lumino). The Arabs, Somali and Pakistanis were settled in *Arabuni* (Swahili word for Arabian), a part of present 'town'. Interview with Bakari Athman (Kakamega, Kenya, 7 November 2015) [hereinafter Interview 75].

[311] In particular, she visited the areas of Shibale, Mjini, Lumino and Lureko.

[312] Kakamega town hosts the Isukha sub-group.

[313] Preliminary interview with Hammad Kassim, Retired Chief Kadhi of the Republic of Kenya (Mombasa, Kenya, 23 May 2013). Pate village is one of the small islands of the larger Pate Island. The larger Pate Island consists of the following small nine islands: Pate, Siyu, Shanga, Mbwayuu, Tchundwa, Mtangawanda, Faza, Iyabogi, Mbwajumale and Kizingitini. Though Mbwajumale and Kizingitini are different places, they are within one smaller island. Hence the tally of nine islands in the larger Pate Island. Interview 97. Since Pate village is older than all the remaining villages in the larger Pate Island, the mentioning of Pate Island often signifies Pate village. Interview 107; Interview with Hashim Ibrahim (Pate, Kenya, 21 November 2015) [hereinafter Interview 107]. Thus unless specifically indicated, all references to Pate Island or Pate in this research relates to the Pate village.

[314] See Appendix 4. However, the 2019 Census decreases this estimate to 50.6%. See Kenya National Bureau of Statistics, '2019 Census Volume IV' (n 35) 422. The county consists of the Lamu archipelago and the mainland. Lamu County Government, 'Lamu County First County Integrated Development Plan 2013 - 2017' (Lamu County Government 2013) xiii. The archipelago includes the broader Amu, Pate, Ndau, Kiwayuu and Manda Islands. It is home to a majority of the waSwahili who are loosely commonly referred to as the Bajuni. Lamu County Government, 'Lamu County Spatial Plan (2016 - 2026) Abridged Version Volume II' (Lamu County Government May 2017) 58. But the locals prefer identifying themselves by their respective Islands or villages. A plurality of the remaining Lamu communities ie the Aweer, the Dahalo, the Orma, the Boni, the Korei and migrant tribes from other counties (eg the Kikuyu and the Pokomo) lives in the mainland. ibid 58 and 59; Lamu County Government, '1st CIDP' 5.

[315] Interview 92. An aged male respondent also described his village 'as the most committed to Islam than its neighbouring Islands.' Interview 97. Pate town alone, for example, boasts of 16 mosques which have existed since its early days.

[316] FGD with men (Pate, Kenya, 20 November 2015) [hereinafter FGD 12]; Interview with Khamis Bwantan (Pate, Kenya, 19 November 2015) [hereinafter Interview 89]; Interview 92; FGD with women (Pate, Kenya, 20 November 2015) [hereinafter FGD 11].

[317] Bajuni word for rural areas where only farms are located.

cashew nuts and coconuts for both family consumption and commerce.[318] Pate villagers also keep animals, particularly cattle.[319] They also fish,[320] harvest mangrove[321] and run small businesses (such as retail shops, carpentry, restaurants, and sale of Swahili snacks).[322] The research happened in both the class-distinct residential areas of the village ie *mitaa ya juu*[323] and Kichokwe[324].

Because the courts are located in Amu Island, the researcher also collected data in this Island.[325] But unlike in Pate, agriculture is rare and seasonal in Amu.[326] The few residents who engage in farming cultivate between three to six months in a year (ie from May to July) and during the short rains of September.[327] They grow maize, bananas, mangoes, coconuts and sesame mainly for subsistence consumption.[328] Fishing and operating donkey taxis, however, are the predominant occupations in Amu.[329] These are done by men. Other economic activities include: formal employment (public and private) for both sexes; and casual jobs in operating boats and erecting buildings for men.[330] Uneducated women

[318] Previously, they cultivated tobacco as their main cash crop. But because of poor market and present aphids attack on the crop, many farmers have abandoned this produce. FGD 12; Interview 89.

[319] FGD 12.

[320] FGD 11.

[321] The stems of mangrove make heavy poles that are used to build houses and roofs in many parts of the Coastal region. The poles give these buildings firmness and unique architectural design. Interview 89.

[322] FGD 11; Interview 89.

[323] Pronounced in Bajuni as *mitaa ya yu*, this area is quiet and peaceful. It is for the relatively rich families. '*Juu*' is a Swahili word for 'up'. '*Mitaa*' is plural of '*mtaa*' which means a neighbourhood.

[324] This is a noisy area belonging to relatively poor people. Both the atmosphere and the buildings of these areas confirm the class distinction between them. And the inhabitants, particularly from *mitaa ya yu*, alert visitors repeatedly to notice these variations.

[325] This island comprises of Amu, Shella, Kipungani and Machondoni islands. Interview 97.

[326] Interview 115; Interview with Harun Abuu, Scholar, Masjid Jamia (Amu, Kenya, 20 December 2015) [hereinafter Interview 116]; FGD 13. That is why Amu Islanders identify the remaining Lamu Islands as *mashamba* (Swahili word for rural areas) or *visiwani* (literally Swahili word for numerous small islands, but contextually backward areas). The term *mashamba* (singular *shamba*) means farms literally.

[327] FGD 13.

[328] FGD 13.

[329] FGD 13; Interview 115.

[330] Interview 115. Boats, donkeys (and now motorbikes) are the main sources of transport in most Lamu Islands.

embroider *kofia*[331] for Muslim men; or prepare Swahili delicacies for sale either outside their houses, in the markets or supply to restaurants.[332]

In addition to the diverse ethnicities and livelihoods, the research sites also have a Kadhis' court. While each of the counties has two Kadhis' courts, Mombasa hosts four Kadhis including the Chief Kadhi. It remains the seat of these courts in the country because of its strategic location among the Kenyan coastal towns which collectively hosted a majority of the Muslim population since pre-colonial times.[333] The Lamu courts are situated in Amu Island and in the rural Witu Island. In Garissa, the courts are in Garissa town and in Daadab Sub-county. The courts in Kakamega are found in Kakamega town and in Butere Sub-County.[334]

1.11.3. Sampling

The researcher sampled data from the following population: successful and unsuccessful female beneficiaries; men and women from these heiresses' communities including their relatives, friends and neighbours; grassroots administrative officials [ie the village elders, the chiefs, the Assistant Deputy County Commissioners[335] and the Deputy County Commissioners];[336] clan elders; civil society organisations which includes both community-based organizations and non-governmental organisations that deal with Muslim and women's rights issues; Muslim religious leaders such as *a'immah*, scholars, retired Kadhis and both male and female teachers; advocates of the High Court of Kenya, and legal aid institutions which have represented Muslim women in inheritance cases; Public Trustees; court registry staff; Kadhis; and High Court Judges.

This sampling was purposive. Being an advocate of the High Court, an academic and an active member of community work initiatives in Mombasa, the researcher identified easily a

[331] Swahili word for a cap.

[332] FGD 13.

[333] Swartz (n 42) 40; Anne Cussac, 'Muslims and Politics in Kenya: The Issue of the Kadhis' Courts in the Constitution Review Process' (2008) 28 Journal of Muslim Minority Affairs 289, 292.

[334] Interview 129.

[335] This office was established to replace the District Officer's in the hitherto provincial administration. With the establishment of the county governments, the constitution called for restructuring of the provincial administration. See para 17 of the Sixth Schedule to the 2010 Constitution.

[336] See notes 38 and 335.

number of key informants in this research site and Nairobi. She further liaised with some of these key informants to select the successful and unsuccessful female beneficiaries and other respondents from the heiresses' communities. Some of the researcher's contacts also agreed to participate in the study. Meanwhile, the research guides in the remaining sites facilitated meeting up with both the key informants and other respondents in these localities. In all the study areas, the researcher identified further respondents from the referrals of the original selected respondents.

Overall, 139 respondents (79 males and 60 females) were identified and interviewed. These included 83 (64 males and 19 females) and 56 (15 males and 41 females) key informants and ordinary respondents respectively. Table 1 shows the dispersion of these interviews in both the original and the fringe study areas. Because women in Kakamega largely participate in socio-economic initiatives in groups, the researcher managed to interview only three individual women: a judge, a village elder and one of her hosts. All other sessions were FGDs.[337] Meanwhile, five of the overall interviews were joint between two and three respondents. Therefore, in total, the number of interviews held was 131.

Table 2: Dispersion of Male and Female Respondents in the Study Areas

	Research Sites							
Respondents	Garissa	Mombasa	Kakamega	Lamu	Malindi	Bungoma	Nairobi	**Total**
Females (KI)*	4	9	2	3	0	1	0	19
Males (KI)*	15	10	12	17	3	1	6	64
Females (O)**	17	14	1	8	1	N/A	N/A	41
Males (O)**	5	2	2	6	N/A	N/A	N/A	15
Total	41	35	17	34	4	2	6	139

Notes:* KI: Key informant; ** O: Ordinary respondent

[337] This Kakamega women's peculiar solidarity continues the support system which women created over two decades ago in order to stand by those who were affected or infected with the HIV/AIDS pandemic. Between 1998 and 2006, for example, the prevalence of the disease was high in Mumias. Interview 83.

Where a respondent shared some sensitive information which could prejudice him or her or a particular official, the researcher anonymised this interview to conceal the identity of that respondent or the relevant official. She then assigned a fresh number to this interview. But this new numbering did not affect the original count of the actual interviews conducted.

About 13 FGDs (four for males and nine for females) were also carried out. Because of the respondents' religious and cultural socialisation which discourage mixing of unrelated males and females;[338] and also to encourage comfortable and open discussions, the researcher held women-only and men-only FGDs. Table 2 represents the dispersion of these FGDs in the original research sites.

Table 3: Males' and Females' FGDs

	Research Sites				
FGDs	Garissa	Mombasa	Kakamega	Lamu	**Total**
Females	1	2	4	2	9
Males	1	1	1	1	4
Total	2	3	5	3	13

The researcher also chatted informally with some of her hosts on the subject of the study. Some of these chats provided useful information. With the consent of the speakers, the researcher has identified these chats as conversations. At least two conversations have been referenced in this research.

Finally, 203 cases (164 from the Kadhis' courts and 39 from the High Court) were reviewed. The Kadhis' court cases were collected from: Mombasa (108); Lamu (17); Garissa (33); Bungoma (1); Nairobi (5). Like the Kadhis' court survey, the review at the High Court's registries had mixed results. While the research assistants in Mombasa reviewed eleven (11) decisions, there was no single determined case in Malindi, Bungoma, Kakamega and Garissa High Courts. The researcher thus assigned a survey of any relevant High Court decision from the country's online reporter at the Kenya Law website. Consequently, 28 more cases were examined from different parts of the country.

[338] This is actually the essence of *hijaab* in Islam. See the accompanying text to note120.

1.12. Chapter Breakdown

This study is divided into seven chapters. Chapter one gives a general overview of the research. It introduces Muslim women's inheritance rights and IIL. The chapter then lays out the research problem as continued displacement of Muslim women's stipulated inheritance rights in spite of successive constitutional and legislative guarantees for the application of IIL in the country. It then seeks to answer the question whether Muslim women in Kenya actually enjoy their inheritance rights as decreed in the *Qur'aan*. Thus it sets out specific broad questions to address this research problem. But the chapter commences the study on three assumptions, viz: that ignorance of IIL across a majority of the Kenyan ethnic and socio-legal communities contributes significantly to the disentitlement of Muslim women's stipulated inheritance shares; that continued observance of ethnic traditions which are unfavourable to women deny Muslim women their general inheritance rights; and that structural barriers in the probate institutions in the country negatively impact on women's actual enjoyment of their inheritance rights. Guided by both its conceptual and theoretical understanding that the principle of equality does not portend identical treatment between the sexes, women and the citizens of a plural society; the study further outlines how it collected its data among key informants, individual respondents and determined court cases to establish the actual Muslim women's inheritance experiences. The chapter also reviews past writings on the subject and shares both the justification and limitations of the research.

Chapter two elaborates the synopsis on the theoretical underpinnings of the research which is contained in chapter one. Delimiting the three minority rights theories' conception of equality, ie multiculturalism, Global Critical Race Feminism and modified Muslim feminism, this chapter underlines that all the three theories allude separately to justice as substantive equality. The chapter further exhibits that these theories' conception of equality aligns with that of Treaty Bodies and renown global human rights lawyers. It, therefore, encourages some Western countries, non-governmental organisations and individuals to appreciate the disproportionate inheritance shares between some men and women in the same familial category as another formulation of the principle of equality.

Chapter three illustrates IIL as substantive equality at play. It demonstrates that both sexes have an inalienable equal opportunity to inherit their deceased relative's property regardless of its size and nature. It also indicates that because paternal males such as sons and

brothers assume their late father's maintenance responsibility of the family, they receive twice as much inheritance as the paternal daughters and sisters. This arrangement is, however, absent among uterine brothers and sisters because the former lack any maintenance obligation over the latter. They thus take identical shares. The chapter also situates a similar *Sharii'ah* mandated reason over widowers' higher inheritance ratio compared to the widows'. It, therefore, argues that it is impossible to implement the suggestion by Muslim modernists of amending IIL such that men and women across all familial relationships receive identical portions. Instead, the chapter offers some proposals within *Sharii'ah* which could possibly give heirs within some categories identical rights.

Chapter four begins an exposition of the research findings. It reveals that syncretic practice which interweaves custom with IIL is a significant factor in disentitling women of their inheritance. Often, a majority of Kenyans subscribe to their customary laws rather than *Sharii'ah,* even when they observe other aspects of Islam. Similarly, societal perceptions on the roles and behaviour of women within families (immediate and extended) determine whether these women can get inheritance or not. The chapter further shows that the continued disintegration of Islamic values push some relatives (males and females) to introduce personal and cultural perspectives during estate distribution in order to exclude legitimate heiresses from the inheritance.

Chapter five delineates ignorance of IIL among various stakeholders and its impacts on women's inheritance. The chapter exposes that a majority of women are ignorant of their specific shares and accept any allocation given to them, if at all. Some men do not know these rights either, and some even assert inaccurate understanding of Islam, which results in negation of women's inheritance. Religious leaders who are uneducated on IIL further condone customary laws which disfavour women. And legal practitioners (both bench and bar) who are unfamiliar with the law either consult the Kadhis or jumble both the LSA and IIL in their analyses.

Chapter six next explains how the barriers in both the formal and the informal probate processes contribute to defeating women's inheritance rights. It identifies inaccessible courts, protracted litigation, unprofessional judicial conduct, courts' imposed alternative dispute resolution mechanisms, judicial incompetence, inability to enforce decisions among Kadhis,

and substitution of IIL with the LSA or customary laws in mainstream courts as some of the challenges women face. Other setbacks include: weak religiosity among the heiresses' families, division of unvalued or partial estates, delayed inheritance distribution, using the deceased's locality as a referent to the applicable law, and the Public Trustees' misconstruction of the Kadhis' court probate powers.

Chapter seven proposes several constitutional, legislative, judicial, and socio-economic measures which different players need to take in order to reduce the instances of disentitlement of women of their stipulated inheritance. Guided by the three main factors of syncretic practice which interweaves custom with Islam, ignorance of IIL, and malfunctioning probate institutions which chapters four, five and six discuss respectively, the chapters suggests specific strategies to tackle various aspects of each of these issues.

The thesis concludes at chapter eight. However, it first gives a summary of each chapter and relates each chapter to the Research Questions. It then outlines that the aim and specific objectives of the study have been met. The chapter next demonstrates that the assumptions have been partially proved and illustrates how its three theories have been applied. It then indicates how its identified concepts of Muslim women's rights, gender justice, equity and non-discrimination have been employed throughout the study.

2.0 CHAPTER 2: UNDERSTANDING EQUALITY THROUGH MULTICULTURALISM, GLOBAL CRITICAL RACE FEMINISM AND MODIFIED MUSLIM FEMINISM

2.1. Introduction

The issue of Muslim women's inheritance rights in Kenya raises two questions relating to the right to equality. First, whether the dissimilar succession shares between the sexes in some degrees of familial relationship disadvantage women. Second, whether the application of IIL to Muslims while the rest of Kenyans observe the LSA constitutes special preferential treatment of Islam. While chapter three responds to the first question, this chapter answers the second question as it explores the meaning of the right to equality in a multi-religious and multi-ethnic polity like Kenya. The chapter explains this right through the joint theories of multiculturalism, critical race feminism (or intersectionality) and modified Muslim feminism.

It employs these three inquiries collectively because they address the unique minority situation of Kenyan Muslim women. Kenyan Muslim women are women, members of a minority religion, and members of their often patriarchal families, clans or ethnic communities. Thus, multiculturalism delineates the rights of Muslims (both men and women) as a minority group in Kenya.[339] Critical race feminists (CRFs) and particularly global critical race feminists (GCRFs) theorise the position of minority women in society.[340] Their epistemology makes other women, especially majority ones,[341] understand the Muslim women's conception of equality.

[339] See note 34.

[340] The definition of minority women has expanded recently to include Muslim women because, whether of white or non-white origin, Muslim women remain low in the socio-political strata of their communities and/or countries. See generally al-Hibri, 'Patriarchal Feminism' (n 116). Wing notes that the concept of 'women of colour' transcends colour and racial identification contemporarily. Wing, 'Introduction: GCRF' (n 128) 2. Wing's works on Muslims include: Wing and Smith (n 154); Adrien Wing, 'Palestinian Women and Human Rights in the Post 9-11 World' [2002] Michigan Journal of International Law 421; Adrien Katherine Wing, 'Reno v. American-Arab Anti-Discrimination Committee: A Critical Race Perspective' (1999–2000) 31 Colum Hum Rts L Rev 561; Adrien Katherine Wing, 'Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism' (2002–03) 63 La L Rev 717.

[341] The expression 'other women' here includes both majority and minority women who have difficulties understanding Islamic construction of equality. Paradoxically it means, here, dominant views.

Finally, Muslim Feminists (MFs) – who specifically theorise on Muslim women[342] – share intricate details of the conception of equality in Islamic jurisprudence.[343] Their explanation of *Sharii'ah* deconstructs mainstream feminist assumptions, while adding women's voices in the explication of Islamic law. This construction comforts contemporary Muslim women to embrace their religious law unreservedly.[344] But as previously noted, this study departs from the MFs' exegeses which contradict explicit provisions of the *Qur'aan* and *Sunnah* hence the usage Modified Muslim Feminism(MoMF) employed in this study.

Despite their different focuses, each of these three theories construes justice as substantive equality. This means treating likes alike and differences differently. Thus Multicultural, Intersectional and Modified Muslim Feminist Approaches to Equality (MIMoMFAE) enjoin concurrent respect for the similarities and differences among citizens, men and women, and between women respectively. This chapter further demonstrates that these minority inquiries' conceptions of equality align with the principle of equality in municipal and global human rights documents.

2.2. MFs' Gender Justice as both Sameness and Specificity of the Sexes

MFs[345] opine that Islam ratifies sexual equality, which equality is premised on both the sameness and specificity of men and women.[346] The *Qur'aanic* discourses are not predicated

[342] Cooke identifies MFs' agenda as seeking justice and citizenship (rights) for Muslim women. Cooke (n 113) 95.

[343] Cooke notes that since MFs do not confine themselves to a single identity (of Muslim), ie they balance their collective and individual identities while interacting with others, they play a pivotal role in destabilizing the status quo of power and knowledge distribution. ibid 100.

[344] Sait and Lim (n 9) 131. That is without fear that the exegesis is patriarchal or anti-Islamic. Mainstream feminism, for example, has always remained suspect in Muslim societies because during colonialism, the colonizers of Muslim countries, missionaries and individual Westerners touted that a Muslim woman needed to convert to Christianity to escape her oppression. Ahmed (n 106) 151–54 and 167; al-Hibri, 'Law and Custom' (n 56) 4.

[345] Cooke calls any Muslim woman who together with other Muslim women deconstructs Islamic interpretation in order to seek equality with men an Islamic feminist. See Cooke (n 113) 95. MFs work, however, differs from their predecessors' (the Muslim secular feminists) who argued for full gender equality in the public (save for religious duty) only and accepted the divisibility of the private and public societal terrains. Badran (n 103) 30. But like other feminists, MFs' perspectives are 'local, diverse, multiple, and evolving' and sometimes differ on what is justice or equality or how to achieve it. Ziba Mir-Hosseini, 'Muslim Women's Quest for Equality: Between Islamic Law and Feminism' (2006) 32 Critical Inquiry 629, 640. Wadud, for example, prefers the title 'scholarship activist' to 'feminist'. Wadud (n 67) xviii.

[346] Barlas (n 102) 133.

on either sameness or difference theory of the sexes.[347] Rather, they recount the ontological identity of men and women without using man as the referent.[348] They also treat men and women differently on some aspects without advocating for the concept of binary opposition of 'self' (meaning men) and the 'other' (signifying women) commonly found in Western inquiries.[349] Indeed both sexes are embraced in the cardinal purport of the Holy Text which is guiding 'humankind towards recognition of and belief in certain truths'[350] and the consequent recompense for pursuing or avoiding that guidance.[351] It is this theory that MFs employ to explicate the position of Muslim men and women in society. Thus, while discriminating practices reign in Muslim communities, MFs disassociate them from Islam.[352]

MFs theory is drawn from their interpretive methodology of the *Qur'aan*. They re-read the Holy Text to both elicit its inherent liberating thesis of sexual equality and to deconstruct its past and present patriarchal exegesis. To MFs, this Islamic epistemology of both sameness and specificity of the sexes is telling when one reads the *Qur'aan* in four styles. These are: through the Holy Book's own-specified methodology of textual holism,[353] by moving past its engendered Arabic language,[354] by ratifying the totality of its message[355] and by 'double-movement'.[356]

2.2.1. Interpretive Methodology of the *Qur'aan*

2.2.1.1. Reading the *Qur'aan* Thematically

[347] ibid 6 and 133.

[348] ibid 133.

[349] ibid 129–30.

[350] Wadud (n 67) 15. These truths include believing in Oneness of God, the Prophets sent to spread this monotheist Message, the Scriptures bearing this concept and guiding humans on how to observe it through worship (either by committing or omitting certain acts), the Afterlife where humans shall either end up in Hell Fire or Paradise depending on their temporal deeds and God's Mercy. Esposito and DeLong-Bas (n 17) 1.

[351] Wadud (n 67) 15.

[352] See eg ibid ix.

[353] Barlas (n 102) 15–18.

[354] Wadud (n 67) 4–7.

[355] Barlas (n 102) 13–14; Wadud (n 102) 102–09.

[356] That is, a movement from a present factual situation to the *Qur'aanic* times (to elicit the lesson behind a particular edict) and back to the present to apply it to the attending situation. See Ziba Mir-Hosseini, 'Justice, Equality and Muslim Family Laws: New Ideas, New Prospects' in Ziba Mir-Hosseini and others (eds), *Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Process* (IB Tauris 2013) 20–21; Wadud (n 67) 3–4; Barlas (n 102) 22–23.

According to MFs, the *Qur'aan* is a coherent text and its passages must be read so, not 'atomistically',[357] to reach its egalitarian teachings. In fact, MFs posit, the Sacred Text urges Muslims innumerably to read it holistically and reproaches those who desecrate its message by reading its prescriptions selectively.[358] This thematic interpretation of the *Qur'aan* includes employing one verse or such number of verses of the Holy Book to explicate or expound another or others, provided that such other verse(s) is within the context under discussion.[359] It is simply an 'intratextual'[360] exegesis of the Islamic concepts.

To MFs, identifying 'the Qur'ān's textual and thematic holism' (and hence the hermeneutic connection[361] between two or more disparate themes) unfolds its antipatriarchal theory.[362] Otherwise, a reader may deprive a precept of its full meaning and risk reaching a patriarchal conclusion. This, MFs contend, is how the classical (male) exegetes came about their discriminatory interpretation of the *Qur'aan*.[363] They read it one verse after another – without giving regard to the themes within it.

2.2.1.2. **Reading the *Qur'aan* through Double-movement**

The second way of discovering equality in Islamic thought, MFs postulate, is to read the *Qur'aan* behind and in front of it[364] what is commonly dubbed 'double movement'.[365] Reading behind the Sacred Text means examining the historical contexts in which a particular precept was revealed to draw its moral lesson.[366] Reading in front of it, on the other

[357] Wadud refers the interpreting of the *Qur'aan* one *ayah* (verse) after another as atomistic reading of the Holy Text. Wadud (n 102) xii and 2.

[358] *Qur'aan* 3:7; 5:44; 6:91; 15: 89 – 94; and 39:23 carry this call.

[359] Barlas (n 102) 18–19.

[360] ibid 2 and 16.

[361] That is their context, grammar and totality of their message. See Wadud (n 67) 3.

[362] Barlas (n 102) 8.

[363] ibid 9.

[364] ibid 22–23.

[365] While the initial MFs attribute the formulation this methodological approach to Fazlur Rahman (a Pakistani Islamic modernist and Western academic) this style of reading the *Qur'aan* is common among Muslims – including the researcher – whether or not they have encountered Rahman's work. See, however, Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (1st edn, University of Chicago Press 1982).

[366] Barlas (n 102) 22.

hand, signify recontextualising that lesson into present needs.[367] It is plainly finding the '"spirit" of the Qur'aan'[368] which was proclaimed over 1400 years ago to apply it to modern times. Such a reading, MFs contend, allows the historicising of the particular (the specific edicts) and taking forward the general (the universal provisions).[369]

It is this 'Spirit' or the 'Word' that is relevant to contemporary societies not the practices of the first Muslim community nor the community itself.[370] Generalising certain contextual prescriptions (intended for seventh century Arabia) to present societies like conservatives do, MFs argue, is one of the reasons for patriarchal interpretations of the Text.[371] Such tendency confuses between revelation and human interpretation – which interpretation is influenced by its history.[372] It also deprives the *Qur'aan* of the specificity of time and of an opportunity to be interpreted anew by each generation of Muslims in every historical period.[373] Yet in order for the *Qur'aan* to remain universal, each society (new or old) must understand the cardinal and immutable principles of the Text and apply them in their own special way.[374]

MFs note, however, that their insistence on recognising the historical contexts and specificity of the *Qur'aanic* teachings does not mean that the moral purpose of the Text is limited to seventh century Arabia. Rather, they oppose the perspective that the only accurate interpretation of the Sacred Book is that of the first centuries of Islam because of their proximity to the Prophet's community.[375] To MFs, the Holy Book provides what are specific and universal principles. And where it does not, an interpretative critical method that infuses both the theme and historicity of *Qur'aanic* provisions elucidates this distinction.[376]

[367] ibid 23.

[368] Wadud (n 67) 3–4.

[369] Barlas (n 102) 58.

[370] ibid 52–53.

[371] ibid 50.

[372] ibid.

[373] ibid 52.

[374] Wadud (n 67) 5–6.

[375] Barlas (n 102) 59.

[376] ibid 60.

This continued individual critical thinking[377] is what MFs choose instead of unquestioning reliance on scholars' consensus.[378] Continued independent reasoning, MFs estimate, guarantees liberatory readings compared to those generated by the male scholars of between 7th and 10th centuries[379] and adopted by the present Muslim states.[380] It also separates the Text (normative) from its exegesis (historical Islam).[381] To MFs, the past interpretations were imbued by the socio-economic and political environments of their time.[382] They are thus detached from contemporary realities. Yet the *Qur'aan* is a living Text.[383]

2.2.1.3. **Reading the *Qur'aan* by Ratifying the Totality of Its Message**

MFs' third method of reading the *Qur'aan* is delivering congruence between God and His Speech.[384] To MFs, these two principles are inseparable in the doctrine of *tawhiid*[385]; and Muslims can only discover God by reading God's own Self-Disclosure in the *Qur'aan*.[386]

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[377] See note 162.

[378] al-Hibri, 'Law and Custom' (n 56) 34; Wadud (n 102) 101–02. Muslims embrace Muslims scholars' coded collective opinion, whether written or not, as the third source of Islamic law. Generally, it is the consensus of a majority Muslims scholars in any given epoch after the Prophetic time over a religious issue. It developed naturally to guard against the fallibility of individual reasoning. Khan (n 5) 7–8; Esposito and DeLong-Bas (n 17) 7–10; Hussain (n 5) 28–29.

[379] That is between 100 and 400 AH (ie 2nd to 4th centuries AH). The development of Islamic jurisprudence heightened during these four centuries because of the presence of the founders of the four main surviving *Sunni* juristic schools. Khan (n 5) 3.

[380] Barlas (n 102) 61–62. A majority of Muslims have largely followed and continue to follow these classical individual or collective thoughts. This following is either by design or by default. Between the 10th and 19th centuries (ie 4th to 13th AH), for example, individual reasoning stopped because the followers of these schools believed that *Qur'aan* and the Prophetic *Sunnah* had, by then, been elaborated exhaustively. It re-opened towards the end of the 19th century when Muslim States began interacting heavily with foreign cultures. Khan (n 5) 3; Esposito and DeLong-Bas (n 17) 10. An-Na'im, however, notes that present Muslim scholars rely heavily on the broader principles and methodology established by these earlier juristic schools to address contemporary issues. An-Na'im, *IFL* (n 124) 7.

[381] Ibid.

[382] Mir-Hosseini, 'Strategies' (n 90) 10. An-Naim and Khan concur separately with this MFs' view. See An-Na'im, *IFL* (n 124) 7; Khan (n 5) 2–3.

[383] Wadud (n 67) 5.

[384] Indeed *Qur'aan* 39:23 alludes that the Message of the *Qur'aan* is consistent (despite its revelation in bits over 23 years). The *Qur'aan* was descended this way according to the prevailing circumstances. Hafiz Ibn Kathir, *Tafsir Ibn Kathir (Abridged)* (10/10, 2nd edn, Dar-us-Salam Publications 2003) 542.

[385] Arabic word for Oneness or Unity of God.

[386] Muslims, generally, believe that God discloses Himself in the *Qur'aan* in over 99 attributes.

Barras, for example, attempts to discuss three such disclosures to demonstrate the equality of men and women. These are God's attributes of Divine Unity, Justness and Incomparability.

Since the concept of Divine Unity symbolizes God's Indivisibility and the Indivisibility of His Sovereignty, Barlas faults the thesis of male dominance over women and children.[387] Arguing so, Barlas surmises, is a form of *shirk*[388] as it extends God's Sovereignty to humans.[389] Moreover, patriarchy places habitually one person over another; yet under the concept of Oneness of God this vertical arrangement is impossible.[390] The only acceptable hierarchy between humans (including the two sexes) is based on piety as provided by *Qur'aan* 49:13.[391] Moreover MFs opine that since God is present when two, three or more people are together;[392] and His presence must remain 'as the highest focal point',[393] then the only available relationship between men and women is that of 'horizontal reciprocity'[394] (*mu'awadhah*).

Theirs is a relationship of cooperation, not competition or hierarchy,[395] whether in a marriage[396] or not.[397] Their different '"*fitrah* [primordial nature]"'[398] makes no males

[387] Barlas (n 102) 12–13.

[388] Arabic word which literally means associating partners with God. Herein, it means associating God's attributes with His creations. See also ibid 13–14; Wadud (n 102) 109. *Shirk* is the greatest sin and the only unforgivable one according to *Qur'aan* 4:48. See also *Qur'aan* 31:13; Barlas (n 102) 96.

[389] Barlas (n 102) 96.

[390] Wadud (n 67) 109.

[391] *Qur'aan* 49:13 proclaims that: 'O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other. Verily the most honoured of you in the sight of Allah is the most righteous of you. And Allah has full knowledge and is well-acquainted.' Ali (n 7) 1341–42.

[392] See *Qur'aan* 58:7.

[393] Wadud (n 102) 109.

[394] ibid 108.

[395] ibid 106–07.

[396] Indeed *Qur'aan* 2:187 and 30:21 describe the mutuality of spouses. *Qur'aan* 2:187 instructs that: Permitted to you on the night of fasts, is the approach to your wives. *They are your garments and ye are their garments* (…).Ali (n 7) 74–75. Emphasis added. *Qur'aan* 30:21, on the other hand, postulates that: 'And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in *tranquility* with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect.' ibid 1012–13. Emphasis added.

[397] *Qur'aan* 9:71, for example, appoints both men and women as each other's guides and protectors.

[398] Wadud (n 67) 35 citing Sayyid Qutb, Fi Zilal al-Qur'an (In the Shade of the Qur'an) (Dar al-Shuruq I/VI, 1980) 643.

superior to females.[399] Nor does God's choice to send males as Prophets connote any male privilege or associate 'moral voice with gender'[400]. Both men and women can broadcast religious messages as enunciated by *Qur'aan* 9:71.[401] The duty of transmitting God's message – which imbues automatically the exegesis of the Text – is thus a shared moral discourse between the sexes.[402]

Barlas notes that the other two virtues of Divine Justice and Incomparability also refute males' dominance over females. As relates to the latter attribute, Barlas observes that God's Incomparability is vivid in His constant rejection of 'His sexualization/engenderment – as Father (male)',[403] whether literally or symbolically.[404] If this is so, MFs wonder why some human fathers equate their reign in their 'homes'[405] to 'divine patriarchy'.[406] MFs also dismiss males' assumption of special affinity and more closeness to God.[407]

With regard to the former principle, Barlas opines that since God innumerably describes Himself as never doing *dhulm*[408] in the *Qur'aan*,[409] then His Speech detailing relations

[399] Both Wadud and al-Hibri faults the incessant comparisons made between the sexes eg men are better at item X and women at another as if the dual items are unrelated in the totality of society's functionality. To Wadud and al-Hibri, such contrasts manifest *istikbar* (thinking of oneself as better than another) which in Islam is an abhorred act as demonstrated in *Qur'aan* 7:11 – 13; 38: 72 – 76 among other passages. See al-Hibri, 'Law and Custom' (n 56) 26; Wadud (n 102) 102. Indeed *Qur'aan* 7:11 – 13 narrate that Satan's fall resulted from his refusal to obey God's command to perform the symbolic bow to Adam (the first human soul). Satan believed that he was better than Adam as he was created from fire and Adam was made of clay.

[400] Carol Gilligan, 'Remapping the Moral Domain: New Images of Self in Relationship' in Carol Gilligan and others (eds), *Mapping the Moral Domain: A Contribution of Women's Thinking to Psychological Theory and Education* (Harvard University Press 1988).

[401] Barlas (n 102) 154.*Qur'aan* 9:71 notes explicitly that: 'Believers, men and women, are protectors one of another: they enjoin what is just, and forbid what is evil: they observe regular prayers, practice regular charity, and obey Allah and His Messenger. On them will Allah pour His Mercy: for Allah is exalted in power, Wise.' Ali (n 7) 459. See also *Qur'aan* 66: 11 – 12 where two women are mentioned as prototypes of both believing men and women.

[402] Barlas (n 102) 148; al-Hibri, 'Patriarchal Feminism' (n 116) 143.

[403] Barlas (n 102) 15.

[404] ibid 98. See *Qur'aan* 5:18; 4:171; 6:100; 9:30; and the entire four verses of *Qur'aan* 112. Barlas notes that these passages describe God's nature as Indivisible Unity which has no partners (ie fellow deities), consorts, children or imitation as the pagan Arabs or other religious traditions attested/ attest to. ibid 94–99.

[405] The home can be real (ie composed of a related family) or symbolic (composed of un-related members), hence the quotation marks.

[406] Barlas (n 102) 98.

[407] ibid 15.

[408] A derivative of the Arabic word '*dhulamah*' which means injustice or wrong. Contextually this word means abrogating another's right(s).

between the sexes cannot bear misogynist overtones.[410] To hold a contrary view is to attribute *dhulm* against women to God – which is unthinkable and far from the totality of *Qur'aanic* teachings.[411] According to MFs, while the perceptions of what constitutes *dhulm* (and human rights) vary from one theorist to another, a theory that posits the inherent inferiority of women and of women's subordination to men defeats the dual principles of agency and dignity which the *Qur'aan* describes as intrinsic to all humans.[412] The *Qur'aan* defines humankind (without limiting it to males) as God's trustee on earth.[413] Thus both males and females are responsible to ensuring that they live and interact between themselves and with other creations in accordance to God's Word. As MFs surmise, the sexes stand, literally, on this aspect on an absolute equal scale.[414]

2.2.1.4. **Un-reading Gender in the *Qur'aanic* Language**

MFs' final tool to discovering equality of the sexes within Islamic thought is un-reading gender in the 'gender-specific'[415] Arabic language which conveys the *Qur'aan*. They appreciate that each Arabic word is either masculine or feminine and that whereas there is an exclusive plural (meaning three or more things) for female items, there is no such specificity for males.[416] Thus the plural Arabic masculine imports two possibilities: first, three or more male-only entities; and second, three or more entities one of which is female.[417] Hence, a prescription that bears masculine plurality infers women as well unless the *ayah* refers explicitly to males. With this consciousness, MFs discern the *Qur'aan*'s specific mention of males and females in certain precepts and of a more generic reference in others.[418]

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[409] See eg *Qur'aan* 4:40; 10:44; 18:49.

[410] Barlas (n 102) 14.

[411] ibid.

[412] ibid.

[413] See eg *Qur'aan* 2:30, 177; 6:165.

[414] See *Qur'aan* 3:195; 6:164; 9:67 – 68, 71 – 72; 16:97; 20:15; 33:35; 40:40; 48: 5 – 6; 74:38 among other verses.

[415] Wadud (n 67) 6. This is a known Arabic grammatical tenet.

[416] ibid 4–5.

[417] ibid 3–4.

[418] ibid 4.

In addition, MFs argue, since the Holy Book bears universal guidance to all humankind, then not all precepts mentioning males or females relate exclusively to the specified sex.[419] Indeed as MFs argue, while *Qur'aan* 22:27 mentions, it summons both sexes for the once-in-a-lifetime pilgrimage to *Makkah*.

There are also instances when a male or female analogy communicates to both sexes. A clear example is *Qur'aan* 66:11 – 12 which classify the wife of Pharaoh (Asiyah) and Mary (mother of Jesus) as models of 'those who believe'[420] (plural masculine).[421] To MFs, if these dual devout female illustrations were only intended for women, then the *Qur'aan* would have appropriated, unmistakably, a plural feminine word.[422] But the Sacred Book employ of women to distinguish good from evil (for all) reveal that some passages containing female or male figures or forms can be read broadly to benefit both sexes. Failing to do so, MFs warn, results in misogynist and discriminating perspectives. And one example of such biased construction is the limitation of the verses on Bilqis – the Queen of Sheba[423] – to female-led examples only instead of a general analogy on leadership.[424]

When Muslims (and non-Muslims alike) read the *Qur'aan* in these four ways, MFs opine, a theory of equality of men and women enveloped in both their identities and differences emerges. This Islamic paradigm disassociates itself from the confusion between sex and gender, on one hand, and sex and women, on the other, common in modern patriarchal and Western philosophies of sexual differentiation.[425]

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[419] ibid 7.

[420] Ali (n 7) 1494.

[421] Wadud (n 67) 40.

[422] ibid.

[423] Bilqis is touted to have been the ruler of Yemen and possibly Abyssinia (present Ethiopia) as well. Ali (n 7) 943. Her story is narrated by *Qur'aan* 27:23 – 44. According to these pronouncements, Bilqis' wealthy community worshiped the sun before she joined Prophet Solomon (also referred to as King Solomon) in believing in the One True God.

[424] Wadud notes that every leader, male or female, can emulate Bilqis' wisdom and decisiveness. She notes that Bilqis choice to send a gift to Prophet Solomon instead of engaging in war with him, though against the norm, exhibited her leadership priorities (welfare of her people) and her understanding of 'peaceful politics'. Similarly, her independent decision to embrace monotheism when her community was still practising idolatry signified a leader's decisiveness when confronted with the truth. Wadud (n 67) 13, 40–42.

[425] Barlas (n 102) 129.

As regards the first dichotomy, Islamic epistemology distinguishes men and women on the ground of their 'pure'[426] or 'immutable, and complete'[427] differences.[428] It does not differentiate the sexes on the basis of the other where the man is the referent. Thus to MFs, when a man is 'A', a woman is 'B' not '-A'[429]. The distinction between the sexes exists because one term is defined by all the other terms, not one.[430] Women are, therefore, not lesser to men nor are the two sexes incompatible, incommensurable or unequal.[431] They are absolute equals as the *Qur'aan* enunciates innumerably in the passages relating to the creation of men and women from a single Self (Adam);[432] the appointment of humans as God's trustee in this world;[433] and the equality before God of the moral praxis of both sexes.[434] The only distinguishing element between them – including other related variables (women and women; and men and men) – is piety what Barlas describes as 'ethical-moral'[435].

Piety is an element which is neither sexualised nor engendered. It is stripped of sexual, racial, class or national affinities. Thus according to MFs' thought, a black poor Kenyan Muslim woman, for example, can be on the same or more footing than a ruddy rich Qatar man. The Prophet (PBUH) foretold Bilal bin Raja'a, a black freed male slave from Abyssinia (present Ethiopia), of his admission to Paradise because of Bilal's unwavering monotheist belief. Meanwhile, *Qur'aan* 111:1 – 3 descended to curse and promise the Fire to Abu Jahl, a

[426] Elizabeth A Grosz, *Jacques Lacan: A Feminist Introduction* (Routledge 1990) 124.

[427] Barbara Freyer Stowasser, *Women in the Qur'an, Traditions, and Interpretation* (Oxford University Press 1994) 37.

[428] Barlas (n 102) 131 and 129.

[429] ibid 131.

[430] Grosz (n 426) 124.

[431] Barlas (n 102) 129–30.

[432] See *Qur'aan* 4:1; 6:98; 7:189; 9:71; 16:72; 30:21; 49:13; 53:45; 75:39; 50:7; and 51:49. See also Muhammad Sharif Chaudhry, *Women's Rights in Islam* (Adam Publishers & Distributors 1991) 158. A discussion on these precepts follows below.

[433] See note 413.

[434] See *Qur'aan* 2:178; 3:195; 6:164; 9:67 – 8, 71 – 72; 16:97; 20:15; 33:35; 40:40; 48: 5 – 6; 74:38 among other verses. See also Sharif Chaudhry (n 432) 159. Note 449 states some of these precepts.

[435] Barlas (n 102) 130. During his only pilgrimage, the Prophet delivered a sermon (dubbed the Last or Farewell Sermon) which read in part that 'All of you belong to one ancestry of Adam and Adam was created out of clay. There is no superiority for an Arab over a non-Arab and a non-Arab over an Arab; nor for white over the black nor for the black over white *except in piety*. Verily *the noblest among you* is he who is *the most pious.* Sarwat Saulat, *The Life of the Prophet* (Reprint, The Islamic Foundation 1978) 88.Emphasis added.

free Arab man and the Prophet's paternal uncle, because of Abu Jahl's disbelief in Oneness of God and his unwavering enmity to the Prophet.

Similarly, MFs argue relating to the second set of factors of sex and women, that Islam does not place the whole burden of the onus and stigma of sex on women alone.[436] It describes both sexes as capable of being sexually impure or pure[437] and attaches to them an equal responsibility of maintaining chastity.[438] In fact in *Qur'aan* 7:20 – 22, God narrates that both the first humans, Adam and Eve, wronged Him when they followed Satan's whispers.[439] The two joined Arabic syllables of 'م' (*mim*) and 'ا' (*alif*) ie'ما' (*maa*) at the end of a verb, a noun and a pronoun in these precepts indicate duality. In fact in *Qur'aan* 7:23, the plea for forgiveness is in plural form which means both Adam and Eve sought God's Mercy after the Fall.

The following paragraphs elaborate on these dual angles of MFs' thought.

2.2.2. **Sex and Gender**

MFs read absolute equality (sameness) of the sexes in the pronouncements relating to the nature of human creation and its agency on earth.[440] To MFs, human agency (ie being a God's trustee) bears dual roles: fulfilling the rights of God (ie worship or '*ibaadah*); and the rights of God's other creations (including other humans) ie *mu'aammalat*.[441] Indeed, as per MFs' argument, *Qur'aan* 2:177 confirms the connectedness or inseparability of these two aspects of moral personality.[442]

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[436] Barlas (n 102) 129. Millett observes that Christianity, and later Western patriarchal thought, associates women, sex and sin. Femaleness is blamed for the exit of the first humans, Adam and Eve, from Paradise. Again, a disobedient wife or a non-nurturing mother is connected with sex which itself is seen as dirty, depraved and draining. These negative attributes of coitus explain the Christian value of sexual renunciation among Catholics priests and nuns. Kate Millett, *Sexual Politics* (University of Illinois Press 1970) 51 and 54.

[437] Barlas (n 102) 154. See eg *Qur'aan* 24:3, 26, 32; and 30:21.

[438] See *Qur'aan* 4:24 – 25; 5:6; 24:30 - 33, 58; 30:21 among other prescriptions.

[439] See also *Qur'aan* 7:27.

[440] Wadud notes that the *Qur'aan* depicts the inherent equality of the sexes by looking at three stages of human existence (creation, potential for change and recompense). Wadud (n 67) 36.

[441] Kamali calls '*ibaadah* and *mu'aammalat* devotional matters and civil transactions respectively. See Kamali, *Shari'ah* (n 98) 2–3. Literally, the Arabic word '*mu'aammalat*' means dealings, intercourse, transactions, behaviour or conduct.

[442] Appendix 1 reproduces *Qur'aan* 2:177.

Thus, both Muslim males and females must observe their '*ibaadah* ('moral-religious'[443]) and *mu'aammalat* ('social-communal'[444]) duties accordingly. One is never a true believer if she or he commits to the moral-religious roles and neglects the social-communal or vice-versa.[445] While this is so, however, the believers execute these obligations proportional to their physical (health and economic) means.[446]

2.2.2.1. Equality in Creation and the Moral-religious

Since the *Qur'aan* mentions innumerably that both sexes originated from a Single Self (the first human soul) to form a pair that was/is meant to coexist mutually,[447] MFs find them ontologically equal because mutuality does not presuppose hierarchy or inequality.[448] To MFs, both men and women bear full (not half or lighter) individual responsibility for their choices and actions (whether good or evil). That is why the Holy Book demands of both of them same standards of behaviour and adjudges them uniformly.[449]

Even when the Sacred Text classifies men and women as (biologically) opposites,[450] it does not associate righteousness with the former and baseness with the latter.[451] Instead, the

[443] Barlas (n 102) 141. Barlas terms *'ibaadah* 'moral-religious' and *mu'aammalat* 'social-communal' – which descriptions the researcher adopts because they are on-point.

[444] ibid.

[445] ibid.

[446] See *Qur'aan* 2:233 and 286 which affirm this position.

[447] See *Qur'aan* 4:1; 6:98; 7:189; 9:71; 16:72; 30:21; 49:13; 53:45; 75:39; 50:7; and 51:49 which pronounce the intended mutual union of males and females. See also *Qur'aan* 4:3 which enjoins men to marry orphans as second, third or fourth wives if they fear they would be unable to manage justly the orphans' estate. As *Qur'aan* 30:21 exhibits, *Qur'aan* 4:3 endorses that marriage imbues love and kindness (mercy) and erases hostility or injustice (between the sexes).

[448] Barlas (n 102) 134; Wadud (n 102) 106–07.

[449] See eg *Qur'aan* 3:195 (men and women will be repaid equally for the deeds); 9:67 (hypocrites are both males and females); 9:68 (male and female hypocrites and disbelievers are warned of God's curse and Hell Fire in the Hereafter); 9:71 (male and female believers are protectors of each other); 9:72 (male and female believers are promised the Garden in the afterlife); 16:97 (a believing man or woman who is virtuous is promised of good and pure life and a reward equal to the best of his or her deeds); 48:5 (believing men and women are promised the Garden and foretold that this is the greatest felicity); 48:6 (male and female hypocrites as well as male and female polytheists are foretold of God's curse, wrath and the Fire). While some of these verses mention expressly both sexes, others appropriate the neutral phrases *nafs* (herein meaning soul); *ibn* Adam (child/ children of Adam) to signify an individual person (which comports with both men and women). See eg *Qur'aan* 74:38: 'every soul will be held in pledge of its deeds.' Ali (n 7) 1562.

[450] See *Qur'aan* 92:3.

[451] See *Qur'aan* 92: 15 – 17. Indeed, immediately after the *Qur'aan* identifies the sexes as binary opposites just as day and night, it mentions evil and good and postulates that either males or females can fill the categories

Qur'aan recognises both of them as each other's guides and protectors[452] and entrusts them with the foremost Islamic public duty, viz: enjoining uprightness and discouraging corruption.[453] MFs thus dispute any construction that reckons the distinction between males and females as inherent.[454] While men and women may be different (biologically), MFs posit, the *Qur'aan* does not view this 'unlikeness'[455] as inequality, degenerative or symbolic of sexual disunity between the two.[456] Instead, it conceives it as a base to forging human relations[457] and to serving God and God's creations.[458] It is a pedestal upon which humans fulfill their dual agency roles in this world.

To MFs, even then, differences are not pathological. Unevenness is normal and it epitomizes God's Will as declared in *Qur'aan* 5:48 and 30:22.[459] These dual precepts normalise the existence of disparities in society and establish the inappropriateness of erasing or obliterating such dissimilarities.[460]

The recognition of distinctions in Islamic thought is, therefore, not to create hierarchies between races, nationalities (tribes), classes or sexes.[461] It is to test the faithful.[462] In *Qur'aan* 5:48, for example, God declares that if He had wanted, He would have made humankind of all ages 'a single people'[463] ie under one Prophet and identical Law. Instead, He brought

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of good and evil. The *Qur'aan* then concludes this chapter by narrating the attributes of the good and the evil and their attending recompense. Thus *Qur'aan* 92:3 can be read together with *Qur'aan* 92: 4-11; and 92:14-21.

[452] See *Qur'aan* 9:71.

[453] See *Qur'aan* 3:110.

[454] See Wadud (n 67) 35. Barlas contests attaching value to such differences such that one sex is seen as unequal, deficient, weak or inferior in a particular matter. Barlas (n 102) 144.

[455] The researcher parethesises this word because the *Qur'aan* describes Eve (the companion of Adam) as a 'like nature' of Adam. Ali (n 7) 183, 399 and 655 translating Qur'an 4:1; 7:189 and 16:71 respectively.

[456] Barlas (n 102) 145.

[457] See *Qur'aan* 49:11 which proscribes sarcasm between men and men; and between women and women.

[458] See generally *Qur'aan* 2:187; 30:21 and 49:13.

[459] Barlas (n 102) 146.*Qur'aan* 30:22 read together with *Qur'aan* 30:28, for example, reveals that the contrasts in languages and colours among humans are but Signs of God's Might and Wisdom. See also *Qur'aan* 30:23 – 24 which term other hybrid contrasts as God's Signs.

[460] ibid.

[461] ibid.

[462] See *Qur'aan* 5:48 read together with *Qur'aan* 5:44 – 47. *Qur'aan* 32:18-20 narrate the recompense of both those who fail and succeed in this test.

[463] Ali (n 7) 264.

different shepherds with varied levels of His Law and the sole purpose for this was to test each generation for the Message it had received.[464] God, thus, encourages them to strive in upholding righteousness instead of disputing over who holds true guidance.

As MFs contend, both *Qur'aan* 5:48 and 30:22 confirm *Qur'aan* 49:13, viz: that the only acceptable distinction between humans (and sexes) in 'God's perspective'[465] is piety. All remaining incongruities between humans are, therefore, inessential.[466] These contrasts are extraneous to being a human agency on earth. And women are thus no less human than men just because they are of different sex.[467]

The birth of Mary (Jesus' mother) and her service to God prove this point. According to *Qur'aan* 3:35 – 38, when Jesus' grandmother was carrying Mary's pregnancy, she expected a son and therefore dedicated the foetus to God's service. Upon delivery, however, Mary's mother remarked 'O my Lord! Behold! I am delivered of a female child (…) *and no wise is the male like the female* ….'[468] But God indicated that He knew that the child was female and not male. He accepted the dedication and blessed Mary to grow up beautiful and in devotion. Mary was special and fed from the Garden (of Eden) until Prophet Zakariyyah (ie Zachariah), her uncle and foster parent, sought an heir (in God's service) like her. Ultimately, *Qur'aan* 66:11 – 12 declares Mary a model of both male and female believers. Literally, this same female child became of the same (actually higher) category as any righteous man.

2.2.2.2. Equality in the Social-Communal

Since the *Qur'aan* holds both men and women equally accountable on the moral-religious praxis, MFs faults Muslims for reading inequality in the social realm of the sexes simply because the *Qur'aan* treats men and women differently in matters of divorce, marriage, inheritance, evidence among others.[469] To MFs, such a conviction is an outright

[464] Barlas notes that 'the sole function of difference in the Qur'aan is to differentiate between belief and unbelief.' Barlas (n 102) 146. See also Mernissi (n 120) 119.

[465] Wadud (n 67) 37.

[466] ibid.

[467] ibid 35.

[468] Ali (n 7) 136–37.

[469] MFs make this charge against patriarchal male jurists as well as Muslim secularists (male and females). Shaheen, a lawyer and a Muslim secularist of Pakistani origin for example, while acknowledging that Islam improved the status of women nonetheless observes that this religion failed to uphold the political and socio-

misreading of the Sacred Book, albeit unintentional,[470] because it confuses differences with prejudice.[471] Yet gender differentiation is not synonymous to gender devaluation.[472]

As MFs argue, when the *Qur'aan* treats men differently from women,[473] it is not because it is viewing the social sphere as different from the moral.[474] Rather, it restored women's rights in patriarchal seventh century Arabia and later communities (including contemporary ones) as well as operationalised the sexes' dual responsibilities as moral agents. Thus the Sacred Text established and protected women's rights within male-dominated societies.[475] It also introduced subtle reforms in an androcentric society[476] or leveraged an advantage (right) enjoyed by females only and which men are responsible for.[477] The *Qur'aan* also describes[478]

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economic equality of the sexes because under *Qur'aan* 2:228 '"Men are a degree above women".' See Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* (Kluwer Law International 2000) 44. *Qur'aan* 2:228 postulates that:

> Divorced women shall wait concerning themselves for three monthly periods nor is it lawful for them to hide what Allah hath created in their wombs, if they have faith in Allah and the Last Day and their husbands have the better right to take them back in that period, if they wish for reconciliation. *And women shall have rights similar to the rights against them, according to what is equitable: but men have a degree (of advantage over them)*. And Allah is Exalted in Power, Wise.

Ali (n 7) 92. Emphasis added.

[470] Barlas (n 102) 50 and 148. Mir-Hosseini states that the classical jurists had no intention 'to undermine women' or 'to ignore the voice of revelation (*wahy*)' when they published their patriarchal exegesis. The legal and gender assumptions of their time as well as their perceptions influenced their comprehension of *Sharii'ah*. Mir-Hosseini, 'Strategies' (n 90) 10.

[471] Barlas (n 102) 199.

[472] Linda Nicholson, *Gender and History* (1st edn, Columbia University Press 1986) 92.

[473] Shaheen singles out *Qur'aan* 4:34 (indicating that men are protectors of women); 2:282 (equating a male's testimony to two females') as further licenses for male dominance. Sardar Ali (n 469) 44.

[474] Barlas (n 102) 149.

[475] Shaheen identifies these protective rights as those relating to inheritance (women's inexistent property rights were recognised); women's maintenance at husband's expense; women's right to initiate divorce (*khula*) which right was unavailable in pre-Islamic Arabia; the waiting period during divorce ('*iddah*) to regulate men's unilateral right of divorce; among others. Sardar Ali (n 469) 56–63.

[476] Wadud (n 67) 78; Esposito and DeLong-Bas (n 17) 14 and 46. Islam's permission for males to marry up to a maximum of four wives limited the pre-Islamic polygynous practice of up to 100 wives. Azizah al-Hibri, 'A Study of Islamic Herstory: Or How Did We Ever Get into this Mess?' (1982) 5 Women's Studies International Forum 207, 209; Nazīrah Zein Ed-Dīn, 'Removing the Veil and Veiling: Lectures and Reflections towards Women's Liberation and Social Reform in the Islamic World' (1982) 5 Women's Studies International Forum 221, 222. While polygyny is allowed, Islam advocates monogamy. Barlas (n 102) 192 and 198; Wadud (n 67) 83; Alamin Mazrui, 'The Equality Bill 2000: An Alternative Islamic Perspective' in *Human Rights as Politics* (Kenya Human Rights Commission 2003) 315. See similarly *Qur'aan* 4:3, 20 – 21 and 129. A detailed discussion on polygamy follows below.

[477] Chapter 3 discusses how some men's double inheritance shares balances their responsibility to maintain the females in the same degree of relationship. A man's more rights in a divorce (as mentioned in *Qur'aan*

the situation in seventh century Arabia which context may accurately be said of contemporary times.

To MFs, therefore, Islam is not 'structurally'[479] paternalistic. Its recognition of the prevalence of patriarchy is dissimilar to enforcing or advocating it.[480] If Islam were patriarchal, MFs argue, it would not have proclaimed against female infanticide,[481] wife inheritance,[482] men who slander chaste females[483] among other sexist practices.[484] Similarly, the *Qur'aan* would not have revered mothers more;[485] adopt a woman's question to proscribe males' regressive ways of terminating marriages (*dhihar*[486]); and name a whole chapter '*an-nisaa'i*'[487] when there is no corresponding *surah* for males. The Holy Text would also fall

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2:228) include men's first option to rescind a repudiatory divorce (*talaq raj'i*) since he bears the duty of family maintenance. Barlas (n 102) 196. Note 1579 explains the concept of a revocable divorce.

[478] Al-Hibri, 'Islam, Law and Custom' (n 378) 30.

[479] ibid 27.

[480] Barlas (n 102) 199.

[481] See *Qur'aan* 81:8 – 9. See also ibid 198; al-Hibri, 'Law and Custom' (n 56) 212. The *Qur'aan* mentions repeatedly that fathers in patriarchal pre-Islamic Arabia were indifferent to the birth of a girl-child. They were so ashamed of the news of the delivery of a baby-girl that their faces would darken and they would hid themselves from their compatriots because of this negative information. In this prevailing discomfiture, these patriarchs either chose to keep or bury their daughters alive. Many picked the latter option. See *Qur'aan* 16:58 – 59. See also *Qur'aan* 43:17. Thus *Qur'aan* 81:8 – 9 reminds Muslims that on the Day of Judgment, these murdered girls shall stand for justice against their fathers.

[482] See *Qur'aan* 4:19. See also al-Hibri, 'Herstory' (n 476) 212; Mernissi (n 120) 122.

[483] *Qur'aan* 24:4 – 5 instructs 80 stripes for men who fail to substantiate their claim of sexual impropriety eg adultery (by bringing four witnesses) against 'chaste women'. Ali (n 7) 24. In addition to this corporal punishment, the *Qur'aan* mandates that such a person should be barred from giving evidence on any other matter throughout his life unless he repents and reforms his conduct.

[484] See al-Hibri, 'Herstory' (n 476) 212–13 where al-Hibri enumerates the Islamic reforms on women's treatment. According to al-Hibri, however, the most ultimate success of Islam against male dominance was commuting the '"paternal bond" of Jahiliyyah' with 'religious bond' such that all Muslims (male or female, black or white, young or old, rich or poor) became equal. This novel concept of living ousted the pagan Arabia tribal allegiances and introduced ties predicated on 'moral and religious principles'. ibid.

[485] While the Holy Book places kindness to both parents next to worshipping God, it reveres mothers more. Barlas (n 102) 198. See also *Qur'aan* 2:83; 4:36; 6:151; 17:23 – 24; 19:14; 29:8; 31:14 – 15; 46:15; and 71:28. *Qur'aan* 4:1 postulates that: 'and reverence the wombs that bore you'. Ali (n 7) 183.

[486] Arabic word for a practice where a man equates his wife to his mother's back and therefore becomes tabooed customarily to have sexual relations with her. Yet he still confines her to a relationship that is neither marriage nor divorce. See *Qur'aan* 58:1 – 4. These pronouncements related to the story of Khawlah bint Tha'labah, the wife of Aws bin Sāmit. When Sāmit compared Tha'labah with his mother's back, Tha'labah knew she was divorced because that analogy signified just that in pagan Arab custom. But because her husband was old and they had young children, Tha'labah feared that Sāmit would be unable to care for her children effectively. She was thus reluctant to leave the marriage and approached the Prophet (PBUH) for counsel. As she narrated her predicament to the Prophet, the four verses were revealed to proclaim the law on *dhihar*.

[487] Arabic word for women.

short of ascribing matching parental rights to divorced parents[488] and identical evidentiary value to spousal attestations on an adultery allegation against another when they lack witnesses.[489]

In the foregoing, MFs opine that concluding that the Holy Book sanctions sexual equality in the moral-religious and unevenness in the social-communal is illogical.[490] In fact, the Holy Text's identical treatment of the sexes in the socio-economic arena is visible in the precepts relating to sexual relations;[491] marital relationship;[492] and inheritance rights.[493] Such an inference is also un-*Qur'aanic* because it defeats the Oneness of God perspective that is enshrined in *Qur'aan* 49:13 which is purely lateral relationships between the sexes, not hierarchical. It is unfathomable that humans can be equal before God and unequal before men when piety is not in consideration.[494]

MFs hence maintain that the existence of hierarchies in Islamic thought is always premised to fulfilling or revealing either of the dual humans' moral obligations (ie worship and relationship with other creations).[495] It is never 'sexual, racial or economic'[496]. Indeed, *Qur'aan* 4:32 suggests this MFs' conclusion.[497]

2.2.3. Sex and Women

MFs further read equality of the sexes (in the social-communal realm) in the pronouncements regulating sex.

2.2.3.1. Equality in Sexual Relations

[488] See *Qur'aan* 2:233.

[489] The complainant must swear four times in God's name that s/he is telling the truth and invoke God's wrath on himself or herself if s/he is lying in the fifth oath. As for the defender, s/he should make four oaths in God's name that the complainant is lying and invoke God's wrath on himself or herself if the complainant is telling the truth. See *Qur'aan* 24:6 – 9.

[490] Barlas (n 102) 148. See also Badawi 22-23.

[491] See *Qur'aan* 2:187 reproduced in note 396.

[492] See *Qur'aan* 30:21 reproduced in note 396.

[493] See *Qur'aan* 4:7 reproduced in the accompanying text to note 817.

[494] Barlas (n 102) 148.

[495] ibid 146.

[496] ibid.

[497] See Appendix 1.

To MFs, Islam – unlike other patriarchal religions[498] and some Western feminists such as MacKinnon[499] – does not vilify sex nor use it to discriminate against women.[500] Sexuality is not in opposition to spirituality. It is not sinful. Instead, it is one of the signs of God's Mercy to humanity as proclaimed by *Qur'aan* 30:21.[501] Conjugal relations are therefore natural and desirable for both sexes if done within the limits prescribed by God (ie are within a lawful marriage and heterosexual).[502] Both males and females hence have the same sexual natures. They both have sexual desires and needs and the right to fulfill them.[503] Yet both can be sexually corrupt.[504] Hence the *Qur'aan* instructs both of them to be chaste (inside and outside marriage).[505] It does not portray the woman as promiscuous or the man as with unusual sexual urge.[506]

To MFs, therefore, the argument that the provisions on polygyny are meant to satiate males' sexual lusts is fallacious, even 'un-Qur'aanic'[507]. Instead, the passages on multiple wives were intended to serve women on three fronts. First, they were promulgated explicitly to secure the property rights of females orphaned during the Battle of *Uhud* when the nascent

[498] See note 436.

[499] See note 82.

[500] Barlas (n 102) 154. MacKinnon blames male-female sexual relations for the gender inequalities prevalent in society. To her, males commit sexual violence against women because such atrocities arouse them just as sex does. See MacKinnon (n 85) 5–6. West also opines that radical feminists perceive women's relation to men as 'invasive and intrusive'. Robin West, 'Jurisprudence and Gender' (1988) 55 University of Chicago Law Review 1, 15.

[501] Barlas (n 102) 154.

[502] ibid 152. See also *Qur'aan* 4:15 – 16; 7: 80 – 83; 11:78 – 81; 15:61 – 72; 24:2; 30:21 among others.

[503] See *Qur'aan* 30:21. *Qur'aan* 2:187 is more explicit. See note 396. The Arabic word '*libaas*' (garment or clothing) in *Qur'aan* 2:187 imports the significance of this necessity of life. Marital sex, just like a garment, protects its participants from attacks of foreign (strange) elements (ie illicit sexual relations). It also offers them comfort (possibly by its legal unfettered and non-judgmental availability) and pleasure. And both sexes have identical rights and obligations towards these ends. *Qur'aan* 16:81 narrates the purposes of clothes.

[504] See *Qur'aan* 24:3 and 26. See also note 105.

[505] Barlas (n 102) 156. See also note 438.

[506] ibid 157.

[507] Wadud (n 67) 84. That is, the Holy Book does not sanction the practice on this premise. Wadud finds men's non-observance of the *Qur'aanic* ideals of self-restraint and chastity in marital relations until married to (second, third or) the fourth wife as selective construction of *Qur'aan* 4:3. ibid. See also Barlas (n 102) 156–57. Indeed *Qur'aan* 4:24 counsels men to marry 'desiring chastity, not lust.' Ali (n 7) 192.

Muslims lost about 70 of its male soldiers.[508] The Sacred Text thus instructed the males who were in charge of these orphans to marry them or their widowed mothers if they (males) feared they would otherwise be unable to manage justly the orphans' estate.[509]

Second, these males could only marry two, three or four women if they could guarantee justice between their said wives. Justice here imbues numerous things including substantive equality in provisions, spending time, managing the orphans' estate, and kind treatment of orphans (incase their mothers are the ones in the polygynous relationship).[510] Otherwise, they could only wed one woman.

Third, both the restrictions to four wives and a single one were a win for women.[511] They afforded justice for women generally and gave widows and female orphans an opportunity to get into a licit relationship even when their population exceeds that of men.[512] The first limitation on polygyny which extends beyond the context of the presence of (*Uhud*) orphans or widows[513], for example, culminated a pre-Islamic practice where men had as many as 100 wives.[514] Men could then (and now) have a maximum of four wives whom they would have to treat honourably.

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[508] This was the second battle that Muslims (living in *Madinah*) fought with the pagan Arabs of *Makkah*. It was fought on 3 AH and marked the heaviest defeat of early Muslim history. *Qur'aan* 3:152 – 155 and 166 explain the circumstances which led to the Muslims' loss.

[509] See *Qur'aan* 4:3. Appendix 1 reproduces it. Wadud notes that *Qur'aan* 4:3 counterbalanced the males' obligation of maintaining the wives with the responsibility of managing the wives' properties. Wadud (n 67) 83. Meanwhile, *Qur'aan* 4:2 narrates the incidences of dealing unfairly with the orphans' estate. *Qur'aan* 4:6, on the other hand, while it permits a poor custodian to use a 'just and reasonable' amount of the estate for his personal use, it proscribes a rich guardian from taking any compensation from the orphans' wealth. Ali (n 7) 185. *Qur'aan* 4:5 and 10 also add to the provisions on management of the estate of both male and female orphans.

But *Qur'aan* 4:3 imports that some female orphans may remain unmarried to their property managers if the latter opts to take one wife only. It was, however, a relevant precept then because it filled the void of property managers. The females' male close relatives had been killed in the Battle and majority of women had less expertise in property management since women in pre-Islamic Arabia were themselves regarded as property.

[510] Wadud (n 67) 83.

[511] Barlas (n 102) 157.

[512] Islam frowns vehemently upon adultery (*zinah*) such that it is equated to the grave sin of murder. See *Qur'aan* 25:68. *Qur'aan* 17:32 admonishes Muslims not to near *zinah* 'for it is a shameful deed and an evil, opening the road (to other evils)'. Ali (n 7) 682–83. The penalty for unlawful sex is equally harsh (100 stripes for unmarried persons and stoning to death for married ones). See *Qur'aan* 24:2. See also generally Jadeed (n 88).

[513] This construction is imminent when one reads *Qur'aan* 4:3 together with *Qur'aan* 4:129. A discussion on the thematic reading of these verses follows shortly.

[514] al-Hibri, 'Herstory' (n 476) 209; Ed-Dīn (n 476) 222.

Moreover, husbands are no longer able to treat their multiple wives as expendable chattels (ie abandon and only visit them when in need of sex or other physical needs). Indeed *Qur'aan* 4:129 confirms this.[515] While this pronouncement declares that it is impossible for men to 'be fair and just as between women'[516], it nonetheless mandates polygynous men to be available to all their wives.[517] Accordingly, MFs fault Muslim men who contract serial one-night marriages (*mut'ah*) solely to gratify their sexual lusts.[518]

2.2.3.2. Equality in Sexual Protection

In addition to bearing equal sexual natures, MFs postulate, both sexes bear mutual obligations to nurture their sexual purity through eliminating scopic activity (ie the *gaze*) and covering their bodies (ieobserving the *hijaab*). The requirement for modesty is thus not for females only. It is for both sexes, in private[519] and in public.[520] To MFs, these equivalent prescriptions underscore that the human body (not the female body only) is itself a sexed body and potentially erotic.[521] Thus the Holy Text modulates human sexual desire by mandating both sexes to conduct themselves modestly instead of declaring copulation unclean.[522]

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[515] *Qur'aan* 4:129 posits that: 'ye are never able to be fair and just as between women even if it is your ardent desire: but turn not away (from a woman) altogether, so as to leave her (as it were) hanging (in the air). If ye mend your ways and practice self-restraint, Allah is Oft-forgiving, Most Merciful.' Ali (n 7) 227.

[516] ibid.

[517] The proviso in this passage sanctions the very polygynous practice that the *Qur'aan* enacts to be impossible to observe. Thus while Islam permits polygyny, monogamy remains 'the preferred marital arrangement of the Qur'an.' Wadud (n 67) 83. See also *Qur'aan* 4:20 – 21 which suggest a similar conclusion. The provision for polygyny is an exception, not the rule. And it was promulgated to serve unique socio-economic interests of the Muslim community, particularly women, instead of banning it completely. MFs are, however, divided as to the validity of this type of marriage. Wadud and al-Hibri feels the standards stated in *Qur'aan* 4:3 and the recognition in the first part of 4:129 as well as the *Qur'aanic* ideal of mutuality between the sexes which is embodied in *Qur'aan* 2:187 and 30:21 renders polygamy a nullity. ibid; al-Hibri, 'Herstory' (n 476) 216. Barlas, however, maintains that while both *Qur'aan* 4:3 and 4:129 fall short of generalising polygyny, this form of marriage operates only in unique circumstances. Barlas (n 102) 192 and 198. All MFs, however, construe men's continued fanning of this practice (as if it were the rule) as another patriarchal idiosyncrasy.

[518] Barlas (n 102) 157. This practice is prominent in the Middle East particularly in Iran.

[519] See *Qur'aan* 24:58.

[520] Barlas (n 102) 159. 'Public' in Islam means presence of strange members of the opposite sex (*ajnabi*). Thus an individual may be in public in the privacy of his/her very own house if strangers are present. See *Qur'aan* 24:31. 'Strangeness' means permissible degree of marriage. Once married, however, a husband and a wife move out of this category of distantness. See *Qur'aan* 24:31.

[521] ibid.

[522] ibid 160.

MFs note that in addition to regulating both sexes, the verses on decency fall short of confining (all) Muslim women in their homes[523] or 'enshrouding them in face and body veils.'[524] This is because, first, the passages on the gaze indicate inherently that the woman is in public.[525] Otherwise, there would be no requirement for her or the man to lower her or his look.[526] Second, *Qur'aan* 24:31 which prescribes the women's apparel (*khumuur*)[527] requires covering of the bosom only.[528] It is traditionalists who have definedthe women's apparel too broadly to include hair and face.[529] According to MFs, the instructive *hijaab* to all Muslim women (past and present) remains covering of the women's chests only. But as indicated in the text accompanying note 121, this is one MFs' misreading of the *Qur'aan* which prompts the researcher to depart from the original theory.[530]

MFs, nonetheless, fault male conservatives for generalising women's full body covering (even exclusive of the face and hands) beyond seventh century Arabia. To MFs, *Qur'aan* 33:59 – 60 which call on Muslim women to shroud themselves when in public was specific to the first Muslim community where slavery still persisted.[531] Since *jaahiliyyah* (non-

[523] Indeed *Qur'aan* 33:33 and 34 encouraged the Prophet's wives to remain in their houses instead of being aimlessly in public. However *Qur'aan* 33:32 was categoric that these women were different from other females because they have given up the pleasures of this World compared to other females (see *Qur'aan* 33:28) and chosen God and His Messenger (see *Qur'aan* 33:29). They were wives of a High office and much was expected of them. Thus *Qur'aan* 33:30 and 31 prescribe double punishment and reward respectively to the Prophet's wives above other females.

[524] Barlas (n 102) 60.

[525] ibid 158.

[526] ibid.

[527] A derivative of the Arabic word *khimaar* which means a veil.

[528] Barlas (n 102) 158.

[529] ibid.

[530] The researcher deconstructs the MFs' conception of the *hijaab* in a forthcoming paper.

[531] *Qur'aan* 33:59 reads that: 'O Prophet! Tell thy wives and daughters and the believing women that they should cast their outer garments over their persons (when abroad): that is most convenient, that they should be known (as such) and not molested. And Allah is Oft-Forgiving, Most Merciful.' Ali (n 7) 1077.

Qur'aan 33:60 adds that: 'Truly, if the Hypocrites and *those in whose hearts is a disease*, and those who spread false rumours in the City desist not, We shall certainly stir thee up against them: then will they not be able to stay in it as thy neighbours for any length of time:' Emphasis added. ibid.

Qur'aan 33:61 narrates the punishment of the three groups of people named in 33:60 while verse 33:62 indicates that these penalties existed in the previous God's law sent to other communities and that they do not change.

believing)[532] men abused women (especially slaves) sexually,[533] MFs explain, the Sacred Text asked Muslim women to wear the *jilbaab*[534] in order to be identified as such and avoid molestation.[535] This loose-fitting clothing was thus a sign to the non-believing men of that time that certain women were non-approachable.[536] In present societies where there are laws protecting women against sexual abuse, MFs contend, the wearing of the veil is unnecessary even though they admit that sex predators still exist.[537]

Even then, MFs argue, the veil was never meant to hide Muslim women from Muslim men, rather to make them visible to the non-believing males. It is no medium to guard women's chastity in a Muslim society or to keep Muslim men at bay because the latter are also expected to observe modesty. To insist (and sometimes violently) that Muslim women veil themselves on the premise that their bodies are 'pudendal'[538], MFs argue, is to miss the object of the *Qur'aan* particularly the 'link between the *jilbāb* and the *Jāhilī* society'.[539] Put differently, it is a plain manifestation of patriarchy.

But as MFs dispute the classical construction of the veil, they similarly disagree that nudity (as touted by some Westerners) correlates freedom.[540] Barlas faults Western disassociation of modest dressing with sexual inaccessibility. To her, the perspective that bodily exposure fails to arouse sexual cravings in others is misguided. And so are the

[532] The Arabic word *jaahiliyyah* means ignorance, benightedness (or darkness) literally. It is used in Islamic collections to signify the pre-Islamic era – when the Arabian community was deficient of the truths (liberation or injunctions) brought by the *Qur'aan*. Present Muslims still contend that anyone who is not adhering to the *Qur'aan* is a *jaahili* (ignorant) or is associated with the people of the *jaahiliyyah* epoch.

[533] Mernissi notes that these men engaged in the practice of '*ta'arrud* – 'literally taking up a position along a woman's path to urge her to fornicate,".' Mernissi (n 120) 180. She posits that the *Qur'aan* acknowledged that female slaves were compelled into prostitution and it proscribed it vide *Qur'aan* 24:33.

[534] Arabic word for a gown or loose garment.

[535] Barlas (n 102) 56.

[536] ibid.

[537] ibid 57.

[538] ibid.

[539] ibid.

[540] ibid 160.

arguments that expect more modesty on the viewers, not the viewed; or those that equate exposed and covered bodies to freedom and imprisonment respectively.[541]

2.2.4. Deconstruction of Mainstream Feminism

Apart from deconstructing Muslim males' conception of sexual equality, MFs also contest Western theories that predicate gender justice on either the sameness (eg liberal feminism) or differences (eg cultural feminism) of the sexes. To MFs, both these mainstream feminist perspectives fan the inferiority of women since they project man as the 'subject' (ie the definitive term) and woman as the unequal 'other'.[542]

The exclusive 'sameness' philosophy or formal equality, MFs note, is a reaction to the binary categorization of men and women in societies and its resultant public and private spheres.[543] Because women were relegated to the private (home, hearth and children)[544] and denied disproportionately access to the public (employment, commerce and politics), liberal feminists, such as Ginsburg[545] and Williams[546], demand identical treatment of the sexes.[547] They argue that women are equally capable of functioning in the public sphere (despite their physical differences from men) provided that structured inequality in law and society is removed.[548] To MFs, however, formal equality did not improve the status of women. As they

[541] ibid. See also Interview with Salim Muhammad, Principal, Muslim Academy (Amu, Kenya, 23 December 2015) [hereinafter Interview 121] where the male scholar equates Muslim women to pearls. 'Because women are very precious, the *Qur'aan* enjoins them to cover themselves when in public.'

[542] ibid 131. Both MacKinnon and Cain, radical Western feminists, hold similar views to MFs. See MacKinnon (n 85) 34; Cain (n 82) 838.

[543] Barlas (n 102) 131. Ginsburg and Flagg, white liberal feminists – for instance – state that both the US Constitution and the courts maintained a 'separate-spheres' mentality or 'breadwinner-homemaker dichotomy' until the 1970s. Ginsburg and Flagg (n 84) 14.

[544] Charlesworth and others (n 176) 626.

[545] Ruth Bader Ginsburg is a Caucasian female lawyer and presently a Justice of the US Supreme Court.

[546] Wendy Webster Williams, a Caucasian law professor, led the pack of contemporary liberals for a while.

[547] Rosemarie Tong, *Feminist Thought: A Comprehensive Introduction* (1st edn, Routledge 1989) 124. Ginsburg prosecuted numerous gender discrimination cases in the US in the 1970s in order to highlight US sex discriminatory laws and bring about both constitutional and legislative changes. See Ginsburg and Flagg (n 84) 14–15. Williams, however, later became suspect of the emerging anti-discrimination law she had long fought for because the equal protection law required persons to be either male or female before it extended 'its protection'. Wendy Williams, 'Notes from a First Generation' (2015) 1989 University of Chicago Legal Forum 99, 105–06.

[548] Tong (n 547) 126.

joined the public, women continued their private roles as before, which combination made them '"super moms" who are eternally exhausted'.[549]

Thus, MFs opine, the disadvantages brought by the exclusive sameness theory made other Western theorists believe that the solution to sexual inequality was appreciating some differences between the sexes as inevitable.[550] This thinking, which was propounded by cultural feminists, demanded that the law must reflect these differences (physical, psychological and social)[551] as well as 'women's innate right to equality to men'.[552] Unless women champion their uniqueness ie 'special interests or legitimate grounds for their social being'[553], cultural feminists assert, men would speak for them as they did before.[554]

Hence the foremost cultural feminist, Gilligan, calls on society to value women's different approach to life issues which is both caring and relation-based.[555]According to Gilligan, women speak with a different voice (ie interpret things differently) from men because of the disparate 'life experiences'[556] of the sexes. Society must, therefore, acknowledge this fact instead of dismissing the female perspective as underdeveloped.[557]

But like radical feminists, MFs find the difference claim by cultural feminists a disguise of patriarchy. It still epitomises men because the self-assigned female traits of 'caring and connection to others'[558] are women's response to male dominance.[559] These features are far

[549] al-Hibri, 'Law and Custom' (n 56) 4.

[550] Barlas (n 102) 132.

[551] This recognition is what gave birth to the special protection clauses in mainstream laws eg affirmative action measures.

[552] Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Cavendish Publishing 1998) 142. MacKinnon dismisses cultural feminists' argument as double standard. To her, this philosophy is the only thought 'in mainstream equality doctrine where you get to identify as a woman and not have that mean giving up all claim to equal treatment.' MacKinnon (n 85) 38.

[553] Thomas Laqueur, *Making Sex: Body and Gender from the Greeks to Freud* (Reprint, Harvard University Press 1992) 197.

[554] ibid.

[555] Cain (n 82) 836.

[556] ibid.

[557] Carol Gilligan, *In a Different Voice* (Harvard University Press 1982) 24–26.

[558] Cain (n 82) 838.

[559] ibid;MacKinnon (n 85) 39.

removed from women's own 'pure'[560] attributes.[561] Thus unlike cultural feminists, MFs surmise the solution to the equality paradox[562] as failing to read inequality in the biology of the sexes and sexes' occasional social hierarchies.[563] Otherwise, such a reading obliterates the specificity of the sexes in attending to the dual roles of human agency on earth.

2.3. Justice is both Multicultural and Intersectional

2.3.1. Multiculturalism and Equality

Despite their primordial, cosmological and eschatological equality[564] with men, Muslim women remain marginalised across the world (whether in majority or minority Muslim populations).[565] They miss out from the potent public discourses of their communities and nation-states. While this obscurity stems from a myriad of factors[566], it is actuated primarily by these women's differences from the mainstream.[567]

A Muslim woman's sex, religious identity and other 'intragroup' dynamics differentiate her from the conventionally accepted criterion in a society. The conflation of her innumerable identities, therefore, complicates her struggles against domination because she contests it in all these opposing fronts. But since Islam possesses innumerable truths,[568] a majority of Muslim women seek refuge in their religion to resolve these variant strands of patriarchy[569] even when Westerners and other non-Muslims dismiss Islam as backward.[570]

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[560] Grosz (n 426) 124.

[561] MacKinnon (n 85) 39;Cain (n 82) 838.

[562] Emon dubs the double-standards construction of difference (ie treating persons unevenly is sometimes legitimate and sometimes illegitimate) the 'paradox of equality'. See Emon (n 178) 237.

[563] Barlas (n 102) 132.

[564] Wadud (n 67) x.

[565] Tamir, a political philosophy professor, finds this a general character of most women. See Yael Tamir, 'Siding with the Underdogs' in Joshua Cohen and others (eds), *Is Multiculturalism Bad for Women? Susan Moller Okin with Respondents* (Princeton University Press 1999) 47.

[566] Wadud (n 67) 2.

[567] See note 155.

[568] See note 350. See also *Qur'aan* 5:3 where God says that He has chosen Islam as a religion (a way of life) for Muslims. See similarly *Qur'aan* 3:19, 85; 24:55; 30:30 and 48:28. *Qur'aan* 2:2; 4:105; 16:64; 16:89; and 31:20 among other precepts describing the Holy Book as guidance to the Believers.

[569] Adamu notes that Islam 'embraces all aspects of Muslim women's lives and shapes their experiences'. Fatima L Adamu, 'A Double-Edged Sword: Challenging Women's Oppression within Muslim Society in Northern Nigeria' (1999) 7 Gender and Development 56, 60. In fact, *Qur'aan* 4:59 enjoins Muslims to seek solutions to their issues from God and His Messenger. See also *Qur'aan* 45:18 instructing to follow *Sharii'ah* and 'not the desires of those who know not.' Ali (n 7) 1297. See further *Qur'aan* 2:147 and 213.

These women search for the genesis of their liberation within Islam[571] even when they consult other traditions.[572]

Thus despite their multiple 'social identities'[573], Muslim women derive their foremost definition of self from their religion.[574] Their striking identity then in the larger nation-statehood is that of 'Muslim'. And in multicultural dialogues, Muslim females together with Muslim males constitute a distinct group worth of recognition in any majority non-Muslim country.[575] Their common distinct religious identity demands for them a share in constructing the 'nature and operation'[576] of the normative structures of their States. This is the spirit of justice.[577] But to require them to assimilate into dominant and/or secular perspectives that are intolerant of their 'important religious values'[578] is both 'patriarchal'[579] and imperialist.[580]

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[570] Ayelet Shachar, 'The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority' (2000) 35 Harvard Civil Rights-Civil Liberties Law Review 385, 402; al-Hibri, 'Law and Custom' (n 56) 3.

[571] Adamu (n 569) 57.

[572] Barlas notes that she employs the *Qur'aan* to explicate sexual equality even if she appropriates the words 'liberatory' and 'antipatriachal' to interpret it. Barlas (n 102) xii.

[573] McColgan (n 152) 195. McColgan describes these identities as the varied 'concepts of self' that every individual bears because of his or her different group membership. ibid.

[574] Many multiculturalists find culture most definitive in describing a person's identity. See eg Kymlicka, *Multicultural Citizenship* (n 37) 22; Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1995) 155; RanjooSeodu Herr, 'A Third World Feminist Defense of Multiculturalism' (2004) 30 Social Theory and Practice 73, 76. But as al-Hibri advises, the Muslim community is defined by 'religious not cultural issues'. al-Hibri, 'Patriarchal Feminism' (n 116) 44. The former is the normative Islam and the latter signify the practices of Muslim societies. Barlas (n 102) 9. Whereas other writers interchangeably appropriate 'religion' with 'culture', MFs caution against this tendency. To MFs, since Islam does not abolish local customs that are consistent with it, many Muslim communities retain controversial traditions that are easily conflated with Islam. al-Hibri, 'Patriarchal Feminism' (n 116) 43.

[575] Kymlicka formulates multicultural groups into two broad categories: national minorities and polyethnic states. The former constitutes historical 'territorially concentrated cultures' which have merged voluntarily or involuntarily into a larger state. The latter are individual and families who migrate into new countries and align themselves into their hitherto ethnic groups through associations. Kymlicka, *Multicultural Citizenship* (n 37) 10–11.

[576] Charlesworth and others (n 176) 615.

[577] Tanaka J notes that '[T]o treat unequal matters differently according to their inequality is not only permitted but required.' *South West* (n 80) 306.

[578] al-Hibri, 'Patriarchal Feminism' (n 116) 44.

[579] ibid.

[580] Abdullahi An-Na'im, 'Promises We Should All Keep in Common Cause' in Joshua Cohen and others (eds), *Is Multiculturalism Bad for Women? Susan Moller Okin with Respondents* (Princeton University Press 1999) 63.

Multiculturalism hence requires that the unique interests of each significant group[581] in a society are reflected in the public societal structures.[582] Special minority legal provisions would, for example, ensure that minority nationals enjoy 'the same treatment in law and *in fact* as other nationals'[583] particularly the majority. These minority legal provisions would allow minorities to continue participating in their distinct characteristic or culture[584] without fearing domination by the majority group.[585] The special provisions would also allow minority groups to participate in the political and socio-economic affairs of the nation-state without anticipating exclusion.[586] In essence as they enjoy their national features, minorities would also preserve their peculiarities.[587]

Thus, for example, while the Kenyan Muslims (both at the Coast and the rest of the nation)[588] can and do join the rest of the citizenry in observing the rest of the country's laws – including the constitution – they have (just like another minority designation in the country) a right to observe their personal laws such as IIL. Such observance does not obviate them from being Kenyans[589] because to be a citizen does not necessitate embracing the country's uniform laws to the detriment of one's other important values which society categorises as

[581] Joseph Raz, 'How Perfect Should One Be? And Whose Culture Is?' in Joshua Cohen and others (eds), *Is Multiculturalism Bad for Women? Susan Moller Okin with Respondents* (Princeton University Press 1999) 98.

[582] S James Anaya, 'The Capacity of International Law to Advance Ethnic or Nationality Rights Claims Essays' (1989) 75 Iowa L Rev 837, 842; Robert McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 The International and Comparative Law Quarterly 857, 859.

[583] Patrick Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38 The International and Comparative Law Quarterly 867, 870. Emphasis added.

[584] Para 4 in the preamble to the 'UNESCO Universal Declaration on Cultural Diversity' (2 November 2001) defines culture to include the religious features of a given society or group. See also 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) 105.

[585] McCorquodale (n 582) 859.

[586] ibid.

[587] *Advisory Opinion at 17, Minority Schools in Albania* PCIJ Series A/B No 64 (International Court of Justice 1935).

[588] Islamic personal law – and *Sharii'ah* generally – was at first officially limited to the Kenyan Coast. While the British colonialists extended the application of the personal law to some hinterlands in the 1940s, this extension only became legal under the 2010 Constitution. Even section 4(2) of the Kadhis' Court Act which continued the distribution of the courts in various parts of the country after independence, misread the repealed constitution. See article 170 (4) of the 2010 Constitution; Chesworth (n 320) 5; Cussac (n 353) 292; Kimeu (n 174) 20; Kuria Mwangi, 'The Application and Development of Sharia in Kenya: 1895 - 1990' in Mohamed Bakari and Saad Yahya (eds), *Islam in Kenya: proceedings of the National Seminar on Contemporary Islam in Kenya* (Mewa Publications 1995) 254; Abdulkadir (n 41) 109; *Jesse* (n 295) 37, 39–41.

[589] Interview 9; FGD with men (Garissa, Kenya, 30 September 2015) [hereinafter FGD 2].

private.[590] It is observing both[591] and finding a balance between the two. This is the dictate of the principle of the right to equality.

In essence, the normative recognitionof minority groups' laws is not in itself an invidious form of discrimination against the majority.[592] Instead it is a manifestation of the application of the principle of equality to a 'diverse citizenry'[593] such as Kenyans. Special minority legal provisions are 'consistent with, and even required by justice'.[594] Justice demands pluralism – more so when subtle differences among a people in a category vary their experiences of certain aspects of life.[595] Hence, rules that are apparently neutral to the interests of the different groups in a society (ie difference-blind rules) are unjust because in reality these laws are not neutral. They essentialise the dominant group.[596] Yet the law must be attendant to the political and socio-economic diversity of its people.[597]

According to multiculturalists, the natural ensuing public discourse then is not whether addressing minorities' marginalisation inherently causes injustices to the dominant groups.[598] But how apparent or presumed neutrality in normative structures inflicts disadvantages on the former and what measures, if any, would remedy these harms effectively and in the least

[590] Interview with Billow Gudo, Preacher (Garissa, Kenya, 2 October 2015) [hereinafter Interview 12]; Joseph Wandera, 'Anglican Responses to Kadhis Courts in Kenya' in Abdulkader Tayob and Joseph Wandera (eds), *Constitutional review in Kenya and Kadhis Courts: Selected papers presented at the workshop, 20 March 2010, St Paul's University, Limuru, Kenya* (Center for Contemporary Islam University of Cape Town 2011) 46.

[591] ibid.

[592] Kymlicka, *Politics in the Vernacular* (n 150) 33; Ekuru Aukot, 'The Constitutionalisation of Ethnicity: The Case for Ethnic Minority Protection in Kenya' in *Report of the Constitution of Kenya Review Commission: Technical Appendices* (Constitution of Kenya Review Commission 2003) vol 5(2), 492; *Christian Education South Africa v Minister of Education* 4 ZACC 11, para 42 (South Africa 2000).

[593] Wandera (n 590) 46.

[594] Kymlicka, *Politics in the Vernacular* (n 153) 33. McColgan notes that when equality is understood broadly, then multiculturalism is pivotal in achieving justice as it reduces unjust indirect discrimination. McColgan (n 152) 193. See also Waris (n 34) 27.

[595] Raz (n 581) 98.

[596] Wadud, for example, observes that when the drafters of the US Constitution wrote the phrase 'All men are created equal', they did not extend it to the 'equality between black men and white men.' Wadud (n 67) 36. Harris shares similar sentiments and dismisses MacKinnon's dominance theory as 'gender essentialist' because it excludes the voices of minority women just as the preamble to the US Constitution did in the phrase 'We the people'. Harris (n 137) 583. MacKinnon's dominance theory links women's suffering to male domination.

[597] Charlesworth and others (n 176) 613; Calmore (n 130) 2137–41.

[598] Kymlicka, *Politics in the Vernacular* (n 153) 35.

costly manner.[599] Respect for diversity rather than integration fosters cohesiveness because the minority groups feel a sense of belonging.[600] It 'strengthens solidarity'[601] and accommodates the multiplicity of identities inherent in a 'healthy democracy'[602]. Thus the responsibility for championing ethnocultural rights is collective (between both supporters and critics of minority rights) for the benefit of everyone in the society.[603]

Because of the 'exceptional importance'[604] of Islamic personal laws – including IIL – to Muslims, for example, the independence government entrenched the Kadhis' courts in the constitution so as to allow Muslims (albeit at the time restricted to the Coast) to observe these laws.[605] Even if that legal recognition responded expressly to the then Muslims' hesitance to join mainland Kenya and the Sultan of Zanzibar's demand to relinquishing its reigns over the Kenyan Coast, it fulfilled the principle of the right to equality.[606] The government, then and later, should argue comfortably that it permitted these laws in the country to prevent Muslims from suffering disadvantages which attend in the mainstream or other groups' personal

[599] ibid 35–36.

[600] Wing and Smith (n 154) 786. 'By ordering people to integrate, you are telling them and everyone else they don't belong, which makes it harder for them to integrate.' Simon Kuper, 'Trouble in Paradise', *Financial Times* (London, 3 December 2004) 24.

[601] Kymlicka, *Multicultural Citizenship* (n 37) 36.

[602] Kymlicka, *Politics in the Vernacular* (n 153) 36. Several authors opine that, naturally, people bear multiple identities. See eg Waris (n 34) 27; Anaya (n 582) 837; Fredman (n 64) 719.

[603] Kymlicka, *Politics in the Vernacular* (n 153) 35; Wing and Smith (n 154) 779.

[604] *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others* [2016] eKLR (ewcaciv) 9.

[605] Kimeu (n 177) 27.

[606] When Kenya was about to gain independence, the Coastal Muslims wondered whether they would continue to observe their personal laws upon independence. Since the ongoing nationalistic movements in the mainland were led by the dominant Christian tribes, the coastal Muslims were doubtful that the 1895 British undertakings which promised the continued observance of *Sharii'ah* in the Kenyan littoral would be honoured. These Muslims thus chose to revert to the region's earlier ruler, the Sultan of Zanzibar. They also championed for self-rule. In response to these coastal agitations, both the British government and the Sultan appointed a Commissioner to advise them on the administration of the littoral as per the 1895 concessions. In 1961, Commissioner James Robertson recommended the merger of the coast with the mainland just before Kenya attains self-rule on condition that the Kadhis' courts would be protected in the independence constitution and would be placed under the auspices of the Chief Justice. Interview with Abud Bashamaa, Deputy Principal, Madrasatul Ayesha; Golicha Ismail, Official, Council for Imaams& Preachers of Kenya – Garissa Branch; and Hashim Abdillah, Treasurer, Supreme Council of Kenya Muslims – Garissa Branch (Garissa, Kenya, 27 September 2015) [hereinafter Interview 2]; Cussac (n 333) 292; Margaret Strobel, *Muslim Women in Mombasa, 1890-1975* (1st edn, Yale University Press 1979) 33–34; James R Brennan, 'Lowering the Sultan's Flag: Sovereignty and Decolonization in Coastal Kenya' (2008) 50 Comparative Studies in Society and History 831, 846; Kimeu (n 177) 21; Colony and Protectorate of Kenya, 'Sessional Paper No 9 of 1961: The Kenya Coastal Strip, Report of the Commissioner' (His Majesty's Stationery Office 1961) 21.

laws.[607] This policy argument remains relevant (contemporarily and in future) for both Muslims and equality lawyers to justify safeguarding the recognition of Islamic personal laws in the country's laws, whether constitutionally or statutorily.[608]

Innumerable commentators, however, fault group rights, arguing that first, these privileges corrode the social cohesion of a nation.[609] Since these entitlements imbue "the 'politicization of ethnicity'"[610], critics construe 'any measures which heighten the salience of ethnicity (…) divisive.'[611] Such measures negate 'common national values'[612] and have the tendency of giving prominence to some culture(s) over others.[613]

The recognition of Islamic personal law, generally, and IIL in particular in the Kenyan legal system (for example) has been construed as privileging Islam and/or fragmenting a necessary unified nation. The opposition to the retention of this law both during the drafting and enactment of the LSA[614] and during the constitution review process (through the establishment of the Kadhis' courts)[615] is a vivid example.[616] When Muslims opposed their

[607] Appendix 3, for instance, highlights the incongruities between IIL and the later LSA.

[608] The entrenchment of Islamic personal laws in the constitution is a separate legal issue from its recognition in the Kenya's legal system.

[609] Interview 130. See also Kymlicka, *Politics in the Vernacular* (n 153) 36.

[610] ibid.

[611] ibid.

[612] Wessendorf and Vertovec (n 145) 14.

[613] This perspective is profound in the judgments against observance of religious days and dresses in public schools in the Kenyan Constitutional Court, the High Court. See eg *Ndanu Mutambuk i& 119 Others v Minister for Education and 12 Others* [2014] eKLR; *Kenya High* (n 276); *Nyakamba Gekara v Attorney General & 2 Others* [2013] eKLR; *Seventh Day Adventist Churches (East Africa) Ltd vs Minister for Education & 3 Ors* [2014] eKLR.

[614] The process of drafting the LSA began in 1967. Then, the newly independent government appointed a Commission to review the existing plural inheritance laws (Islamic, British, African and Hindu customary laws), and to recommend and draft a fresh comprehensive uniform law for all. The Commission published both its report and the draft law in 1968. Parliament accepted these proposals and enacted the LSA in 1972. The law, however, became operative in 1981. Eugene Cotran, *Casebook on Kenya Customary Law* (Nairobi University Press 1987) 227; Eugene Cotran, 'Marriage, Divorce and Succession Laws in Kenya: Is Integration or Unification Possible?' (1996) 40 Journal of African Law 194, 203; Bakari (n 109) 241; Abdulkadir Hashim, 'Re-Inventing the Wheel?: The Law Succession (Amendment) Bill, 2015', *The Friday Bulletin: The Weekly Muslim News Update* (739th edition, Nairobi, 30 June 2017); Abdulkadir Hashim Abdulkadir, 'Unity within Diversity: Unification and Codification of Muslim Law of Personal Status' (African Universities Congress, Khartoum, January 2006) 338–40 <https://profiles.uonbi.ac.ke/hashim/files/unity_within_diversity_0.pdf> accessed 25 July 2017; Waris (n 34) 42.

[615] Kenya engaged in an overhaul of its independence constitution between the years 1998 and 2010. Kivutha Kibwana, 'Constitutional Development in Kenya in 1999' (Kenya's 1999 Annual Report on Constitutional Development, 1999) 5–17; Chesworth (n 300) 7–13; Cussac (n 333) 294–300; Kimeu (n 177) 18,

observance of the LSA in 1981[617] and construed it as a breach of both the constitution[618] and the Kenya Government's pre-independence agreement,[619] the then Attorney General (Joseph Kamera) found the Muslims' claims a clamour for favoritism.[620] Similarly during the constitution review process, a former Archbishop of the Anglican Church of Kenya (the late David Gitari) observed that the proposed constitution could not protect the personal laws of minority groups to the exclusion of 'the mainstream Christian religion'[621] which accounts for about 80% of the populace.[622] Doing so, Gitari espoused, privileged Islam.[623]

Meanwhile, one of the founding reasons of the LSA was touted as unifying Kenyans. The government, then, found a uniform law of succession as 'necessary and (…) part of the nation-building'[624] exercise of the post-colonial territory.[625] According to the government, it was 'imperative'[626] that such a common law applied to Kenyan residents 'without distinction'[627]. The continuance of plural laws among the heterogeneous Kenyan communities seemed to breed inequalities or fragment the emerging one nation-state.

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19 and 24–27; Constitution of Kenya Review Commission, 'The People's Choice: The Report of the Constitution of Kenya Review Commission' (Short Version, 18 September 2002) 1–2 chronicle parts of this process.

[616] Throughout these dual law reform processes, Muslims insisted on the maintenance of their personal laws. Cussac (n 333) 294, 296; Abdulkader Tayob, 'Muslim Responses to Kadhis Courts as Part of Kenya's Constitutional Review' in Abdulkader Tayob and Joseph Wandera (eds), *Constitutional review in Kenya and Kadhis Courts: Selected papers presented at the workshop, 20 March 2010, St Paul's University, Limuru, Kenya* (Center for Contemporary Islam University of Cape Town 2011) 56; Waris (n 34) 47; Commission on the Law of Succession, *Report of the Commission on the Law of Succession 1968* (Government Printers 1968) paras 18–22, 24 and 65.

[617] Cotran, 'MDSL' (n 614) 203–04; Cotran, *Casebook* (n 614) 227; William Musyoka, *Law of Succession* (LawAfrica 2006) 12; Abdulkadir (n 614) 340.

[618] That is sections 22(1) [freedom of conscience] and 179 [establishment of the Kadhis' courts].

[619] Musyoka (n 617) 12.

[620] Oded (n 42) 91.

[621] Chesworth (n 300) 10 citing David Kanyoni, 'Kadhi's Courts in Kenya: A Contentious Issue' (BD Dissertation, St Paul's United Theological College 2004).

[622] ibid 10. The 2009 National Census estimated Christians at 83.0% of the population. Kenya National Bureau of Statistics, 'KNBS 2009 Census' (n 35) 396.

[623] Wandera (n 590) 43; Kimeu (n 177) 26; Cussac (n 333) 297.

[624] Cotran, 'MDSL' (n 614) 197 reproducing Njonjo's speech.

[625] Several commentators concurred with this government's perspective. Kahn-Freund, for example, describes codification and unification of laws of plural religious and cultural society is a natural post-independence process. Otto Kahn-Freund, 'Law Reform in Kenya' (1969) 5 E Afr LJ 54, 54.

[626] Cotran, 'MDSL' (n 614) 196 reproducing Njonjo's speech.

[627] ibid reproducing Njonjo's speech.

A similar assertion also arose during the constitution review process. The Christian clergy argued that since Muslims had become citizens of a unified nation, it behooved them to cease clinging to their separate family laws.[628] Instead, the Muslims ought to owe their allegiance to all the country's mainstream laws.[629]

But multiculturalists view these assertions as prioritising societal stability to justice.[630] Kymlicka, for instance, recounts that there is no existing evidence that shows that recognition of minority rights erodes 'the civic solidarity'[631] of a people. This assertion is conjectural,[632] if not racist.[633] Countries that have adopted official multiculturalism policies such as Canada and Australia have, in fact, high levels of inter-communal relations and a low record of intolerance.[634] During the field research, for instance, several respondents (Muslims and non-Muslims) found the application of IIL in Kenya a good thing, and not divisive.[635]

Again while on the face of it such recognition of minority systems appears like preferential treatment for the Muslims, it is not. It is actually accommodation, a very essential[636] principle in equality law.[637] Unlike favouritism, accommodation permits 'exceptions and exemptions where merited'[638] in a society notwithstanding existing common rules or policies. As Langa CJ explained in *Pillay*, accommodation entails:

> that sometimes the community, whether *the State*, an employer or school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to *participate* and *enjoy* all their rights *equally*. It ensures that

[628] Kimeu (n 177) 26–27.

[629] ibid.

[630] Kymlicka, *Politics in the Vernacular* (n 153) 36–37.

[631] ibid 36.

[632] ibid.

[633] McColgan (n 152) 191. Writing on the ban of the female *hijaab* in French and Belgian public institutions, Bracke and Fadhil find the comments about women and Islam as purely racist. Sarah Bracke and Nadia Fadil, '"Is the Headscarf Oppressive or Emancipatory?" Field Notes from the Multicultural Debate' (2011) 2 Religion and Gender 36, 48.

[634] Kymlicka, *Politics in the Vernacular* (n 153) 37.

[635] Appendix 5 reproduces some of these responses.

[636] *Fugicha* (n 626) 29.

[637] See Ian Brownlie, 'The Rights of Peoples in Modern International Law Special Issue: The Rights of Peoples' (1985) 9 Bull Austl Soc Leg Phil 104, 111–13 where he contrasts accommodation with discrimination.

[638] *Fugicha* (n 626) 28.

> we do not relegate people to the margins of the society because *they do not* or *cannot* conform to certain social norms.[639]

But even then, cohesiveness is not about eliminating pluralism.[640] '[T]he aim should not be to eliminate difference, but to prohibit the detriment attached to such difference (…) by adjusting existing norms to accommodate difference.'[641] Thus the existence of numerous laws relating to one subject-matter in the same social context, for example, is not in itself negative differentiation. Requiring the plural Kenyan religious and tribal groups to abandon their intimate succession or other personal laws in favour of unfriendly integrated ones, however, is both discriminating and assimilationist.[642]

Second, mainstream feminists on their part, find multiculturalism as endorsing reprehensible practices against women.[643] Okin,[644] for example, finds the clamour for group rights a legitimation of male control over females – even if its supporters limit such a protection to liberal communities.[645] Many traditions in the global South (Africa, Asia and Latin America) and in the global North (through immigrant and indigenous communities) – where these ethnocultural rights are situate – practise female genital mutilation, polygamy and child marriages purely to subdue women 'sexually and reproductively'[646]. Men marry

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[639] *MEC for Education: Kwazulu-Natal and Others v Pillay* 2 BCLR 99, para 73 (South Africa 2007). Emphasis added. See also *Fugicha* (n 626) 28 where the Court of Appeal cited other cases from Canada and South Africa to explain this doctrine.

[640] Interview with Magdalene Okwaro, Judge, High Court (Mombasa, Kenya, 30 October 2015) [hereinafter Interview 64].

[641] Fredman (n 64) 720. See also Sandra Fredman, 'Engendering Socio-Economic Rights' in Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press 2013) 227; *Seventh Day Adventist Churches (East Africa) Ltd vs Minister for Education & 3 Ors* [2017] eKLR (EWCA Civ) 18.

[642] James S Read, 'Marriage and Divorce: A New Look for the Law in Kenya' (1969) 5 E Afr LJ 107, 108. See note 117.

[643] Susan Moller Okin, 'Is Multiculturalism Bad for Women?' in Joshua Cohen and others (eds), *Is Multiculturalism Bad for Women? Susan Moller Okin with Respondents* (Princeton University Press 1999) 14. In fact, critics of multiculturalism estimate that it undermines the rights of all the sub-categories in a group, not women alone, since it often associates members' interests with those of the dominating members. See eg Chandran Kukathas, 'Survey Article: Multiculturalism as Fairness: Will Kymlicka's Multicultural Citizenship' (1997) 5 Journal of Political Philosophy 406, 416–17; Tamir (n 565) 47–48.

[644] A white liberal and political feminist.

[645] See generally Okin (n 643). Liberal societies are those groups that permit individual freedoms including the freedom to exit the membership of a group. In such communities, communal rights never override individual freedoms. Nor is discrimination based on sex, race or sexual preference permitted. ibid 11–12.

[646] Okin (n 643) 16. See also ibid 14–15.

multiple women, for example, primarily to satiate their sexual lusts[647] or to discipline badly behaved spouses.[648]

Thus, recognising ethnocultural rights (and thereby upholding these regressive traditions) on account of the sense of agency[649] that group identity brings to individuals, Okin argues, is myopic – at least with regard to females.[650] Many women of these minority groups, particularly young ones,[651] benefit nominally from those practices and they would opt, instead, for their culture to extinguish or to mutate into Western ideals of sexual equality.[652] Again, since a majority of these oppressive customs happen privately and are therefore hidden, there exists no minority group worthy of liberal privileges,[653] more so those religious ones or those that follow antique scriptures for guidance on how to spend their contemporary lives.[654]

Multiculturalists, however, find these second group of criticisms essentialist and assimilationist. Herr[655] and Honig[656], for instance, fault Okin for branding minority cultures as too archaic to suit modernity.[657] To Honig, the practices Okin labels as discriminatory are more nuanced than the ostensible messages they carry and therefore require unpacking to reveal their egalitarian missions.[658] While the female *hijaab* seems a symbol of 'women's oppression and marginalisation'[659] to strangers, for example,[660] it serves a 'religio-

[647] Okin (n 643) 15 recollecting an interview with a French Muslim immigrant from Mali.

[648] When impolite women are threatened of a co-wife, they change to good conduct. ibid 9–10.

[649] Kymlicka defines this feeling as self-respect. He argues that membership to an ethnocultural group constructs an identity through which persons choose how to live. Will Kymlicka, *Liberalism, Community, and Culture* (Clarendon Press 1989) 165.

[650] Okin (n 643) 22.

[651] Okin opines that the older women normally join men in enlivening gender inequalities. ibid 24.

[652] ibid 22–23.

[653] ibid 22.

[654] ibid 21.

[655] A political feminist of Asian descent.

[656] A political white feminist and a lawyer.

[657] Herr (n 574) 73; Bonnie Honig, 'My Culture Made Me Do It' in Joshua Cohen and others (eds), *Is Multiculturalism Bad for Women? Susan Moller Okin with Respondents* (Princeton University Press 1999) 36.

[658] Honig (n 657) 37.

[659] Cooke (n 113) 103.

political'[661] agenda for veiled women.[662] It both depicts these women as pious (ie as against 'public displays of sexuality')[663] and gives them access to the public sphere to engage in 'educational and professional activities'[664]. Actually, the *hijaab* enables Muslim women to both observe their religion and participate in other aspects of their life.

Both Volpp[665] and Flax[666] further link Okin's separation of race from sex to her conclusion of wishing minority cultures into extinction.[667] According to Volpp, Okin– like other dominant feminists – epitomises sex differences as the only form of oppression that women undergo.[668] She ignores other contexts such as poverty and race.[669] Such thinking, Volpp opines, assumes that women 'can live their lives only as women'[670] and not as parts of other societal categories. It also castigates culture as entirely negative.[671] Yet culture also offers opportunities to women.[672]

According to Ahmed, the connection between women's oppression and culture, such that improving the status of women involved abandoning their native cultures, was created by colonialists.[673] She, however, finds it an absurd and a false relationship because 'those who

[660] Bracke and Fadhil note that both the French and Belgian proscribe the female *hijaab* in public institutions because they regard it as oppressive to and defeatist of women's emancipation. School authorities, in particular, feel that young Muslim (immigrant) women are forced to veil by their families or communities. Bracke and Fadil (n 633) 47; Okin (n 643) 10–11. See also Interview 121.

[661] Cooke (n 113) 104.

[662] Honig (n 657) 37.

[663] Cooke (n 113) 103.

[664] ibid 104. See also Ahmed (n 106) 223–24.

[665] A lawyer and CRF of Asian descent.

[666] A psychotherapist white feminist.

[667] See Volpp (n 138) 1192 and 1202; Flax (n 117).

[668] Volpp (n 138) 1199.

[669] ibid.

[670] ibid. See also Flax (n 117) 501.

[671] Volpp (n 138) 1202.

[672] Fredman (n 64) 720. See eg Celestine I Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries' (2000) 41 Harv Int'l L J 381, 406–09 indicating that in some Kenyan ethnic tribes, women's unregistered interests offer a legitimate defence against individual title-holding of family land.

[673] Ahmed (n 106) 165–66.

first advocated it believed that Victorian mores (…), and Victorian Christianity, represented the ideal to which Muslim women should aspire.'[674]

Third, mainstream feminists also fault multiculturalism for defeating gender equality because it obviates women's freedom to choose including their ability to 'question, revise or abandon'[675] their cultural gender roles.[676] Thus minority women continue to suffer in their cultures. McColgan, therefore, advises that where group rights (such as IIL) disadvantage women, a State must refuse to recognise such laws even if the adult Muslim females consent to the application of that group law.[677]

But multiculturalists read imperialism in this dominant feminist view.[678] To them, mainstream feminists – just like other traditional liberals – regard a woman as an abstract individual.[679] This liberal subject, who is both civilised and universal, must also bear the Western culture.[680] Thus any woman with a culture different from the Western one belongs to an archaic and primitive socialization.[681]

According to multiculturalists, this mainstream feminist thought also elides the fact that feminism also exists within minority cultures,[682] including religious ones.[683] But religious people see the good reasonably differently.[684] In fact as demonstrated in the MF epistemology, feminism – just as sexual equality – exists in Islam. While MF conception

[674] ibid. See also Winnie V Mitullah, 'Recognising and Respecting Cultural Diversity in the Constitution' in *Report of the Constitution of Kenya Review Commission: Technical Appendices* (Constitution of Kenya Review Commission 2003) vol 5(2), 55 relating on similar British colonialists' and missionaries' perspectives on the Kenyan African tribes. Hashim further observes that despite the British colonialists retaining the observance of Islamic law in Kenya, *Sharii'ah* stood inferior to the British laws. Abdulkadir (n 614) 332. See also Alamin Mazrui, 'Universalism' in *Human Rights as Politics* (Kenya Human Rights Commission 2003) 342; Esposito and DeLong-Bas (n 17) x.

[675] Kymlicka, 'Liberal Complacencies' (n 144) 31.

[676] ibid 31–32.

[677] McColgan (n 152) 185.

[678] Volpp (n 138) 1201.

[679] Fredman (n 64) 719.

[680] Volpp (n 138) 1201.

[681] Nussbaum (n 584) 107.

[682] Volpp (n 138) 1193.

[683] Nussbaum (n 584) 107.

[684] ibid 108.

differs from the mainstream Western ones, it remains competent to espouse gender justice and to participate in other global discourses on democratic and human rights values.[685]

During Kenya's constitutional review process (1998 – 2010), for example, some Christian clergy faulted the Committee of Experts[686] for adulterating the Bill of Rights to exempt Muslims from its application.[687] The proposed constitution – and now the 2010 Constitution – had embodied a provision which subjected any of the provisions of the Bill of Rights containing the word 'equality' to the Islamic understanding of equality[688] if the case is before the Kadhis' courts.[689] But it has now emerged that the provision originated from the adoption of the substantive variant of equality instead of its 'formal, universalised, and absolutist'[690] version, not by the Muslim community, but by a coalition of Kenyan women rights activists[691] during the first review process.[692]

To this women's alliance, which had anchored its campaign for gender equality and women's empowerment on the principle of equality,[693] substantive equality regarded all women as stakeholders in 'policy formation'[694] and respected their different views.[695] Thus

[685] Wadud (n 102) 100–01; al-Hibri, 'Law and Custom' (n 56) 3.

[686] A group of nine members which was made up of local and foreign specialists in law, civil society and religious representation and which had the mandate of fusing all previous drafts of the proposed constitution and tackling the contentious issues which led to the refusal of the 2005 Proposed Constitution of Kenya. Chesworth (n 300) 11; Kimeu (n 177) 25–26; 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) 7, 17–18.

[687] See The Standard Team, 'Draft: State and Church Talks on New Law Collapse', *The Standard* (Nairobi, 29 April 2010) 6; Gekara Emeka-Mayaka, 'Churches Want Vote on Draft Postponed', *Daily Nation* (Nairobi, 8 April 2010) 5.

[688] See article 24(4).

[689] D Mutua (n 37) 92; Waris (n 34) 51. This means that this approach is untenable if the matter is before the High Court or the Magistrate Courts.

[690] D Mutua (n 37) 91.

[691] These were FIDA Kenya, Institute for Education in Democracy, Kenya Human Rights Commission and the League of Kenya Women Voters. ibid 4.

[692] This was just before the first National Constitutional Conference in 2003. ibid 4 and 92. About three such conferences took place between April 2003 and March 2004. Bård-Anders Andreassen and Arne Tostensen, *Of Oranges and Bananas: The 2005 Kenya Referendum of the Constitution* (CMI, Chr Michelsen Institute 2006) 2; Cussac (n 333) 289. See also 34(4) of the 2005 Proposed Constitution of Kenya.

[693] The campaign was titled 'Safeguarding the Gains of Women in the Draft Constitution'. D Mutua (n 37) 4.

[694] ibid 91.

[695] ibid.

as it related to the Kadhis' courts, the coalition respected the Muslim women's conception of rights – despite its stark difference to the majority non-Muslim women's predilections.[696]

2.3.2. Global Critical Race Feminism and Equality

Global critical race feminism (GCRF) posits that since minority women are mostly situate in the peripheries of every society (whether developed or developing),[697] their understanding of sexism and privilege is absent from the normative texts.[698] Both national and international legal instruments absent 'literally'[699] the unique and the 'multiple consciousness'[700] of the oppression of these women.[701] Legal rules and institutions address primarily the sufferings of white upper and middle-class women because the mainstream struggles against misogyny and patriarchy were spearheaded by this category of women. GCRF thus critique this dominant feminist legitimation of the discriminatory experiences of elite white Western women for all global women.[702]

For example the 1968 proposed LSA's essentialization of one perspective of protecting women did not necessarily translate into greater rights for women, at least certain categories of women. First, while the identical treatment between the sexes seemingly offered gender justice between male and female heirs of the same relationship, this arrangement violated the rights of other women in the process.[703] The enjoinment of identical portions between a deceased's sons and daughters when there was no surviving spouse, for example, jeopardised

[696] ibid.

[697] Wing, 'Introduction: GCRF' (n 128) 2; al-Hibri, 'Patriarchal Feminism' (n 116); Volpp (n 138) 1201.

[698] Wing, 'Introduction: GCRF' (n 128) 2; Charlesworth and others (n 176) 613.

[699] Wing, 'Introduction: GCRF' (n 128) 2.

[700] This phrase was first used by the African American sociologist, Deborah King, to describe the intersectionality of black women's contradictions in the face of sexual discrimination. See generally Deborah K King, 'Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology' (1988) 14 Signs 42.

[701] Kline notes that women of colour are always at pains to identify whether the oppression they suffer is because of their race, colour or other features. Kline (n 128) 121.

[702] Muslim women (particularly Arab), for example, find Western feminist concerns of their plight an extension of colonial Orientalist ideals. See al-Hibri, 'Law and Custom' (n 56) 4; Cooke (n 113) 91; Barlas (n 102) xiii. See also Adrien Katherine Wing, 'Global Critical Race Feminism Post 9-11: Afghanistan Access to Justice: The Social Responsibility of Lawyers' (2002) 10 Wash U JL &Pol'y 19, 24; Crenshaw (n 135) 1242; Kline (n 128) 116; Wing, 'Introduction: GCRF' (n 128) 2; Spelman (n 134); Harris (n 137) 583 for the CRFs' marginalisation accounts.

[703] D Mutua (n 37) 12 and 91.

the rights of the Muslim sons' possible wives and daughters because of the sons' decreased provisions.[704]

Second, the LSA prioritising of the widow over the deceased's mother as a dependant[705] defeated the innate familial proximity between the deceased and his or her mother. Yet *Sharii'ah* reveres this relationship[706] and designates a mother as one of the principal heirs.[707] Thus in four selected cases from Mombasa and Garissa, for example, the courts granted the mother her share even when the widow and the deceased's children were present.[708]

Third, while analysts lauded the (proposed) LSA for establishing the doctrine of discretionary trust (such that a surviving spouse has power to allocate the intestate estate to the deceased's children),[709] practice reveals that some widows (and possibly widowers) abuse their trusteeship over their minor daughters' (and possibly sons') succession rights. While the law assumes that the surviving parent would share the inheritance with the children, this is not always the case.[710] Yet these children are the ones that need most protection.'[711]

Thus by endorsing critical legal scholars (CLS) and critical race theorists (CRTs), global critical race feminists (GCRFs) thus demonstrate that man-made law is partial, subjective and indeterminate, after all.[712] It perpetuates unjust hierarchies based on class, sex, race or ethnicity among its constituents. But as mainstream feminists challenged sexism in the normative structures, they ignored intragroup differences among women. Their approaches were elitist[713] and subsumed the varied experiences of different women (of colour) into

[704] See sub-section 3.3.3.

[705] See sections 29 and 35.

[706] See note 485.

[707] The accompanying text to note 896 defines principal heirs.

[708] See *Re Estate of Salim Mwachiro Jira* [2011] KC Succession Cause No 108 of 2011 (Mombasa); *Re Estate of Tabu Athman Swaleh* [2010] KC Succession Case No 39 of 2010 (Mombasa); *Re Estate of Kassim Juma* [2012] KC Succession Case No 10 of 2012 (Mombasa); *Dekow Ali Hillow v Bare Ali Hillow* [2014] KC Succession Case No 32 of 2014 (Garissa). See also the accompanying text to note 890.

[709] JND Anderson, 'Comments with Reference to the Muslim Community' (1969) 5 E Afr LJ 5, 18; Kahn-Freund (n 625) 84. See also section 35(2) – (4) of the LSA

[710] Interview 8. Fleming explains the basis of this assumption. See accompanying texts to notes 231 and 232

[711] Interview 8.

[712] Wing, 'Civil Rights in the Post 911 World' (n 340) 719.

[713] Wing and Willis (n 139) 3.

mainstream women.[714] Similarly, when CRTs confronted legal manifestations of white privileges, they essentialised all minorities (lumping together men and women).[715] Yet the racial oppression of men of colour varied tremendously to that of their sisters.[716]

The present proposed amendment to the LSA, 'The Law of Succession (Amendment) Bill 2015 (like other majority Kenyan laws),[717] for example, essentialises Christian Western values which conflict with those of Muslim women.[718] While there is no doubt that gender justice (among other things)[719] informs the Bill proposals; and there is an effort to cure some obvious sex discriminating passages in the LSA,[720] it is the Bill's insistence on conception of equality as identical treatment[721] which is problematic. Because IIL construes equality as substantive, the LSA (even as proposed by the Bill) will remain inconsistent with IIL.[722] Yet the Bill intends to extend both the LSA substantive and procedural provisions to Muslims.[723]

According to GCRFs, minority women's discrimination stems from a mixture of sexual and other prejudices.[724] Women of colour therefore suffer more subordination than other women, not because of their sex only – but because of a combination of other factors such as

[714] Wing, 'Introduction: GCRF' (n 128) 6.

[715] ibid.

[716] ibid.

[717] Kimeu (n 177) 27; D Mutua (n 37) 7; Cotran, 'MDSL' (n 614) 197; Ibrahim Lethome, 'Opposition to Kadhi Courts Uninformed and Misplaced', *The Standard* (Nairobi, 16 November 2009) <https://www.standardmedia.co.ke/article/1144028457/opposition-to-kadhi-courts-uninformed-and-misplaced> accessed 23 October 2017; 'Ithna-Asheri Memo' (n 284) 523; Mazrui (n 476) 311–12; Tayob (n 616) 58.

[718] Appendix 2 illustrates these inconsistencies. At the time of submitting this study, however, the researcher has established that The Law of Succession (Amendment) Bill 2019 before the National Assembly's Justice and Legal Affairs Committee only amends section 3 (by adding the definition of a spouse) and section 29 (by repealing it and introducing a fresh section 29) of the LSA. See <http://www.parliament.go.ke/sites/default/files/2019-12/Law%20of%20Succession%20%28Amendment%29%20Bill%2C%202019.pdf >. Both these amendments do not conflict with IIL.

[719] Such as the economic realities of the country. For example, the definition of 'property' includes securities, stock, shares and digital assets and intellectual property. See proposed section 3 (b). The value of the shilling has also depreciated hence the heightened suggested fines.

[720] For example sections 35, 36, 39 and 40. Appendix 3 reproduces these provisions.

[721] See sections 16 and 18 which permit identical shares to full brothers and sisters; and sons and daughters respectively.

[722] Hashim (n 614). Anderson conceded this point as early as 1969 in his commentary to the 1968 Report. See Anderson, 'Comments' (n 709) 6, 17–19. On his part, Kahn-Freund, noted that the 'most difficult problem' for the Commission was to reconcile the proposed LSA to the intricate and 'deeply-rooted system of Islamic law.' Kahn-Freund (n 625) 84.

[723] See sections 3 and 25(b).

[724] Crenshaw (n 135) 1244.

their age, colour and race.[725] Until this simultaneity of identities is taken into account, minority women's realities will continue to be misconstrued.[726] Hence critical race feminists (CRFs), the precursor to GCRFs, urge feminist and antiracist discourses (for example) to stop treating the variables of race and gender separately when discussing discrimination against women of colour. Instead, to include a dimension of each other and see how the two intersect to define the dominance suffered by these women.

Because Kenyan Muslim women belong to different ethnic tribes[727] (which groups live in diverse geographies and possess divergent livelihoods), the CRFs' call fits well in analysing consciously the inheritance experiences of these women.[728] The intersectionality theory will thus bring insight into whether the 'multiple belongings'[729] of Kenyan Muslim women (ie as women, Muslims and members of their often patriarchal families, clans or ethnic communities) influence the way these women access their *Qur'aanic* succession shares.

2.4. Multicultural, Intersectional and Modified Muslim Feminist Approaches to Equality and Substantive Equality: A Parity of Ideas

2.4.1. The Principle of Equality means Substantive Equality

The call for plural justice among multiculturalists, CRFs and MFs is actually one for substantive equality.[730] That is the concurrent treatment of like cases alike and different cases differently.[731] This is what derives from MFs' conception of sexual equality as sameness and

[725] ibid. For example, because majority of women of colour are unemployed, underemployed or poor, they seek refuge in domestic violence shelters in the United States when battered by their partners. Their Caucasian counterparts, on the other hand, hardly resort to these shelters since they have better financial muscles. Crenshaw attributes the minority women's consequent accommodation to gender, class and racial discriminatory employment and housing practices. ibid 1246.

[726] To GCRFs, gender justice extends beyond the binary categorisation of men and women. Flax (n 117) 501.

[727] Bakari (n 109) 236.

[728] See eg Wing, 'Global Critical Race Feminism Post 9-11' (n 10) 33 where Wing suggests a similar approach to address the plight of Afghan women.

[729] Cooke uses this phrase to describe the position of having numerous identities. See Cooke (n 113) 92.

[730] Ansar al-Adl, 'Concept of Gender Equality in Islam (Part 2 of 2): Substantive Equality of Men and Women' (*The Religion of Islam*, 25 December 2006) <https://www.islamreligion.com/articles/462/concept-of-gender-equality-in-islam-part-2/> accessed 26 May 2018; Kymlicka, 'Liberal Complacencies' (n 144) 33; Flax (n 117) 503.

[731] Alison M Jaggar, 'Sexual Difference and Sexual Equality' in Alison M Jaggar (ed), *Living With Contradictions: Controversies In Feminist Social Ethics* (1st edn, Westview Press 1994) 20.

specifity of the sexes. It also coincides with multiculturalists' conception of justice as according to minorities group rights alongside the 'formal individual rights'[732] which everyone (but particularly the majority) possesses. It also aligns with the CRFs' perspective that the law and such 'other means'[733] must address the unique multiple discrimination which minority women suffer because 'all women are not situated identically in relation to men'[734] and to other women.[735]

Incidentally, many national and international legal documents enshrine substantive equality. This is done through either the explicit proscription of both direct and indirect forms of discrimination[736] or the construction of the principle of equality they embody as substantive.[737] While interpreting article 4 of the CEDAW Convention, for example, the CEDAW Committee posited that State Parties must move 'beyond a purely formal legal obligation of equal treatment of women with men'[738] in order to meet their obligations under the Convention.[739] The Committee next noted that:

> It is not enough to guarantee women treatment that is identical to that of men. Rather, *biological* as well as *socially and culturally constructed differences* between women and men must be taken into account. Under certain circumstances, *non-identical treatment* of women and men will be required in order *to address such differences*.[740]

Thus in its concluding observations to several Member States, the CEDAW Committee has regretted State Parties' limited focus on *de jure* (formal) equality instead of extending to *de facto* (practical)[741] equality,[742] which latter form of equality the Committee 'interprets as

[732] Kymlicka, 'Liberal Complacencies' (n 144) 33.

[733] Byrnes (n 66) 70.

[734] Flax (n 117) 503.

[735] 'CEDAW/C/GC/28' (n 62) para 18; Fredman (n 641) 227.

[736] See eg article 1 of the CEDAW Convention ('effect or purpose'); articles 27 (4) and (5) of the 2010 Constitution; Constitution of Zimbabwe (2013), article 56(4); Constitution of the Republic of South Africa (1996), articles 9(3) and (4); Constitution Act of 1982 (Canada), article 15.

[737] See note 69. See also Byrnes (n 66) 65–66, 69.

[738] 'CEDAW/C/GC/28' (n 62) para 6.

[739] Fredman (n 641) 238.

[740] 'CEDAW/GR/25' (n 69) para 8. Emphasis added.

[741] Byrnes (n 66) 55.

substantive equality.'[743] This was evident, for example, in the Committee's observations to Benin,[744] Slovakia[745] and Brazil.[746] The Committee has thus recommended to these Member States (and others in a similar position) 'to adopt laws and practices that embody a substantive equality approach.'[747] In the case for Benin, for instance, the Committee advised the State Party to:

> [r]eview all its laws, policies and programmes(…) and take all appropriate legislative and other measures to ensure that women *enjoy de facto equality with men* in all sectors, including adequate sanctions *prohibiting direct and indirect discrimination* against women as defined in article 1 of the Convention.[748]

Several global human rights lawyers concur that the equality enjoined in international human rights documents is substantive. Fredman, for example, asserts that it is unequivocal that 'the right to equality should move beyond a formal conception'.[749] This is because this principle is socially contextual.[750] It responds to actual wrongs.[751] It also reflects upon peoples' individual identities.[752] While advocating for engendering of socio-economic rights, Fredman chooses substantive equality to do this.[753]

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[742] ibid 65.

[743] 'CEDAW/GR/25' (n 69) para 8.

[744] UN Committee on the Elimination of all forms of Discrimination Against Women, 'Concluding Comments: Benin' [2005] UN Doc CEDAW/C/BEN/CO/1-3, para 20.

[745] UN Committee on the Elimination of all forms of Discrimination Against Women, 'Draft Concluding Observations of the Committee on the Elimination of Discrimination against Women: Slovakia' [2008] UN Doc CEDAW/C/SVK/CO/4, para 8.

[746] UN Committee on the Elimination of all forms of Discrimination Against Women, 'Report of the Committee on the Elimination of Discrimination against Women (Twenty Eighth and Twenty Nineth Sessions)' [2003] GAOR 58th Session Supp No 38 UN Doc (A/58/38), para 98.

[747] Byrnes (n 66) 65.

[748] 'CEDAW/C/BEN/CO/1-3' (n 744) para 20. Emphasis added.

[749] Fredman (n 64) 713.

[750] ibid 713 and 732.

[751] ibid 713 and 714.

[752] ibid 719.

[753] Fredman (n 641) 7. Fredman attributes her choice to the four qualities of substantive equality. Substantive equality remedies wrongs rather than championing for gender neutrality. It enhances individuals by giving them positives instead of removing the advantage presently enjoyed by the majority. It accommodates difference, even among women, instead of obviating it. And it allows women (and others) to articulate their issues their own way. ibid 225–28.

Holtmaat, on the other hand, posits that the broad definition of discrimination under article 1 of the CEDAW Convention surpasses 'the formal equal treatment definitions of discrimination' dominating (for example) 'European sex equality law'.[754] In fact, articles 3, 4 and 24 enshrine substantive equality. Holtmaat also notes that the CEDAW Convention recognises intersectionality.[755]

Byrnes, on his part, observes that while the CEDAW Committee has 'adopted a flexible approach to the meaning of equality'[756] in the Convention, this style is intended to 'ensuring substantive equality.'[757] This is because while the Committee acknowledges the importance of formal equality, it finds that strand of justice inadequate to eliminate disadvantages against women.[758]

International and national courts have also adopted substantive equality to construe the right to equality.[759] The Canadian Supreme Court,[760] the South African Constitutional Court (SACC),[761] the United States Supreme Court,[762] and the European Court of Human Rights (ECHR)[763] (for instance) have outlawed neutral practices and laws which disadvantage certain people because of those people's protected characteristics and which 'cannot be justified.'[764] In *Achbita*, the ECHR held that:

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[754] 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.

[755] ibid 100. Byrnes concurs and traces this recognition in art 11(2) (pregnant women) and art 14 (rural women). Byrnes (n 66) 69. See also 'CEDAW/C/GC/28' (n 62) para 18.

[756] Byrnes (n 66) 62. Byrnes relates to the Committee's intermittent usage of the phrases *de jure* and *de facto* equality, direct and indirect discrimination, and formal and substantive equality.

[757] ibid 63.

[758] ibid.

[759] Fredman (n 64) 713 and 720.

[760] See eg *Law v Canada (Minister of Employment and Immigration)* (Canada supremecourt 1999); *R v Big M Drug Mart Ltd* 1 SCR 295 (Canada supremecourt 1985).

[761] See eg *Pillay* (n 661); *City Council of Pretoria v Walker* 3 BCLR 257 (South Africa 1998).

[762] See *Griggs v Duke Power Co* 401 US 424 (US 1971); *EEOC v Abercrombie & Fitch Stores, Inc* 575 US 25 (US 2015).

[763] *Serif v Greece* App no 38178/97 (ECtHR, 14 December 1999); *Samira Achbita and Centrum voorgelijkheid van kansenenvoorracismebestrijding v G4S Secure Solutions NV* C-157/15 (ECtHR, 14 March 2017).

[764] Fredman (n 64) 721.

> an internal rule of a private undertaking may constitute indirect discrimination (…) if it is established that the *apparently neutral obligation* it imposes results, in fact, in persons adhering to *a particular religion or belief being put at a particular disadvantage*, unless it is objectively justified by a legitimate aim (…) and the means of achieving that aim are appropriate and necessary.[765]

The Kenyan Court of Appeal embraced this view lately.[766]

In the foregoing, therefore, the global understanding of the principle of equality is in tandem with MIMoMFAE's conceptions – after all. This marriage of ideas between minority and majority perspectives is crucial in the advancement of Muslim women's sexual equality going forward, the world over. First, it justifies the inclusion of their sense of justice in minority Muslim population countries. Second, it beckons majority Muslim countries' unreserved acceptance of international instruments which enjoin equal substantive treatment of the sexes.[767]

2.4.2. **Continued Islamic and Western Conceptual Incongruities**

Notwithstanding the common understanding of the right to equality as substantive, there has been a struggle between Muslim countries[768] (including secular countries with significant minority Muslim populations)[769] and the Western ones[770] over the meaning of the word

[765] *Achbita* (n 763) [45].

[766] See *Fugicha* (n 626); *Seventh Day Adventist Churches (East Africa) Ltd vs Minister for Education & 3 Ors* [2017] eKLR (ewcaciv). The Supreme Court, however, overturned the Court of Appeal's decision in *Fugicha* in January 2019 because the court document upon which the doctrine of indirect discrimination was raised was faulty and was introduced by an interested party, not the original litigants. The Supreme Court, however, expressed its desire to pronounce itself on this doctrine if a further case is filed and the doctrine is pleaded in a proper court document. See *Methodist Church in Kenya v Mohamed Fugicha& 3 ors* [2019] eKLR [59] and [60].

[767] See note 68.

[768] Of the 57 members of the Organisation of Islamic Countries, 54 have ratified the CEDAW Convention and 25 of which have entered reservations against its offending provisions. Sisters in Islam (n 31) 5. See also generally UN Committee on the Elimination of All Forms of Discrimination Against Women, 'Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations Relating to the Convention on the Elimination of All Forms of Discrimination against Women' [2006] UN Doc CEDAW/SP/2006/2.

[769] For example: Singapore, India, Thailand and the Philippines. Sisters in Islam (n 31) 5. See also UN Committee on the Elimination of All Forms of Discrimination Against Women, 'Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya' [2007] UN Doc CEDAW/C/KEN/CO/6 10, paras 43–44 reprimanding Kenya for recognising plural personal laws.

[770] Including NGOs and individuals.

'equality' especially as it relates to sexual equality. Islamic states – which derive their conception of equality of the sexes from *Sharii'ah*[771] – oppose any legal provision which establishes a version of equality contrary to Islamic tenets.[772] Thus they enter reservations against specific articles of[773] or an entire international instrument[774] which enjoins offending sexual equality.[775] Secular countries with significant Muslim minorities also hold declarations or reservations against equality passages which conflict with the religious or personal laws of its minority communities.[776] Western States, however, object to these reservations.[777] And Treaty Bodies find reservations to be limiting of the observance of globally accepted normative values.[778]

This geopolitical conceptual incongruity is most evident in the realm of family matters, including inheritance. During the discussions on girls' equal right to inheritance at the Fourth World Conference on Women and Development in Beijing, for instance, there was a contestation between Muslim countries on one hand, and Western States and NGOs on the other, relating to the use of the word 'equality'.[779] Muslim countries objected to the employment of this term because *Sharii'ah* enjoins a daughter's succession share as half as much as that of her brother's.[780] Instead, the Muslim countries preferred the word 'equity'.[781]

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[771] Their approach is similar to MFs.

[772] Sisters in Islam (n 31) 12–13; Andrew Byrnes, 'Article 2' 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) 98; Marsha A Freeman, 'Article 16' 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) 420; Nyamu, 'Cultural Legitimization' (n 672) 392.

[773] For example the most reserved passages are articles 2, 5, 15 and 16 of the CEDAW Convention.

[774] Saudi Arabia, Tunisia, and Mauritania have entered general reservations against the CEDAW Convention. See 'CEDAW/SP/2006/2' (n 768) 20, 26 and 29.

[775] Freeman (n 772) 441; Byrnes (n 772) 97–98.

[776] See 'CEDAW/SP/2006/2' (n 768) 14, 27 and 29 where India, Singapore and the Philippines have either entered declarations or reservations against arts 2, 5(a), and 16 of CEDAW.

[777] See column 3 of ibid 48–55.

[778] See para 14 of the CEDAW Committee Statement on Reservations to CEDAW contained in UN Committee on the Elimination of All Forms of Discrimination Against Women, 'Report of the Committee on the Elimination of Discrimination against Women (Eighteenth and Nineteenth Sessions)' [1998] GAOR 53rd Session Supp No 38 UN Doc (A/53/38/Rev1), 48.

[779] Celestine Itumbi Nyamu, 'Achieving Gender Equality in a Plural Legal Context: Custom and Women's Access to and Control of Land in Kenya' (1998) 15 Third World Legal Stud 21, 22.

[780] ibid 21.

But the Western delegates perceived the Muslims' objection a ploy to defeat the universality of human rights in the Platform.[782] To them, such a move risked reversing the accepted generality of human rights by previous international instruments.[783] In the end, therefore, the Platform adopted the word 'equality' "with the understanding that 'equal right to inheritance' does not necessarily mean"[784] identical succession shares.[785]

But Treaty Bodies find the Islamic practice of giving women lesser inheritance shares to men 'in the same degree of relationship'[786] to the deceased a violation of the equality principle.[787] While interpreting article 16(1) in its General Recommendation 21, for example, the CEDAW Committee described daughters' and widows' smaller portions compared to sons and widowers a 'serious discrimination against women'[788] To the Committee, such family members 'are entitled to equal shares in the estate'.[789] It has thus, repeatedly,

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[781] ibid 22.

[782] ibid.

[783] ibid. The CEDAW Committee has found the exchange of the word 'equality' and 'equity' as causing 'conceptual confusion'. See UN Committee on the Elimination of All Forms of Discrimination Against Women, 'Concluding Comments: Guyana' [2005] UN Doc CEDAW/C/GUY/CO/3-6, para 20. It thus recommends using the former. ibid; 'CEDAW/C/GC/28' (n 62) para 22.

[784] Nyamu, 'Plural Legal Context' (n 779) 23.

[785] ibid. See paras 9, 15, 16, 19, 20, 23, 24 and 31 of Chapter V of the Report of the Conference where Egypt, Iran, Iraq, Kuwait, Libya, Mauritania, Morocco and Tunisia respectively objected to or indicated that they would apply para 274(d) of the Platform in accordance with *Sharii'ah*. Para 274(d) calls upon governments to pass laws which afford all children 'equal right to succession and equal right to inherit' regardless of their sex. See Vereinte Nationen (ed), *Report of the Fourth World Conference on Women: Beijing, 4 - 15 September 1995* (A/CONF177/20/Rev1, United Nations 1996).

[786] UN Committee on the Elimination of All Forms of Discrimination Against Women, 'General Recommendation 21' in *Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Treaty Bodies* (UN Doc HRI/GEN/1/Rev.9 (Vol. II), 2008) para 34.

[787] Baderin (n 14) 281. See further UN Committee on the Elimination of all forms of Discrimination Against Women, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Libyan Arab Jamahiriya' [2009] UN Doc CEDAW/C/LBY/CO/5, para 17; UN Committee on the Elimination of all forms of Discrimination Against Women, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Bahrain' [2008] UN Doc CEDAW/C/BHR/CO/2, para 38; UN Committee on the Elimination of All Forms of Discrimination Against Women, 'Concluding Comments of the Committee on the Elimination of Discrimination against Women: Syrian Arab Republic' [2007] UN Doc CEDAW/C/SYR/CO/1, para 33.

[788] 'CEDAW/GR/21' (n 786) para 35. See also ibid para 21 where the Committee termed any law which sanctions greater inheritance rights for men discriminating.

[789] 'CEDAW/GR/21' (n 786) para 34. See also UN Committee on the Elimination of All Forms of Discrimination Against Women, 'General Recommendation 16' in *Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Treaty Bodies* (UN Doc HRI/GEN/1/Rev.9 (Vol II), 2008) para 53 where the Committee indicated that State Parties are obliged to adopt laws of intestate succession that ensure 'equal treatment of surviving females and males.' See also UN

recommended to Muslim State Parties (among others) to harmonise their family laws with the CEDAW Convention.[790] Similarly, when explaining article 3 of the ICCPR, the Human Rights Committee held that women must 'have equal inheritance rights to those of men'.[791] The Committee on Economic, Social and Cultural Rights, on the other hand, observed that implementing article 3 of the ICESCR vis-à-vis article 10 thereto required giving widows 'equal rights to (…) inheritance'.[792]

The employment of the word 'equality' in these Treaty Bodies' statements seems to imply identical treatment. Thus the Treaty Bodies are calling upon Member States to ensure that their female citizens have both the same access to inheritance and the same inheritance divisions to their male counterparts. It is hence evident that while the Treaty Bodies construe the principle of equality as substantive, their pronouncements on succession (and other family) matters appear to limit it entirely to formalism.[793]

This construction on the part of the CEDAW Committee appears to flow from article 16(1) (c) which calls on states to guarantee women and men the '*same* rights'[794] at the dissolution of a marriage.[795] It expounds explicitly the phraseology 'on a basis of equality of men and women' in the chapeau to article 16(1) as sameness of treatment.[796] This explains

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Committee on the Elimination of all forms of Discrimination Against Women, 'General Recommendation 27' [2008] UN Doc CEDAW/C/GC/27, paras 51–52.

[790] See eg 'CEDAW/C/LBY/CO/5' (n 787) para 38; 'CEDAW/C/BHR/CO/2' (n 787) para 39; UN Committee on the Elimination of All Forms of Discrimination Against Women, 'Concluding Comments of the Committee on the Elimination of Discrimination against Women: Saudi Arabia' [2008] UN Doc CEDAW/C/SAU/CO/2, para 14; 'CEDAW/C/SYR/CO/1' (n 787) para 34.

[791] UN Human Rights Committee, 'General Comment 28' in *Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Treaty Bodies* (UN Doc HRI/GEN/1/Rev.9 (Vol I), 2008) para 26. The Council also implied this recommendation in 'HRC/GC/18' (n 69) para 5.

[792] Committee on Economic, Social and Cultural Rights (n 65) para 27.

[793] Freeman (n 772) 416; Fredman (n 641) 231. This happens even when the HRC acknowledges that the right to religion embodies the right to religious marriages. See 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/Rev.9 (Vol. I), 2008) para 4.

[794] Emphasis added.

[795] While the term 'inheritance' misses out in the category of property rights under article 16(1) (h), it is embodied in article 16(1) (c) because the Convention also envisages determination of marriage by death. Freeman (n 772) 414 and 425.

[796] Byrnes intimates that this phrase also means substantive equality. Byrnes (n 66) 61. But it does not do so in article 16.

why Muslim Member States have made reservations to article 16[797] in larger numbers compared to other sexual equality provisions in other treaties.[798] The point is: while a substantive construction is possible in the latter passages, it is impossible in the former.

The emerging incongruence in Treaty Bodies' explication of equality also explains, perhaps, Islamic countries' preference for the term 'equity'. Muslim States choose this word because it rhymes with the Islamic conception on the relationship of the sexes.[799] The award of males' greater inheritance portions, for example, is a 'fair treatment of men and women'[800] because it factors in their corresponding familial obligations.[801] But while this may be so, the Muslim countries' lexical choice is unnecessary. It assumes that the term 'equality' only embodies sameness of treatment and not substantive equality.[802] In fact while encouraging its Member States to employ the word 'equality' instead of 'equity', the CEDAW Committee conceded that the latter word denotes substantive or *de facto* equality.[803]

Similarly, the 2010 Constitution's qualification of the word 'equality' in article 24 (4)[804] is unnecessary. Even without the qualification, the word 'equality' offers itself to its substantive meaning. It would have been up to the courts and equality lawyers to flush out this meaning from the word. And doing so would be to fulfill the prohibition against indirect

[797] This explanation responds partly to Byrnes' quest for the specified inconsistencies between the laws of the reserving states and the CEDAW Convention. See ibid 98.

[798] The CEDAW Committee has lamented this OIC countries' inconsistent behaviour. See eg UN Committee on the Elimination of All Forms of Discrimination Against Women, 'Concluding Comments of the Committee on the Elimination of Discrimination against Women: Niger' [2007] UN Doc CEDAW/C/NER/CO/2, para 9.

[799] Saudi Arabia, for instance, understands the principle of sexual equality as 'similar rights between men and women as well as complementarities and harmony between them'. 'CEDAW/C/SAU/CO/2' (n 790) para 13. Some MFs also employ this term instead of the word 'equality'. See note 1035.

[800] 'CEDAW/C/BHR/CO/2' (n 787) para 66.

[801] See eg 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 (Continued): Combined Initial, Second and Third Periodic Report of Pakistan (Continued)' [2007] UN Doc CEDAW/C/SR782.

[802] Alda Facio and Martha I Morgan, 'Equity or Equality for Women - Understanding CEDAW's Equality Principles' (2008–09) 60 Ala L Rev 1133, 1135–37; Byrnes (n 66) 61. While explicating the inheritance provisions, an *imaam* differentiated between 'justice' and 'equality'. To him, Islam enjoins *uadilifu* (a Swahili word for justice or fairness). Interview with Mbarak Asmani, Imaam, Masjid Awwabina (Pate, Kenya, 20 November 2015) [hereinafter Interview 95].

[803] Committee on the Elimination of All Forms of Discrimination Against Women, 'CEDAW/C/GUY/CO/3-6' (n 783) para 20.

[804] See the accompanying text to note 689.

discrimination within the principle of equality. The inclusion of this qualification, however, has now made courts to regard it as a compromise to the principle of equality under article 27[805], which perspective is wrong.

In the foregoing, the presentation of minorities' conception of equality as contravening the global ideal of justice – over the years – is erroneous. Instead, it is a contestation of similar ideas between two camps which hesitate (or indeed refuse) to hear each other. If the concept of equality in human rights instruments is largely substantive; and MIMoMFAE also premises this same ideal, then the hesitance to accommodate minority perspectives of justice among traditional liberals (present and past) is misplaced.[806]

2.5. **Conclusion**

The meaning of equality has remained debatable for ages. This chapter has presented the MIMoMFAE conception of the principle. It has shown that Muslim feminism (and Islamic law generally) construe sexual equality, for example, as both treating men and women identically in some respects and treating them differently in other instances because of *Sharii'ah*-premised reasons. Incidentally, this similar approach is found in multiculturalism. While multiculturalism acknowledges the universal recognition of basic rights for all citizens, it demands respect for those rights which are unique to minorities. Moreover, critical race feminism requires normative structures to go beyond the blanket provision of women's rights and instead pay attention to the nuanced subtleties between women.

This approach to the principle of equality by or for minority communities is now attracting global acceptance. International human rights lawyers, global and national courts, and Treaty Bodies indicate that the equality enshrined in both municipal and global human rights instruments is substantive. This means treating those similarly situated similarly and those differently situated differently.

But there remains hesitance in allowing Muslims and Muslim countries to extend this conception of equality to their inheritance law. Western governments, NGOs and Treaty bodies find discriminatory the legislation in Muslims States that awards daughters half the

[805] See *Christine Kimwana Chuba and another (Suing through their mother and next friend Josephine Wanjiru Njuki) v Asha Nifus iChuba* [2019] CA Civil Appeal No 121 of 2018 (Mombasa) 2 and 3.

[806] See Nyamu, 'Plural Legal Context' (n 779) 23 opining that the 'equality-equity' debate between Islamic and Western countries at the Beijing Conference was purely a contestation of cultures.

succession shares awarded to their brothers. Such a perspective, however, defies the very meaning of substantive equality, at least if seen in light of the definition provided by paragraph 8 of the CEDAW Committee General Recommendation 25. It is time that lawyers, scholars, women's rights advocates remained firm in their embrace of substantive equality. As Fredman observes there is need for 'continued engagement to ensure that the voice of substantive equality is the dominant one'[807] in the CEDAW Convention and other human rights documents. Chapter three highlights IIL as an example of this strand of the principle of equality.

[807] Fredman (n 641) 241.

3.0 CHAPTER 3: ISLAMIC INHERITANCE LAW: AN ILLUSTRATION OF SUBSTANTIVE EQUALITY

3.1. Introduction

According to the *Sunni* juristic school of thought, Islamic inheritance law (IIL) derives from the *Qur'aan*, the Prophetic Tradition and the jurisprudence of the first three Caliphs.[808] The Holy Text ensconces both sexes' inalienable right to their deceased relatives' estates[809] and a dual succession system (intestacy and testacy).[810] The Prophetic Tradition, on the other hand, elucidates the testamentary regime and the distribution of the estate after the primary intestate heirs assume their inheritance.[811] The jurisprudence of the Caliphs further narrates the division of the estate to the deceased's remote relatives.

Now that chapter two has demonstrated that the principle of equality means substantive equality, this chapter illustrates IIL as embodying this version of equality. Thus, the chapter showcases that IIL guarantees both men and women identical access to its dual succession system. It then indicates that some men and women (nonetheless) receive different intestate shares because of their disparate familial roles. The chapter also demonstrates that IIL responds to the needs of the hitherto 'disadvantaged, demeaned, excluded and ignored'[812] categories, such as women.[813] In a nutshell, this chapter answers the first of the two equality questions identified in chapter two, viz: whether the dissimilar succession shares between the sexes in some degrees of familial relationship disadvantage women.

Since a big part of IIL centers on its intestacy arrangement, this chapter discusses in detail both men's and women's specific intestate shares. It, therefore, identifies the categories of heirs according to the *Sunni* juristic school of thought. It then delineates those male and female beneficiaries who receive identical shares. It also illustrates the male and female heirs

[808] These 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 ADrespectively).

[809] See *Qur'an* 4:7. See also Interview 44; FGD with *ustadhaat* (Mombasa, Kenya, 30 October 2015) [hereinafter FGD 3].

[810] While *Qur'aan* 4:11, 12 and 176 enshrine it, *Qur'aan* 4:33 confirms the duality of IIL. Hafiz Ibn Kathir, *Tafsir Ibn Kathir (Abridged)* (2/10, 2nd edn, Dar-us-Salam Publications 2003) 440–41. See also Interview 124.

[811] Anderson, *Modern World* (n 18) 59 and 62.

[812] Fredman (n 64) 713.

[813] Sub-section 3.2.3 identifies other marginalised groups.

who take divergent inheritance portions. The chapter further explains these disproportionate shares.

This chapter also interrogates the reforms to IIL suggested by some critics who challenge the continued existence of the unbalanced portions between some men and some women when both sexes (contemporarily) fend for their families. It does so using its own coined theory: Multicultural, Intersectional and Modified Muslim Feminist Approaches to Equality (MIMoMFAE). It then offers some possible interventions in the present practice of IIL.

3.2. Men's and Women's Identical Access to Inheritance

The *Qur'aan* enjoins both sexes' inalienable right to inheritance.[814] First, it enshrines both men's and women's shares to its mandatory intestate system.[815] Second, it guarantees both sexes as possible beneficiaries of its concurrent voluntary testate arrangement.[816]

3.2.1. The Intestate Arrangement

Qur'aan 4:7 recognises that women have a definite charge to a deceased relative's estate. It postulates that: '[F]rom what is left by parents and those nearest related there is a share for *men* and a share for *women*, whether the property be *small or large – a determinate share*.'[817] This precept thus granted women a right which they did not enjoy before.[818] It also made this right automatic and therefore independent of the deceased relative's prerogative or such other persons'[819] which could possibly threaten the females' access to the inheritance.[820] A male religious leader in Mombasa noted that '[B]ecause of anger, we can choose to disinherit

[814] Note 5 shares this study's conception of inheritance.

[815] See *Qur'aan* 4:7, 11, 12 and 176. See also Interview 44; FGD with *ustadhaat* (Mombasa, Kenya, 30 October 2015) [hereinafter FGD 3].

[816] *Qur'aan* 4:11, 12 and 176 also recognise testacy. The earlier testate prescriptions, *Qur'aan* 2:180 and 240, had also incorporated females.

[817] Ali (n 7) 185. Emphasis added.

[818] Sub-section 3.2.3 discusses the inheritance regime in pre-Islamic Arabia.

[819] Interview with Shufaa Ahmed, *Ustadha*, Sumeiya Integrated Education Center (Garissa, Kenya, 15 December 2015) [hereinafter Interview 36].

[820] Baderin (n 14) 283–84.

others. Because people are greedy, unjust, forgetful and biased over others, the Lord divided inheritance Himself.'[821]

The verse also gave women access to all sorts of the deceased's property. Because it made no distinction between the deceased's small or large estates, *Qur'aan* 4:7 wiped out any emphasis on the identity of the deceased's wealth. Therefore, women – then and always – could inherit any of the deceased's wealth whether it was small or large; movable or immovable; commercial or residential; personal or real; liquid assets or investments; joint or separate; ancestral or self-acquired; and 'matrimonial'[822] or not.[823]

While *Qur'aan* 4:7 did not specify the women's inheritance portions, the subsequent verses did. Thus *Qur'aan* 4:11, 12 and 176[824] outline the shares of various females alongside their possible male counterparts in the same degree of relationship. These heiresses are the deceased's mother, widow(s), sister(s) (full,[825] consanguine[826] and uterine[827]) and daughter(s), as the case may be. *Qur'aan* 4:11, for example, enunciates the fractions for daughters and mothers. *Qur'aan* 4:12 explains the portions for widows and uterine sisters. And *Qur'aan* 4:176 stipulates the divisions for full and consanguine sisters.

These heiresses can employ their inheritance allocations as they please,[828] provided that usage is permissible under *Sharii'ah*[829]. According to a male Muslim scholar in Mombasa, for example, the construction of a sizeable number of mosques in Amu was financed by women out of their succession portions.[830]

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[821] Interview with Yunus Abdul, Imaam, Masjid Ibrahim (Mombasa, Kenya, 26 October 2015) [hereinafter Interview 52].

[822] The researcher has put this word into quotation marks because the concept of matrimonial property is alien to Islam. Instead men and women bear separate property rights even in their marriage. Sait and Lim (n 9) 112; Jamila Hussain, *Islam: Its Law and Society* (1st edn, Federation Press 2011) 145. Both sub-section 4.4.4 and Appendix 2 explain how IIL treats a property which is conventionally identified as matrimonial.

[823] Sait and Lim (n 9) 110 and 112; Ali Khan (n 8) 29; Khan (n 5) 38; Hussain (n 5) 43 and 46.

[824] Appendix 1 reproduces these prescriptions.

[825] That is she is related to the deceased through both parents.

[826] That is she shares the same father with the deceased but each has a different mother.

[827] She comes from the same mother with the deceased but each has his or her own father.

[828] Interview 116; Interview 39; Interview with Hassan Farhan, Scholar, Majlis 'Ulamaa (Nairobi, Kenya, 18 November 2015) [hereinafter Interview 127].

[829] See note 17.

[830] Interview 124. These include Malalo and Mwanahishamu mosques in Mkomani area. Interview 124.

3.2.2. **Testamentary Arrangement**

But besides being the majority of the beneficiaries[831] to this overarching intestate system,[832] Muslim women similarly stand to profit from the testate provisions of the *Sharii'ah*. In all the three verses establishing the fixed shares, the *Qur'aan* prescribes that these intestate entitlements only ensue after the payment of the deceased's legacies and debts, if any.[833] Thus females who have no kinship with the deceased[834] or those who are debarred (partially or completely)[835] from the intestate arrangement because of various nullifying grounds[836] or the presence of other heirs[837] may benefit from the deceased's bequests.[838] Female-oriented charitable causes may profit from this endowment too.[839]

The recognition of testacy had actually preceded the intestate structure.[840] Prior to the imposition of intestacy, the Holy Book had prescribed testamentary dispositions to near relatives. These close relations included a widow or widows,[841] a mother,[842] daughter(s) and

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[831] Six of the nine new heirs specifically recognised by the *Qur'aan* are women. Hussain (n 5) 24; JND Anderson, *Law Reforms in the Muslim World* (Athlone Press 1976) 148. See also accompanying texts to notes 901, 905, 908 and 911.

[832] Khan (n 5) 25.

[833] Kemal Faruki, 'Orphaned Grandchildren in Islamic Succession Law: A Comparison of Modern Muslim Solutions' (1965) 4 Islamic Studies 253, 260. Generally, bequests may seek to continue the deceased's lifetime good deeds or expiate his or her shortcomings. ibid.

[834] For instance adopted or foster daughters or mothers. See notes 945 and 951.

[835] Attending texts to notes 930 to 944 below explain the rule on exclusion (*hajb*).

[836] See notes 926 - 929.

[837] For example granddaughters who are excluded from the intestate arrangement by their parents, uncles and aunties. The daughters of a predeceased deceased's son or daughter may benefit from their grandparents' estate this way. Sait and Lim (n 9) 113; Ali Khan (n 8) 208.

[838] Interview 128.

[839] See also note 20.

[840] Sait and Lim (n 9) 113. See also *Qur'aan* 2:180 – 182; 2:240; 5:106 – 107. Khan notes *Qur'aan* 2:180 which he describes as the original 'Verse of Bequests' was revealed in 2 AH while *Qur'aan* 4:12 was promulgated in 3 AH. Khan (n 5) 230. See also Interview with Asmaa Umar, Ustadha, Madrasatul Inaba (Mombasa, Kenya, 13 October 2015) [hereinafter Interview 41]; Interview 44; Ali al-Wahidi an-Neesaboori, *The Reasons for Revelation (of the Quran)* (Sameh Strauch tr, rev 2, International Islamic Publishing House 2009) 150; Kathir, *Kathir 2/10* (n 810) 388–89 contextualising the descent of Qur'an 4:11 to after the Battle of Uhud which happened in 3 AH. *Qur'aan* 4:12 also descended this time. Interview 76.

[841] See *Qur'aan* 2:240 which prescribed maintenance and residence for a widow while she observes her one-year '*iddah* in her husband's residence. This mourning waiting period was later reduced to four months and 10 days through *Qur'aan* 2:234. Thus *Qur'aan* 2:234 abrogated partly *Qur'aan* 2:240. Hafiz Ibn Kathir, *Tafsir Ibn Kathir (Abridged)* (10, 2nd edn, Dar-us-Salam Publications 2003) 675–76.

[842] The Arabic word '*al-wildayni*' in *Qur'aan* 2:180 – 182 which means dual parents imbues the mother. Anderson, *Modern World* (n 18) 62.

sister(s)[843]. When God later revealed *Qur'aan* 4:11, 12 and 176 and proclaimed specific shares to identified deceased's relatives, these earlier verses on bequests became abrogated.[844] While *Qur'aan* 4:7, 11, 12 and 176 annulled *Qur'aan* 2:180 and *Qur'aan* 2:234, *Qur'aan* 4:12 abrogated *Qur'aan* 2:240.[845]

In fact, the Prophet [PBUH] declared that 'Allah has given each heir his fixed share. So there is no will for a deserving heir.'[846] Otherwise s/he would get an undue advantage over other beneficiaries since s/he would still benefit from the intestate regime.[847] Thus the legacies mentioned in *Qur'aan* 4:11, 12 and 176 relate to the relatives who miss out explicitly and implicitly in these passages and such other person who the legator wishes to pass his or her property to.[848]

But since these three precepts were 'silent as to the extent of this continued power of testamentary disposition,'[849] jurists resorted to the Prophetic Tradition for guidance on how the dual forms of succession could co-exist.[850] The answer was found in the *hadith* narrated by Saad ibn Waqqas, a male Companion of the Prophet,[851] viz: a Muslim can bequeath to a maximum of a third of his or her property.[852] Waqqas related that:

> The Messenger of God visited me at Mecca … since I was near death. So I said to him: "My illness has become very serious. I have a good deal of property and

[843] The phrase 'next of kin' mentioned in *Qur'aan* 2:180 include sisters and daughters (the only females not explicitly mentioned in *Qur'aan* 2:180 and 240). See Ali (n 7) 72. The Arabic word '*aqrabinaa*' which means relatives or kindred is masculine plural and their infers both male and female close relations. See also Interview 124.

[844] Khan (n 5) 230–31; Esposito and DeLong-Bas (n 17) 43. The Holy Text overwrote its earlier verses on a particular issue with others over the same issue over time as it corrected steadily the die-hard habits of the early Muslims of immediate pagan Arab culture. Leila and Morse term this gradual form of correction (through legislation) 'gradualism'. See generally Sayeh and Morse (n 181).

[845] Kathir, *Kathir 1/10* (n 841) 491, 675–76.

[846] See Interview 124; ibid 490; Hafiz Ibn Kathir, *Tafsir Ibn Kathir (Abridged)* (4/10, 2nd edn, Dar-us-Salam Publications 2003) 368.

[847] Interview 124; Interview 69.

[848] Some jurists, however, hold that a legacy may only be made in favour of a specified heir if all the heirs consent to it. Khan (n 5) 32, 228 and 232; Hussain (n 5) 387.

[849] Esposito and DeLong-Bas (n 17) 43.

[850] Note 125 relates the significance of the Prophetic Tradition in *Sharii'ah*.

[851] This means a person who lived during the Prophetic time.

[852] Goolam (n 12) 11.

> my daughter is my only heir. Shall I give away all my property as alms?" He said: "No." I said: "Shall I bequeath two-thirds of my property as alms?" He said: "No." I asked: "Half?" He answered again: "No." Then he said: "*Make a will for one-third and one-third is a great deal. It is better to leave your heirs rich than poor and begging from other people*."[853]

A bequest in excess of a third of the estate is, therefore, invalid. Some scholars, however, opine that such a legacy can only be validated by the consent of the intestate heirs.[854] Moreover, this rule of bequeathable third, only applies 'where there are heirs.'[855] If the deceased has no possible heirs, howsoever remote, s/he can bequeath her or his entire property. The beneficiary would be known as a universal legatee.[856]

3.2.3. Remedying Previous Disadvantages against Women

The reigning IIL is a culmination of a gradual reform of a seventh century Arabian succession system which excluded women.[857] Instead of eliminating the 'unjust'[858] inheritance regime at once, the *Qur'aan* moderated the patriarchal tendencies still extant in the nascent Muslim community over some time.[859] Thus before prescribing specific portions to identified males and females, the *Qur'aan* introduced the stand-alone precepts on testacy. *Qur'aan* 2:180, for instance, required the Believers[860] to bequeath a 'reasonable'[861] amount of their estates to their mothers, daughters and sisters (including their corresponding male

[853] Esposito and DeLong-Bas (n 17) 44. Emphasis added. See also Khan (n 5) 231; Hussain (n 5) 384; Kathir, *Kathir 2/10* (n 810) 384. Thus some early Muslim scholars would recommend the amount of a legacy to a quarter of the estate because a quarter is lesser than a third to keep up with the Prophetic advice. ibid 384.

[854] See note 16.

[855] Khan (n 5) 74.

[856] ibid.

[857] Interview 123; Interview 124; Anderson, *Reforms* (n 831) 148; Anderson, *Modern World* (n 18) 60. According to a joint interview with Musa Shaaban and Ahmed Guyo, Kadhis (Garissa, Kenya, 30 September 20150 [hereinafter Interview 7], this approach was informed by human's conception of utterly novel rules.

[858] Esposito and DeLong-Bas (n 17) 38. See also Khan (n 5) 26.

[859] Ed-Dīn alludes to this conclusion in passing. See Ed-Dīn (n 476) 224.

[860] Described as the 'God-fearing'. See Ali (n 7) 72.

[861] While 'reasonableness' is not defined, it is clear that it related to no 'specific portion'. Interview 124. Therefore, the legator had to leave certain proportions of his property to some female (including male) relatives – even if he was the one determining the shares. Interview 124.

counterparts).[862] And it became sinful to change these legacies[863] save when the executor was correcting an apparent error on the will.[864]

Prior to these earlier testamentary passages, the pre-Islamic Arabian customary laws prevailed. These customs protected the deceased's property within his[865] individual tribe[866] in order to embolden his ever warring clan.[867] And even then, the estate passed to adult able-males (howsoever distant) because they could fight and defend the family (clan) possessions in the warfare community.[868] Weak males and minors (who could not participate in the wars) were thus excluded.[869] Again because tribal identity was patrilineal,[870] only paternal males benefited.[871] Uterine or maternal males were alienated.[872] The paternal males also benefited because of their corresponding responsibilities over their female relations.[873] The ethnic traditions further preferred descendants (sons) to ascendants (fathers).[874] And a testator had unmatched freedom of disposition[875] which endeared fathers.[876]

Females, on the other hand, could not inherit because they 'would no longer belong to the family once they were married'[877] and because they did not participate in the fights.[878] It was

[862] Interview 124; Kathir, *Kathir 1/10* (n 841) 490.

[863] See *Qur'aan* 2:181. See also Interview 124.

[864] See *Qur'aan* 2:182.

[865] The masculine pronoun is purposive because then women 'were themselves property to be bought and sold in marriage, to be assigned in payment of debt and to be owned and inherited by their males.' Khan (n 5) 26. See also note 11.

[866] Ali Khan (n 8) 9. Al-Hibri notes that the 'tribe was the highest political, economic, military and legal authority' which each individual identified with. al-Hibri, 'Herstory' (n 476) 212.

[867] Esposito and DeLong-Bas (n 17) 37; Khan (n 5) 26; Hussain (n 5) 24.

[868] Esposito and DeLong-Bas (n 17) 37; Khan (n 5) 26. See also Interview 40.

[869] Esposito and DeLong-Bas (n 17) 37; Khan (n 5) 26. See also Interview 40.

[870] al-Hibri, 'Herstory' (n 476) 212; Radford (n 8) 165.

[871] Ali Khan (n 8) 8. These were mainly sons and brothers (full or consanguine).

[872] ibid.

[873] ibid.

[874] Khan (n 5) 26; Hussain (n 5) 24–25; Ali Khan (n 8) 8.

[875] Hussain (n 5) 24; Baderin (n 14) 283–84; Ali Khan (n 8) 7.

[876] Kathir, *Kathir 1/10* (n 841) 390.

[877] Esposito and DeLong-Bas (n 17) 37. See also Interview 52; Ali Khan (n 8) 8.

[878] Interview 7; Interview with Khalid Ratemo (Bungoma, Kenya, 9 November 2015) [hereinafter Interview 79]; Interview 39; Interview 40; Interview 41; Interview 71.

rhetoric that a woman was ineligible to inherit because she neither rode on horseback nor carried a sword to fight the enemy as her able male counterpart did.[879] Daughters and sisters were particularly alienated from the inheritance because it was believed that they no longer belonged to their original families upon marriage.[880] Widows, on the other hand, (whose individuality was assumed that it subsumed into their husbands' upon marriage),[881] became 'part of the estate'.[882] A stepson or, in his absence, a brother, inherited a relative's widow(s) alongside that relative's property.[883]

Thus with the initial testamentary injunctions having assuaged this androcentric structure, the *Qur'aan* next enunciated *Qur'aan* 4:11, 12 and 176. These final passages acknowledged both the rights of a deceased to his or her estate and those of his or her relatives to the same property.[884] Moreover, both males and females, old and young, distant and close relatives, ascendants and descendants, paternal and maternal could inherit.[885] In fact, the new heirs introduced by these precepts have a primary right over the estate before the pre-Islamic male relatives[886] share the residue.[887] This attendant shift of 'allegiance from individual tribe to individual family unit significantly raised the status of women in the society.'[888] Thus in separate discussions and interviews with women and men in Kakamega, for example, the

[879] Interview 41.

[880] Ali Khan (n 8) 8.

[881] ibid.

[882] Esposito and DeLong-Bas (n 17) 37. See also Interview 44; Interview 123; Khan (n 5) 26; Mernissi (n 120) 120.

[883] Interview 123; Khan (n 5) 26; Ali Khan (n 8) 8; Mernissi (n 120) 120. See also note 11. Islam, however, abolished the practice of inheriting wives against their will. See note 482. See also Interview 123. It also forbade marriage to father's wives (whether the father is alive or dead). See *Qur'aan* 4:22. See further Ali Khan (n 8) 18.

[884] Esposito and DeLong-Bas (n 17) 38; Khan (n 5) 27. Ibn Kathir notes that 'deserving' heirs assume their inheritance portions 'without the need to (…) be reminded of the favour of the inherited person'. Kathir, *Kathir 1/10* (n 841) 490. See also *Qur'aan* 4:33.

[885] Khan (n 5) 31; Esposito and DeLong-Bas (n 17) 38; Ali Khan (n 8) 10; Hussain (n 5) 24–25.

[886] Anderson, *Modern World* (n 18) 63. See also note 871.

[887] Esposito and DeLong-Bas (n 17) 38.

[888] ibid. See also Coulson (n 17) 29; Ali Khan (n 8) 11; Hussain (n 5) 25; Sait and Lim (n 9) 112. See further note 12.

respondents found that IIL elevates women because, first, it does not exclude married daughters.[889] And second, because it permits the deceased's mother to inherit.[890]

3.3. **Men's and Women's Specific Intestate Shares**

The intestate arrangement recognises essentially two sets of the deceased's relations: those by blood and those by marriage (ie the widower or the widow).[891] But not all the identified heirs charge the estate at once.[892] Instead, IIL classifies the heirs into three ranks: the *Qur'aanic* also known as the Sharers (*dhawul-furuudhw* or *ahlul faraaidhw*);[893] the Agnates or the Residuaries ('*aswabah*);[894] and the Distant Kindred (*ulu-l-arhaam* or *dhawul-arhaam*).[895] It further categorises these three groups into principal heirs (ie those who never miss out in the allocation of the property);[896] and those whose presence alienates[897] or reduces the portions of others.

3.3.1. The Sharers, the Agnates and the Distant Kindred

The Sharers are those male and female beneficiaries whose fractions are explicitly mentioned in the Holy Book eg a quarter, an eighth, a half, a third etc.[898] They thus derive

[889] See FGD 8; FGD 9; FGD 10; Interview with Mwijaka Protus, Judge, High Court (Malindi, Kenya, 2 December 2015) [hereinafter Interview 112].

[890] FGD 9. Chapter 4 narrates how some Kenyan ethnic succession customs alienate various female relatives.

[891] Sait describes IIL as very inclusive because it incorporates a significant number of family members, 'immediate, near and distant'. Sait and Lim (n 9) 109.

[892] See note 19.

[893] Arabic phrase for heirs at law. Interview with Mahmoud Ishaq, Kadhi (Kakamega, Kenya, 11 November, 2015) [hereinafter Interview 85]; Interview 95; *Mohamed Juma v Fatuma Rehan Juma and 6 others* [2015] KC Civil Case No 108 of 2014 (Nairobi) 4.

[894] Arabic phrase for consanguine relations ie those heirs whose 'relation to the deceased is traced without the intervention of female links.' Hamid Khan, *Islamic Law of Inheritance: A Comparative Study with Emphasis on Contemporary Problems* (Law Times Publications 1980) 44.

[895] Arabic phrase for relatives on the maternal side. See also Khan (n 5) 70; *Mohamed Juma* (n 910) 4.

[896] Interview with Abdallah Hajj, Principal, Madrasatul Badru (Amu, Kenya, 22 December 2015) [hereinafter Interview 119'; Ali Khan (n 8) 55.

[897] Interview 123.

[898] Interview 71.

their portions first[899] and from the original estate (as if no other heir's proportion has been deducted from the property).[900]

There are 12 *Qur'aanic* heirs: four males and eight females.[901] The males are: father, true grandfather (in the absence of the father) how high so ever (HHS)[902], widower and uterine brother.[903] The females constitute: mother, true grandmother (in the absence of the mother) HHS[904], daughter, son's daughter howlowsoever (HLS), widow, full sister, consanguine sister, and uterine sister.[905]

The Agnates, on the other hand, only inherit after the Sharers and/or if the latter fail to exhaust the estate.[906] These are predominantly the pre-Islamic male heirs.[907] But they also include four females when they 'coexist with male relatives of the same degree'[908]. Known as residuaries in another's right *('aswabah bil ghayr*), these females are: the daughter (when inheriting with a son); the son's daughter howlowsoever (when inheriting with a son's son); a

[899] Interview 95; *Mohamed Juma v Fatuma RehanJuma and 6 others* [2015] KC Civil Case No 108 of 2014 (Nairobi) 4–5.

[900] Interview 121; Interview 44.

[901] *Mohamed Juma* (n 899) 4.

[902] A true grandfather (ie *al jaddu swahihi*) 'means a male ancestor between whom and the deceased no female intervenes.' Interview 7; Khan (n 5) 77. For example, a father's father, a father's father's father and his father (HHS). In *Sharii'ah*, a father includes a father's father (HHS) in absence of father. Interview 71; Interview 127. While the Sacred Text is silent on the benefit of these substitute relatives, *ahaadiith* and the *Qur'aanic* exegesis of the first three Caliphs explicated this fact. Interview 7; Interview 44; Interview with Hatib Hassan (Kakamega, Kenya, 8 November 2015) [hereinafter Interview 78]; Interview with Khamisi Mwenesi, Imaam, Masjid Jamia – Mumias and Omar Mahmoud, Ustadh, Madrasatul al-Answar Islamiyyah (Kakamega, Kenya, 9 November 2015) [hereinafter Interview 80]; Interview with Abubakar Abdi, Imaam, Masjid al-Hudah (Mombasa, Kenya 17 October 2015) [hereinafter Interview 42]; Interview 95; Anderson, *Modern World* (n 18) 59 and 62.

[903] *Mohamed Juma* (n 899) 4; Khan (n 5) 78.

[904] A true grandmother imports 'a female ancestor between whom and the deceased, no false grandfather intervenes' such as 'a father's mother, mother's mother, father's mother's mother, mother's mother's mother, and father's father's mother.' Khan (n 5) 77. A false grandfather signifies 'a male ancestor between whom and the deceased a female intervenes' eg 'mother's father, mother's mother's father, mother's father's father and father's mother's father.'

[905] *Mohamed Juma* (n 899) 4; Khan (n 5) 78.

[906] Khan (n 5) 70.

[907] Interview 127; Khan (n 5) 87. These are called '*aswabah bil nafs* (Arabic phrase for inherent agnates). See note 871.

[908] Esposito and DeLong-Bas (n 18) 41.

full sister (when inheriting with a full brother); and a consanguine sister (when inheriting with a consanguine brother).[909]

Agnates also consists of two further females when they co-exist exclusively with the deceased's daughters. These are the full sister(s) and the consanguine sister(s). They are referred to as *'aswabah maa al ghayr*[910] and assume the estate after the daughters (or son's daughters) inherit as *Qur'aanic* heirs.[911]

Generally, the agnates take the remainder of the estate after the Sharers have assumed their shares,[912] hence their other name: residuaries. They have no such precise portions[913] and often[914] the *Qur'aan* mentions them, explicitly or implicitly, as taking a share equivalent to that of two females.[915] Sometimes, however, agnates inherit the whole property if no *Qur'aanic* beneficiary exists.[916] And depending on the existence of some heirs, certain heirs can in one instance be Sharers and in another situation be agnates.[917]

The distant kindred, on the other hand, are 'males or females related to the deceased through one or more female links'.[918] They include distant (maternal) uncles and aunties; daughter's children and their descendants howlowsoever; son's daughter's children and their

[909] Khan (n 5) 88; *Re Mohamed Said Bayusuf* [2008] KC Succession Case No 98 of 2008 (Mombasa); *Re Shaban Ngoko Rashid* [2008] KC Succession Case No 97 of 2008 (Mombasa).

[910] Arabic phrase for residuaries with another.

[911] Interview 44; Interview 71; Interview 124; Khan (n 5) 88; Esposito and DeLong-Bas (n 18) 41.

[912] Interview 80; Interview 85; Interview 78; Interview 42; Interview 44; Interview 95; Interview 124.

[913] Interview 79; Interview 7; Interview 71; Interview 127; Interview 124.

[914] This qualification relates to the deceased's father. While he is a *Qur'aanic* heir when the deceased has left a child, the deceased's father is an *'aswabah* when the deceased leaves no child. Interview 80; Chaudhry (n 8) 515. The Holy Book is, however, silent that the father's portion as an agnate is twice as much as that of the deceased mother. In fact in many instances, it has turned out not to be. For example when the deceased has left a spouse, the deceased's father's share becomes lesser than twice as much as of the deceased's mother. Sait and Lim (n 9) 111.

[915] Interview 7; Interview with Anwar Omar, Naibul Kadhi, Pate (Pate, Kenya, 20 November 2015) [hereinafter Interview 93]; Interview 124; Hussain (n 5) 25; Anderson, *Reforms* (n 848) 148. Thus unless this specific rejoinder exists, the portions of '*aswabah* vary. They may be big or small. Interview 123.

[916] Interview 127; Khan (n 5) 87. The Prophetic *Sunnah* guides on the agnatic divisions not expressly mentioned in the *Qur'aan*.

[917] See note 914. See also the accompanying text to note 909 above where a daughter becomes an '*aswabah* when she inherits with a son. Yet she is a *Qur'aanic* heir in the absence of a son. Again, in the absence of a *baitul maal* (Arabic phrase for treasury or exchequer, herein an Islamic Public Treasury) in Kenya, a daughter may become an '*aswabah* if her deceased parent has no son nor does she have paternal uncles. Interview with Mbwana Mustafa, Village Elder, Shella (Lamu, Kenya, 19 December 2015) [hereinafter Interview 114].

[918] Khan (n 5) 87.

descendants howlowsoever; daughters of the full brother, full brother's son, consanguine brother, consanguine brother's son and their descendants howlowsoever; and full, consanguine or uterine sister's children and their descendants.[919]

Distant kindred succeed the estate in the absence of heirs from the preceding two categories[920] and an Islamic Public Treasury.[921] In fact, some scholars hold that these heirs do not inherit at all.[922] But in democracies where the Islamic Public Treasury is inexistent, the distant kindred succeed their shares as it happened in *Re Kamari Wakati Khamis*[923]. In that case, the Petitioner benefited from his deceased aunt's entire estate. He was the son of the deceased maternal brother.[924]

3.3.1.1. Principal Heirs

A principal or primary heir may emanate from either the broad *Qur'aanic* or agnatic categories. These beneficiaries are: the widow or widower; the mother and/or the father (HHS); the son(s) and/or the daughter(s) (HLS).[925] Unless for a proscribed *Sharii'ah* ground such as illegitimacy,[926] responsibility for the deceased's death,[927] and difference of religion,[928] these heirs always enjoy the estate.[929]

3.3.1.2. Modifying Heirs

[919] Interview 85; *Mohamed Juma* (n 910) 5; Khan (n 5) 95–96. The researcher confused these heirs with the agnates during field work. While her research tools read 'residuary rights', her verbal question referred them correctly in Arabic as *ulu-l-arhaam*. Because the respondents understood better the Arabic word than the English one, the confusion of these phrases failed to change the substance of their responses.

[920] Esposito and DeLong-Bas (n 17) 42; Khan (n 5) 94.

[921] See note 917. The first three caliphs applied the Prophetic Tradition to outline these two pre-conditions. Interview 7; Interview 85. Note 902 identifies the caliphs.

[922] See eg Interview 7; Interview 85. Khan, however, notes that a spouse who is a Sharer does not exclude a Distant Kindred. She or he inherits with them. See Khan (n 5) 94.

[923] *Re Estate of Late Kamari, Mohamed Sadiki Mahadhi v Faraj Mzee* [2014] KC Succession Case No 2 of 2011 (Lamu).

[924] See also *Re Estate of Mwanaharusi, Binti Ali Fauzia Abdalla Mwinyi v Mwinyi Abdalla Mwinyi Abbas Dola* [2012] KC Succession Case No 198 of 2010 (Mombasa).

[925] Interview 119; Hussain (n 5) 161; Abdul-Azeem Badawi, *The Concise Presentation of the Fiqh of the Sunnah and the Noble Book* (2nd edn, International Islamic Publishing House 2007) 575–76.

[926] Interview 69; Hussain (n 5) 56–61; Khan (n 5) 48–54.

[927] Khan (n 5) 48–54; Hussain (n 5) 56–61.

[928] Hussain (n 5) 56–61; Khan (n 5) 48–54.

[929] Interview 93; Interview 115; Hussain (n 5) 56–61; Khan (n 5) 48–54.

Vide the dual rules of exclusion or blocking (*hajb*),[930] the presence of a particular heir can sideline another from the distribution matrix completely or partially.[931] Both the three verses and Prophetic Tradition explicitly contain *hajb* rules. Thus under partial exclusion (*hajb nuqswaan*)[932], an heir's share reduces (by half) due to the existence of another.[933] This happens in four instances,[934] viz: a spouse's share in the presence of his or her child; a mother's share when the deceased has left a son or daughter; the granddaughter from the son; and the sister from the father.[935]

In complete exclusion (*hajb hirmaan*), however, an heir loses his or her share because of the availability of another. This occurs in several situations. First, an heir who is related to the deceased through another fails to inherit in the presence of the latter.[936] Thus, a father excludes the deceased's full or consanguine siblings from inheritance[937] because he is the 'bridge'[938] that connects them to the deceased. A deceased's mother, however, does not *hajb* her sons and daughters (whether they are the deceased's uterine or full siblings) because she is always a *Qur'aanic* heir[939] and never assumes an '*aswabah* position,[940] and therefore does not take the whole remaining estate.

Second, a beneficiary nearer in degree to the deceased blocks other members in his or her class who are remotely connected to the deceased.[941] Thus a *Qur'aanic* heir blocks a fellow *Qur'aanic* beneficiary, not an agnate. Therefore a daughter (a sharer), for example, cannot

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[930] Scholars term this Arabic concept as 'propinquity' ie nearness in relation. Khan (n 5) 44; Ali Khan (n 8) 32.

[931] Interview 42; Interview 44; Interview 123; Abdul-Azeem Badawi (n 925) 575.

[932] The Arabic word '*nuqswaan*' which derives from the word '*naqsw*' (to decrease) means decrease by half literally and 'temporarily' contextually. Interview 71.

[933] Interview 123; Abdul-Azeem Badawi (n 925) 575.

[934] Some scholars construe these situations as five since they categorise the spouses (a husband and a wife) separately. See eg ibid.

[935] ibid.

[936] Interview 123.

[937] Interview 123; Hussain (n 5) 52; Khan (n 5) 79.

[938] Interview 123.

[939] See Appendix 1 where *Qur'aan* 4:11 reads that 'if the deceased left brothers (or sisters), the mother takes a sixth.'

[940] Interview 119; Abdul-Azeem Badawi (n 925) 576; Hussain (n 5) 52.

[941] Hussain (n 5) 52; Khan (n 5) 44.

exclude a son's son (an agnate) – who inherits in the absence of his father (the son). Among the agnates, the person with closer blood affinity to the deceased (just like in the distant kindred group) benefits from the remaining estate first.[942] Only in his or her absence does the next agnate in nearer family degree come in.

Third, full siblings block consanguine ones in inheriting their deceased brother's or sister's property.

From the foregoing, therefore, estate distribution commences with the primary *Qur'aanic* heirs. Thus the widow or widower, the mother (or true grandmother HHS), the father (or true grandfather HHS), and the daughter receive their portions first. Only after these heirs have assumed their shares (or are inexistent), do the agnates join in the divisions. The son (or a son's son HLS), as a primary Residuary, leads this second pack. He thus blocks other agnates eg the deceased's full or consanguine siblings.[943] In the absence of a son,[944] however, fellow agnates come in starting with the deceased's father.

3.3.2. Identical Shares

Women inherit identical shares with their corresponding males in the same degree of relationship in two situations. This happens in the cases of mothers and uterine sisters. If the deceased leaves a child (or children) then each of his or her surviving biological parents[945] takes a sixth of the estate. Seemingly, the parents also share a third each when the deceased dies without a child.[946] But because in that situation the father is the principal agnate, the remaining third also reverts to him.[947]As regards uterine siblings, a single sister or brother

[942] Interview 124; Interview 127.

[943] Interview 124; Interview 123; Khan (n 5) 79.

[944] Or his descendants.

[945] Adopted and foster parents (among other guardians) are excluded from the Islamic succession regime. Hussain (n 5) 166. See also accompanying text to note 834.

[946] Chaudhry (n 8) 534.

[947] Interview 119; ibid.

takes a sixth each. If these siblings are more than two, then they share identically[948] a third of the property.[949]

3.3.3. Divergent Shares

In the remaining (majority) situations, women take half as much as their corresponding males' portions in the same degree of relationship. This relates to the shares of widows,[950] daughters, and full or consanguine sisters. A widower, for example, receives half of his deceased wife's estate if the latter leaves no child.[951] But if the wife is survived by a child or more, the widower gets a quarter of this inheritance. Contrarily, a widow receives a quarter if the deceased husband leaves no child; but an eighth if a child or children exist.[952] Clearly, this is a different treatment between the surviving spouses. Subsection 3.3.3.3 below explains this divergent treatment.

Where, on the other hand, a deceased leaves neither parents nor children but full or consanguine siblings; then if he is a man and leaves a sister, she takes half the deceased's estate. If the deceased is female, her brother takes the entire inheritance. If either male or female decedent leaves two or more sisters, the heiresses divide between them two thirds of the estate.[953] But if those left behind are a mix of brothers and sisters, then they collectively

[948] The Arabic word '*shurakaau*' (they share) in *Qur'aan* 4:12 (absent a qualification on the divisible parts) indicates that the divisions are equivalent. Interview 124.

[949] The right of the uterine siblings to the estate remains intact notwithstanding the presence of their full or consanguine counterparts. Khan (n 5) 84; 'Amir (n 5) 13; *Re Estate of Shombari, Hamud Sombo Hamud Shombari Sombo v Zaitun Shombari Hamud Sombo* [2013] KC Succession Case No 129 of 2009 (Mombasa).;

[950] Interview 42; Interview 123.

[951] This includes the wife's children from another marriage, but not her adopted children. Unlike in pre-Islamic Arabia where adopted sons had similar rights to an estate as biological ones, *Sharii'ah* negated such possibility. Sait and Lim (n 9) 124; Yahaya Yunusa Bambale, *Acquisition and Transfer of Property in Islamic Law* (Malthouse Press 2007) 78. See also *Qur'aan* 33:4 – 5; and *Qur'aan* 33:37 read together with *Qur'aan* 4:23. This is because IIL primes blood relatives. See the emphasis in *Qur'aan* 33:6. Generally, however, (non-relative) orphans and destitute children are a responsibility of the entire society. See eg *Qur'aan* 2:177 and 215; 4:8 and 36; and 93:9. *Abdullahi Ismail v Mariam Ahmed and Another* [2015] KC Civil Case No 8 of 2014 (Nairobi) 5–6 discusses these points.

[952] In fact, if there is more than a widow, they share the quarter or the eighth (as the case may be).

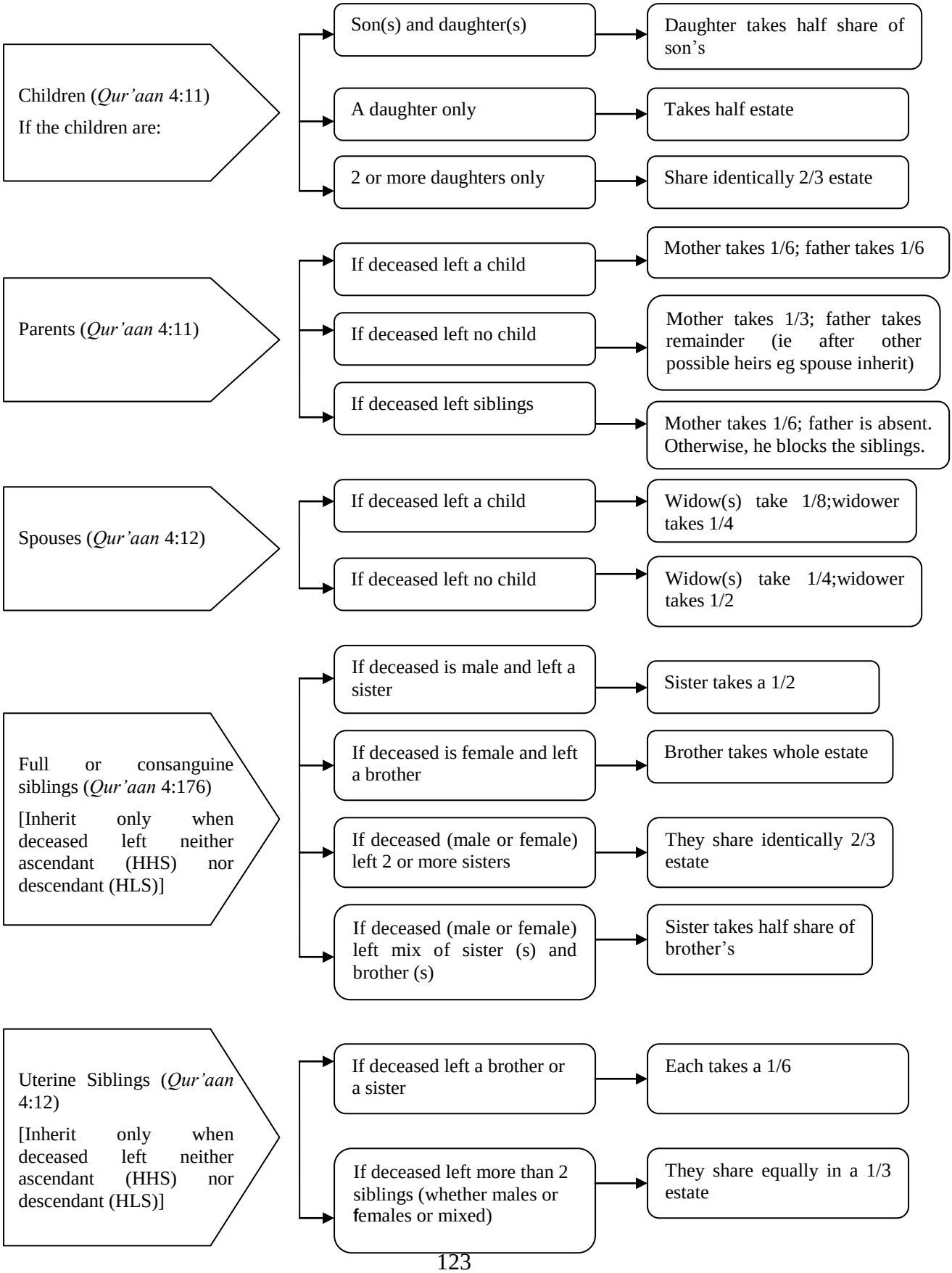
[953] However, the presence of two or more full sisters extinguishes the right of a consanguine sister. Similarly if one full sister is living, she diminishes the share of a consanguine sister or sisters (jointly) to a sixth. Since the maximum collective share allotted to both full and consanguine sisters is two-thirds, then some heirs in that category must be alienated to remain true to this share. Hussain (n 5) 277 and 283; Esposito and DeLong-Bas (n 17) 40–41; Khan (n 5) 84.

share the entire estate with the brothers taking twice as much as their sisters.[954] Like in the case of spouses, the deceased paternal brothers and sisters also inherit disparate shares. Similarly, sub-section 3.3.3.2 below explains the cause to this divergent treatment.

With regard to the deceased's children, if the only surviving child is a daughter; she takes half of the (remaining) estate. If a son, he takes the entire property. When the surviving children are two or more daughters, they jointly share two-thirds of the inheritance. If it is a mix of both a son(s) and a daughter(s), they take the whole property with the son inheriting twice as much as his sister. Figure 1 below illustrates these innumerable fractions.

[954] A full brother, however, extinguishes the rights of a consanguine sister or brother. Hussain (n 5) 270; Esposito and DeLong-Bas (n 17) 41.

Figure 1: Males' and Females' Intestate Shares



3.3.3.1. **Explicating the Divergent Shares**

As indicated in chapter two, these dissimilar divisions have prompted some Western individuals, NGOs, treaty bodies and States as well as Muslim secularists to label *Sharii'ah* discriminatory against women.[955] But MFs read these occasional disproportionate shares as consistent with sexual equality.[956] If these fractions were sex-based, MFs opine, then those between uterine siblings and parents would have been different too.[957] But they are not.

And since more than one ratio prevails in the overall intestate arrangement, then masculinity or femininity is not the legitimate ground to explain the selected different fractions between some males and females.[958] Instead, the true '*illah*[959] behind this disparate shares is moral. It is to facilitate the economic support of the deceased's selected surviving family members, including the corresponding females, by some of their male counterparts.[960] *Sharii'ah* bestows a family maintenance duty on some males. These are the sons, full or consanguine brothers and widowers (or husbands). This duty constitutes part of these males 'dual roles of human agency as detailed in *Qur'aan* 2:177 ie the responsibility towards other creatures: the social-communal roles.[961]

Both a closer look at the application of *Qur'aan* 4:11, 12 and 176 and an intratextual reading of the *Qur'aan* reveal this reason.[962] When one reads these three inheritance verses, s/he discovers three silent rules which direct the intestate divisions.[963]

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[955] See accompanying texts to notes 469 and 787 - 792. See also Interview 123; Interview with Angus Mulili, Public Trustee, Attorney General Chambers (Mombasa, Kenya, 23 October 2015) [hereinafter Interview 49]; Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse University Press 1996) 176; Waris (n 34) 44, 53 and 54.

[956] Barlas (n 102) 146.

[957] Chaudhry (n 8) 537; Ali Khan (n 8) 217.

[958] Interview 123; Chaudhry (n 8) 538–39; Barlas (n 102) 6.

[959] Arabic word for cause or reason.

[960] Interview 71; Interview with Ahmed Hamza, Former Registry Clerk, Kadhis' court (Malindi, Kenya, 1 December 2015) [hereinafter Interview 110]; Interview 123; Interview 119; Interview 42; Osman Muhamed; Interview 39; Interview 115; Mazrui (n 476) 317; Ali Khan (n 8) 216; Chaudhry (n 8) 540–41; Coulson (n 17) 1–2. See also notes 1000 and 1001 - 1002.

[961] Esposito and DeLong-Bas (n 17) 157. See accompanying text to note 441. *Qur'aan* 4:1 explains that humans derive their 'mutual rights' from God. Ali (n 7) 183. *Qur'aan* 4:5, on the other hand, identifies the purport of property as support for self but this support includes others' rights.

[962] Chaudhry adjudges that the inheritance prescriptions do not embody a rationale of their own and therefore exercises individual critical reasoning to derive one through a thematic reading of *Qur'aan* 4:34. Chaudhry (n 8) 540–41. Appendix 1 reproduces *Qur'aan* 4:34.

First, a beneficiary who is more closely blood-related (biologically or legally[964]) to the deceased than another receives a larger share compared to the latter.[965] This explicates, for example, why full or consanguine siblings take a larger share of the inheritance than uterine ones.[966] This is because Islam is patrilineal. According to several interviewed male and female Muslim scholars, the family lineage in Islam is *aqwa*[967] with the father.[968] In fact *Qur'aan* 33:5 says: '[C]all them by (the names of) their fathers: that is juster in the sight of Allah.'[969] Sub-section 3.3.3.2 elaborates on the relationship between the patrilineal nature of Islam and IIL.[970]

Second, an heir who is presumed likely to live longer (therefore with larger future expenses) gets a bigger portion than the one supposedly nearing death.[971] Hence, a daughter receives ½ while the deceased's mother receives 1/6. The presence of a deceased's child further reduces the fractions of the deceased's mother or father to a sixth from a possible 1/3 or more.

Third, a beneficiary with more economic (or financial) responsibilities acquires larger fractions compared to the one with less.[972] This rule explains the disproportionate fractions between the widow and the widower; the son and the daughter; and full or consanguine brother and sister. In fact, a thematic reading of the Holy Book connects this third rule to the

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[963] 'Amir (n 5) 11.

[964] That is as explained by the *Qur'aan*.

[965] Interview 42; 'Amir (n 5) 11.

[966] Abdulkadir (n 42) 277.

[967] Arabic word for stronger or more powerful.

[968] Interview 53; Interview 85; Interview 119; Interview 71; Interview 39.

[969] Ali (n 7) 1056.

[970] This rule also explains why a mother's share is often larger (1/6) than a widow's (1/8) when the deceased's child also exists. It further narrates why when a woman dies and leaves behind a daughter and a widower, the daughter gets ½ of the inheritance while the widower takes ¼. But critics find these arrangements discriminating against the widow. See eg Interview with Opiyo James, Public Trustee, Attorney General Chambers (Malindi, Kenya, 2 December 2015) [hereinafter Interview 111]; Interview with Julius Kiprotich, Public Trustee, Attorney General Chambers (Kakamega, Kenya, 11 November 2015) [hereinafter Interview 87]; Interview with Peter Oloo, Public Trustee, Attorney General Chambers (Garissa, Kenya, 30 September 2015) [hereinafter Interview 11]; Anderson, *Reforms* (n 831) 152.

[971] Interview 42; 'Amir (n 5) 11.

[972] Interview 42; ibid.

passages which place some familial obligations on some males ie *Qur'aan* 2:233; 4:4, 24, 34; 5:5; 33:50; 60:10 – 11; 65:1, 6 – 7.[973]

According to MFs, *Qur'aan* 4:34 (for example) enjoins men with the responsibility of 'breadwinning'[974] for their families.[975] But this duty (*taklif*) is only for some men (*baadhuhum*), not all.[976] To qualify for this role, men must possess two features. They must be both endowed with more 'financial resources'[977] (means) than the women, and they must be actually supporting (financing) these women.[978] A man bereft of any of these dual qualities is therefore not a maintainer of his female relations.[979]

MFs assert that the Holy Book is cognisant of the fact that only some men fulfill these attributes. According to Barlas and Hassan, *Qur'aan* 4:34 is 'normative rather than descriptive'[980] because 'obviously there are at least some men who do not provide for women.'[981] That is why it qualifies that the endowment of more resources is only to some men. This means that not all men are wealthier (or have been so endowed) than women.[982] Some males have identical means to females. *Qur'aan* 4:34, therefore, assists in understanding the inheritance provisions – whether one starts the reading from this precept or the succession passages.[983]

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[973] al-' Āṭī (n 21) 269; Wadud (n 67) 70. Chaudhry's intratextual reading considers *Qur'aan* 4:34 only. See note 962.

[974] al-Hibri, 'Herstory' (n 476) 218; Riffat Hassan, 'An Islamic Perspective' in Karen Lebacqz and David Sinacore-Guinn (eds), *Sexuality: A Reader* (Pilgrim Press 1999) 354.

[975] MFs ascribe general meaning to the dual Arabic words '*ar-rijaalu*' (men) and '*an-nisaa'i*' and retain other Arabic words of the text when interpreting it because all these words determine the ultimate meaning of the precept. In her analysis, for example, Wadud presents this precept thus: 'Men are [*qawwamuna 'ala*] women, [on the basis] of what Allah has [preferred] (*faddala*) some of them over others, [and on the basis] of what they spend of their property (for the support of women).' Wadud (n 67) 71.

[976] al-Hibri, 'Law and Custom' (n 56) 29–30.

[977] Barlas (n 102) 186.

[978] al-Hibri, 'Law and Custom' (n 56) 30; al-Hibri, 'Herstory' (n 476) 218.

[979] al-Hibri, 'Law and Custom' (n 56) 30.

[980] Barlas (n 102) 187.

[981] Hassan (n 974) 354.

[982] Thus 'clearly men *as a class* are not '*qawwamun*' over women *as a class*.' al-Hibri, 'Herstory' (n 476) 218. Emphasis her own. See also al-Hibri, 'Law and Custom' (n 56) 30.

[983] Wadud (n 67) 71.

3.3.3.2. Son's and Daughter's; Full or Consanguine Brother's and Sister's Divisions

As noted above, Islam is patrilineal – just like the pre-Islamic Arabia. This nature of Islam hence ascribes full or consanguine males with the maintenance responsibility over their families in the absence of the father.[984] Thus the son, the full or consanguine brother (ie an inherent agnate)[985] bears this role over their corresponding females. He assumes, automatically, the father's place or position (*maqāmul ab*) ie the father's roles.[986] It is this substitute position of the son, the full and consanguine brother which enables him to give guardianship consent to the daughter's, full and consanguine sister's marriage respectively in the absence of her father.[987]

Thus if the father of a married woman dies, for example, she inherits from his estate. Should the woman's husband divorce her, she will return to her natal family, where her full or consanguine brother (who received two portions during their father's inheritance) must fend for her.[988]

Conversely, a uterine brother (ie a cognate) does not have a similar obligation over his corresponding sister[989] – even if he acts so in reality[990]. This brother cannot also give guardianship consent to his sister (during the latter's marriage) if her father is absent. Instead the sister's care and guardianship lies in the hands of her paternal brother or other paternal male relatives (such as the grandfather and the uncles in that order). Incidentally, this is the same pattern that the priority of agnates follows. It is also the same pattern from which a bride's guardian's consent is sourced during her marriage.

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[984] Interview 39; Interview 119.

[985] See note 907.

[986] Interview 39; Interview 119; Interview 114; Interview 123. According to one of the interviewed Muslim scholars, this relationship between the father, the son or full or consanguine brother corresponds to the Swahili saying that '*mzigo wa kichwani uangukie begani* (ie when the head tires up of carrying a load, the bearer transfers the load to the shoulders). Interview 123.

[987] Interview 114. See also *Qur'aan* 4:25. A valid Muslim marriage ensues when four components exist. These are: the bridal consent, the bride's guardian's consent, dower, and two male witnesses. Abdul-Azeem Badawi (n 925) 372–73.

[988] Interview 114.

[989] Interview 44; Interview 128; al-' Āṭī (n 21) 266; Ali Khan (n 8) 8.

[990] Interview 44.

In the foregoing because a uterine brother has no 'religious duty'[991] to maintain his female counterpart, he does not inherit more than the latter. Instead, their portions match. But since a male agnate (in a 'sibling relationship'[992]) bears a moral duty to care for his corresponding 'specialised female'[993] agnate, he receives more inheritance (possessions) than her. Read differently: because the male agnates take twice as much of the estate as their female colleagues, they bear the responsibility to support them. And because a uterine brother receives identical inheritance to the uterine sister, he has no corresponding duty to maintain her.

In essence, the arrangement of the divisions between sons and daughters on one hand, and full or consanguine brothers and sisters on the other satisfies the third covert inheritance rule. Because sons, full or consanguine brothers have more financial responsibilities over their immediate (paternal) families, they receive more inheritance than the corresponding daughters, full or consanguine sisters who do not, legally, share this responsibility. This rule is also obvious when one looks at the shares between uterine siblings. Because uterine brothers do not have more financial responsibility than their corresponding sisters, they get identical inheritance shares as them.

In actual sense, the third rule (and the siblings' inheritance portions) champions substantive equality. It treats those who are similarly situated (ie the uterine brother and sister) similarly. It also treats those that are differently situated (ie sons and daughters on one hand; and full and consanguine sisters and brothers on the other) differently. Both the uterine sister and brother have no financial responsibility to the family. They thus receive identical shares. In contrast, the son, full or consanguine brother has financial responsibility on his family, he thus receives more inheritance than the corresponding daughter, full or consanguine sister who bears no such responsibility.

If the son, full or consanguine brother were treated identically to the daughter, full or consanguine sister (as the case may be), then this would have indirectly discriminated against

[991] al-' Āṭī (n 21) 269.

[992] Chaudhry (n 8) 540.

[993] ibid. See also note 908.

them on the basis of their economic means.[994] Yes while both the son and daughter (for example) are children of their deceased father or both parents, the son has more responsibility to the family. Justice thus recommends that he gets a larger share. Similarly while both the full or consanguine brother and sister are paternally related to the deceased, the full or consanguine brother bears responsibility over his full or consanguine sister (and the family at large) – while the sister has none. The principle of equality, thus, demands that he receives a larger share. Otherwise, he would be indirectly discriminated against on account of his economic means if he were to receive an identical inheritance share to his sister.

The patrilineal nature of Islam also retains much of the deceased's property in his or her family (ie the paternal side).[995] Because an inherent male agnate continues the lineage of this family (ie their children bear the name of this family)[996], he benefits more from the deceased's wealth. On the other hand since a female's children belong to her husband's family, she receives less property (for herself only)[997] – unless there is no male agnate howsoever remote. One of the interviewed male scholars noted that IIL scholars opine that: *banunaa banu-abnainaa banuna, wabanatunaa abna-uhuna banu rijali 'abaidi*[998].

This reasoning on the source of lineage also explains why a single daughter, full or consanguine sister takes only a half of the estate while their corresponding males receive the entire property when inheriting alone.[999] It also explains why these females (when two or more) assume only two-thirds of the inheritance while their corresponding males exhaust the estate.

3.3.3.3. Widow's and Widower's Divisions

[994] This argument can be sustained under article 27(5) of the 2010 Constitution because the word 'including' in that provision indicate that the list of the protected characteristics therein is non-exhaustive. See also article 259(4) (b) of the 2010 Constitution.

[995] Interview 119.

[996] See the accompanying text to note 969.

[997] Interview 39.

[998] Arabic phrase for: our sons' sons are our sons; and the sons of our daughters are sons of strange males. Interview 119.

[999] Interview 39. In *Mariam Muhaji Abdalla v Ummulkura Abdallah* [2014] KC Succession Case No 2 of 2014 (Lamu) 8, the court noted that these females fail to exhaust the inheritance because they are inheriting as Qur'anic heirs. See further notes 908 and 917.

The rationale to a widower's double share compared to a corresponding widow seems to stem from both a man's obligation to paying dowry to the woman he intends to marry and to maintaining both his existing children and the ensuing ones after the new marriage.[1000] On one hand, *Qur'aan* 4:4, 24; 5:5; 33:50 and 60:10 – 11 require men to give dowry to women before wedding them. This wedding gift becomes a woman's consideration to relinquishing her modesty to a strange man.[1001]

Contrary to common practice, therefore, dowry belongs to the bride (to be) and the power to fix it (ie its nature and size) lies with her. Neither her family (including her parents) nor the groom (to be) can dictate the nature and size of the dower.[1002] The wedding gift can thus be anything permissible in Islam (visible or invisible; tangible or intangible) and of whatever size(large or small) depending on the woman's choice. And she elects how to appropriate it including donating some to her husband.[1003]

Dowry remains the woman's property during and after marriage,[1004] whether or not the two consummate the marriage.[1005] In fact, if no specific amount is fixed and the two divorce, the husband must give the woman a reasonable gift, nonetheless.[1006] *Qur'aan* 4:19 – 21 admonishes divorcing males against taking forcefully or by trickery a part or the entire dower from their immediate former wives. Doing so, the Holy Text notes, is sinful.[1007]

Qur'aan 2:233; 65:1, and 6 – 7, on the other hand, place the duty of family maintenance on husbands.[1008] While these precepts regulate family maintenance upon divorce,[1009] they

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[1000] Interview 85; Interview 41; Interview 127; Interview 44; Interview 119; Interview 121; Mazrui (n 476) 317.

[1001] See *Qur'aan* 4:24. *Qur'aan* 4:21 also infers a similar conclusion.

[1002] But Prophetic tradition recommends a reasonable amount to bring blessings to the union.

[1003] See *Qur'aan* 4:4.

[1004] Whether upon divorce or death of either party.

[1005] If the parties divorce before consummation of the marriage, the woman takes half of the dower. But the man is enjoined to give her the remaining half as well because doing so is 'nearest to righteousness'. Ali (n 7) 97. If a spouse dies before remittance of the dower, then the unpaid dowry constitutes the deceased's estate or debts, as the case may be. Khan (n 5) 32. See the accompany text to note 218.

[1006] See *Qur'aan* 2:236.

[1007] See *Qur'aan* 4:20.

[1008] Appendix 1 reproduces them.

[1009] That is children's feeding and clothing; and divorced wife's shelter and maintenance during her waiting period. This waiting period is three menstrual cycles; or three months for post-menopausal women; or the end

reminisce of the family life during marriage. The Prophet also enunciated this fact expressly in his Farewell Sermon.[1010] Hence a married man has a religious duty to care for his wife and children.[1011]

Thus since upon the demise of his wife, a widower is likely to remarry and would (therefore) give (another) dowry to the in-coming wife, the Holy Book tends to this need by allocating him a larger share. This bigger portion also insulates the widower's continued responsibility over his children (of the just-ended marriage) as well as his novel wife and his future children should he remarry. The widow who bears no family maintenance obligations,[1012] on the other hand, keeps her inheritance for personal use.[1013] In fact if she remarries, she would receive another dower. Meanwhile, the children's respective fractions maintain them until they reach the age of majority[1014] whereupon the children assume them.[1015]

Just like the divisions of the son and daughter; and full or consanguine brother and sister; those of the widow and widower also conform to the third silent inheritance rule. Because (a majority of) widowers bear more financial responsibility – legally – over their families compared to their respective widows, they receive a larger inheritance fraction.

This arrangement, again, illustrates substantive equality. While both the widower and widow have lost their spouses (and therefore are situated similarly), they have different realities. The former has a legal duty to fend for his children and possibly to pay dowry if he

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of pregnancy for an expecting woman. See *Qur'aan* 2:228 and 65:4. Note 1578 explains how this waiting period ensues.

[1010] See note 435. See also Safi-ur-Rahman Al-Mubarakpuri, *The Sealed Nectar: The Biography of the Noble Prophet (SAW)* (Darussalam 2011) 611.

[1011] Said Abdullah Seif Hatimy, *Woman in Islam: A Comparative Study* (Islamic Publications 1979) 29; Badawi (n 226) 23.Wadud (n 67) 73 explains the rationale of bestowing this responsibility on fathers.

[1012] Interview 127; Interview 6; FGD 3; Interview 12.

[1013] Interview 127; Interview 44; Interview 11; Interview with Adam Hamza, Advocate of the High Court (Mombasa, Kenya, 29 October 2015) [hereinafter Interview 63].

[1014] In Islam, this age may be less or more than 18. Bowry (n 42); Ali (n 7) 683. The litmus test is whether the orphans have attained both physical and mental maturity; and understand particularly how to manage their properties. See *Qur'aan* 4:2, 5 – 6; 6:152; 17:34; and 18:82 in Appendix 1. The draft Kadhis' Court Bench Book 2018, however, places this age at 18 to coincide it with the country's mainstream laws. See The Judiciary of Kenya, 'Kadhi's Court Bench Book 2018' (The Judiciary of Kenya no date) 219. It is a principle of *Sharii'ah* that certain matters conform to the traditions (or rules) of the land.

[1015] Notes 509 and 1993 relate how to manage the children's wealth before they become of age.

chooses to remarry (as well as maintain the ensuing family). The latter (on the other hand) though she may actually provide for her children, she has no such legal duty of family maintenance. Her inheritance share is for her own use. The upkeep of her children should actually ensue from the children's respective inheritance divisions provided that such usage is necessary and not wasteful.

In the foregoing, therefore, the disparate shares between certain categories of the sexes do not intend to disadvantage women.[1016] These differences are positive.[1017] They are also purposeful and rational. *Sharii'ah* recognises that since some males bear financial responsibilities over their family members, it is only just if these males are 'compensated'[1018] for this burden. If these men were to inherit like their female counterparts and still provide for them, the law would have disfavoured the males.[1019] Such a scenario would violate men's right to property. It would also constitute *dhulm* which attribute, as seen above,[1020] God distances Himself innumerably from.

Again if the distinction were truly sex-based, then the relevant inheritance prescriptions would be invalid because they violate one of the two fundamental pillars of Islamic legal theory: *maqaaswid ash-Sharii'ah*[1021]. This conclusion is unthinkable, possibly heretic, since the succession passages just like any other *ayah* are derived from the *Qur'aan*, God's Word.

The ultimate intent of *Sharii'ah* (which is promotion and protection of the well-being of humans) is reached when a law, a principle or a policy preserves the five essentials of life.[1022] As noted earlier, these are: religion, life, intellect, progeny, and private property or wealth.[1023] Therefore, any law that 'unjustly deprives any human being'[1024] of these

[1016] Interview 63.

[1017] One of the interviewed male Muslim scholar opined that '[*K*]*ingi cha mwanamume ni kidogo, na kidogo cha mwanamke ni kingi* (a swahili phrase for a larger male's portion is ultimately small and a female's smaller portion is ultimately large) because of the males' attending responsibilities. Interview 119. See also *Re Estate of Omar Babu, Fatma Ghalib Muhammed and Sudi Mwiti Omar* [2015] KC Succession Cause No 14 of 2015 (Nairobi).

[1018] Chaudhry (n 8) 544. See also Esposito and DeLong-Bas (n 17) 46.

[1019] Interview 95; Chaudhry (n 8) 544.

[1020] See the accompanying text to note 409.

[1021] Arabic word which means the objectives or intent of the *Sharii'ah*. The second pillar is *ta'lil* (Arabic term which means the logical relationship between a precept and its effect). Chaudhry (n 8) 524 and 539.

[1022] See note 98.

[1023] Chaudhry (n 8) 522.

essentials would be rendered void because the letter of the law cannot defeat its intent.[1025] Hence, since *Qur'aan* 4:7 accords men and women an identical right to succeed their deceased relative's estate, it would be inapt for the same Text to limit a woman's share just because she is female.[1026]

3.4 Circumstantial Incidences when Heiresses Receive Larger Shares

Despite women's explicit identical or lower shares than their male counterparts', some females receive identical or greater portions than males in certain combinations of existing heirs.[1027] These include: first, when the deceased's daughter is inheriting with the deceased's father. The father first takes 1/6 and the daughter ½. The remaining 2/6 next reverts to the father as an agnate. Both eventually receive ½ each. Second, when the deceased's daughter succeeds the estate together with a widower. The daughter takes ½ and the widower receives ¼. As noted earlier, in the absence of both agnatic and distant kindred heirs (however remotely) as well as the Islamic Public Treasury, the daughter would add the remaining ¼ share (as an agnate) to her already larger fraction. Third, when a full sister inherits with a widower. Each takes his or her ½ share.[1028]

Fourth, when the deceased's daughter inherits in the presence of a widow and full or consanguine brothers. The widow takes her 1/8 share, the daughter receives her ½ share, and the brothers share the remaining 3/8 identically as agnates. Thus in *Re Estate of Ali Khamis Jagina, Mohamed Khamis Jagina v Asmaa Ali Khamis Jagina*,[1029] where the deceased left two wives, one daughter, two (full) brothers and a (full) sister, the daughter received ½ of the estate or 20/40; the widows shared an 1/8 identically (5/40), every brother received 6/40 and the sister got 3/40.[1030]

[1024] ibid.

[1025] Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihād* (Other Press 1994) 222–23. The intent of *Sharii'ah* is derived either from an attending precept or the *Qur'aan* holistically. Chaudhry (n 8) 539.

[1026] Chaudhry (n 8) 522; Badawi (n 226) 23.

[1027] Interview 42; Interview 63; Chaudhry (n 8) 537.

[1028] See also ibid 535–36 which gives further examples.

[1029] *Re Estate of Ali Khamis Jagina, Mohamed Khamis Jagina v Asmaa Ali Khamis Jagina* KC Succession Cause No 46 of 2012 (Mombasa).

[1030] See also *Re Estate of Khalid Mwidadi Salim* KC Succession Cause No 19 of 2012 (Mombasa); *Re Estate of Amina Zaidi* [2012] KC Succession Cause No 40 of 2012 (Mombasa).

In the foregoing and as multiculturalists opine, IIL is more nuanced than its expressed message which largely affords women lesser inheritance than men. One needs to unpack this law to reveal its egalitarian content. Its seemingly discriminatory provisions may actually not be so.

3.5 Addressing the Contemporary Reality of Women Providing for their Families

Notwithstanding the premises on the disparate shares between certain sexual categories, critics (including some MFs) note that familial obligations have presently changed. A lot of women today provide for their households by fending for the children, relatives and supporting their husbands to meet family goals.[1031] Again, save for husbands, sons, full or consanguine brothers are increasingly reluctant to maintain their corresponding female relations.[1032] Society has become individualized and religion rarely determines people's decisions.[1033] Islamic family law has thus been rendered redundant in contemporary Muslim lives.[1034] In these circumstances, the commentators surmise, distributing the estate in accordance with the *Qur'aanic* injunctions will not achieve the 'equity'[1035] the Holy Book had in mind.[1036]

These critics (therefore) suggest several adjustments to the application of IIL to keep it true to this *Sharii'ah* objective. First, some MFs opine, Muslims must consider 'the actual *naf'a* (benefit) of the bereft'.[1037] Thus, 'if in a family of a son and two daughters, a widowed mother is cared for and supported by one of her daughters,'[1038] it would only be just if this supporting daughter gets the largest share. Second, the (Kadhis') courts must ensure that men who get greater fractions support their women folk.[1039] There is no point in giving these males more shares when they fail to perform the functions that necessitated the larger

[1031] Sisters in Islam (n 31) 39; Mazrui (n 476) 317.

[1032] Interview 115; Annette Mbogoh, Programme Coordinator, Kituo cha Sheria (Mombasa, Kenya, 21 October 2015) [hereinafter Interview 46]; Sisters in Islam (n 31) 39; Mazrui (n 476) 317.

[1033] Interview 46.

[1034] An-Na'im, *Reformation* (n 955) 19.

[1035] Wadud (n 67) 87.

[1036] Interview 46; Mazrui (n 476) 317–18.

[1037] Wadud (n 67) 87.

[1038] ibid.

[1039] Interview 46.

inheritance in the first place.[1040] Otherwise, the impact of the law becomes discriminatory.[1041] Third, IIL should adopt identical shares between the sexes as espoused in international human rights documents[1042] to match the attending reality, viz: reduced men's and increased women's traditional responsibilities.[1043]

While the actual roles between some men and women have changed in many families, some of these suggestions imply an examination of the entire corpus of Islamic family law.[1044] Because of the fusion of IIL with the laws of marriage and divorce,[1045] adopting general identical inheritance shares across all categories of familial relationships (for example) means altering the *Sharii'ah* rules on marriage and divorce too. This result raises both legal and *Sharii'ah* complexities which in turn defeat the proposal *ab initio*. This part now examines these complexities and suggests some plausible interventions to this present reality.

3.5.1 The Complexity of General Identical Shares

Some modernist scholars intimate that the call for reform is not to change the revealed text but its understanding.[1046] This is because religion is different from religious knowledge (*ma'arifatu diin*).[1047] While the former is static, the latter changes with time.[1048]

But while this understanding is true, the suggested reform in IIL is to abandon the *Qur'aanic* prescriptions relating to it. An-Naim, for instance, urges Muslims to abandon the Madinah prescriptions (and its *Sunnah*) relating to human interaction and instead to conform to the Makkan precepts.[1049] To An-Naim, the former passages have served their purpose and

[1040] Interview 46.

[1041] Interview 46.

[1042] Interview 46; Sisters in Islam (n 31) 39; An-Na'im, *Reformation* (n 955) 179.

[1043] Sisters in Islam (n 31) 28.

[1044] Interview 40.

[1045] Sisters in Islam (n 31) 38; Sait and Lim (n 9) 135. See also sub-section 3.3.3.1.

[1046] See Soroush in Faisal Bodi, 'A Conversation with Abdolkarim Soroush', *Q-News International* (London, 14–17 June 1996).

[1047] ibid.

[1048] ibid.

[1049] An-Na'im, *Reformation* (n 955) 179–80. See note 384. A plurality of the *Qur'aanic* provisions relating to creating order in the nascent Muslim society (ie those which established legal tenets) was revealed in Madinah, then the nucleus of the Islamic State. Interview 44; Esposito and DeLong-Bas (n 17) 3. The earlier

the latter ones (though impractical then) are now relevant because they enjoin human solidarity.[1050] In particular, An-Naim proposes abandoning *Qur'aan* 4:34 and all other verses engendering 'discrimination against women'[1051] because women are no longer dependent on men.[1052] In fact, An-Naim suggests that family laws in Muslim countries should not be founded on *Sharii'ah* because family law – just like other aspects of law – should be based on the political will of the state, not the will of God.[1053]

3.5.1.1 Abandoning a *Qur'aanic* Precept is an Impossible Proposal to Muslims

Since all the three areas of Islamic family law relating to IIL source their injunctions from the *Qur'aan*,[1054] the word of God, it is impossible for a majority of Muslims to fathom abandoning them, leave alone varying any of their aspects. *Qur'aan* 10:15, 15:9 and 69: 44 – 47 negate the alteration of the *Qur'aan* even by the Prophet.[1055] In fact, the self-abrogation of the Holy Book ceased a year to the Prophet's demise during his Farewell Sermon.[1056] During this address, *Qur'aan* 5:3 descended and partly read: '[T]his day have I perfected your religion for you, *completed* my favour upon you, and have chosen for you Islam as your religion.'[1057]

The concluding words of *Qur'aan* 4:11, 12 and 176, on the other hand, are emphatic that the inheritance portions (including some women's lesser inheritance shares) are fixed by God, the All-Knowing.[1058] *Qur'aan* 4:11, for example, reads: '*faridhwatan min Allah*'[1059].

Makkan passages had targeted predominantly on building *iiman* (Arabic word for belief) in the Islamic message among the large pagan Arabs and small Muslim community. Interview 44. See note 6. See also the accompanying text to note 350.

[1050] An-Na'im, *Reformation* (n 955) 180.

[1051] ibid 55.

[1052] ibid 54–55 and 180.

[1053] An-Na'im, *IFL* (n 124) 20. An-Naim opines that even then, the will of God is only lived through human agency which includes conception and development of normative values. ibid.

[1054] Sait and Lim (n 9) 107.

[1055] Interview 40.

[1056] Interview 40.

[1057] Ali (n 7) 245. Emphasis added.

[1058] See also *Qur'aan* 8:75 and 33:6 which proclaim that inheritance rights are inscribed in the Original Plan of Allah, the Preserved Tablet. Hafiz Ibn Kathir, *Tafsir Ibn Kathir (Abridged)*, vol 7 (7/10, 2nd edn, Dar-us-Salam Publications 2003) 44. While the *Qur'aan* was revealed over 23 years (see note 384), its complete

Not even the Prophet had a say on the disparate divisions.[1060] Believers cannot, therefore, question them.[1061] In fact, *Qur'aan* 33:36 precludes Muslims from doing so.[1062] Disputing these fractions, irrespective of the attending circumstance, therefore, becomes blasphemous.[1063]

The admonition in *Qur'aan* 4:14, which continues *Qur'aan* 4:13, also makes Believers to refrain from varying the law despite the changed socio-economic realities.[1064] *Qur'aan* 4:14 postulates that 'But those who disobey Allah and His Messenger and transgress His limits will be admitted to a Fire, to abide therein and they shall have a humiliating punishment.'[1065] On its part, *Qur'aan* 4:13 reads: 'These are limits set by Allah; those who obey Allah and His Messenger will be admitted to Gardens with rivers flowing beneath, to abide therein (forever) and that will be the supreme achievement.'[1066]

The impossibility of challenging the *Qur'aanic* precepts is not alien to the *Qur'aan* alone. Several national constitutions also preclude contesting their validity. The 2010 Constitution, for example, obviates a challenge of its validity or legality 'by or before any court or other State organ.'[1067] It would thus be double-standards to require Muslims to question their primary source of family law.

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version had been descended at once to the First Heaven from the Preserved Tablet. Kathir, *Kathir 10/10* (n 384) 541–42. See *Qur'aan* 85:22 and 97:1. *Qur'aan* 15:9, therefore, promises its retention to this Eternal Decreed Design ie no human or circumstance can alter it – after all.

[1059] Arabic phrase for 'these are settled portions ordained by Allah'. Ali (n 7) 187. Note 17 summarises the Islamic conception of property.

[1060] Interview 2; Interview 39; Interview 40; Interview 127.

[1061] FGD with women (Garissa, Kenya, 30 September 2015) [hereinafter FGD 1]; Interview with MunaBuhem (Garissa, Kenya, 14 December 2015) [hereinafter Interview 29]; Interview with Hani Kawa (Garissa, Kenya, 28 September 2015) [hereinafter Interview 5].

[1062] It proclaims: '[I]t is not fitting for a believer, man or woman when a matter has been decided by Allah and His Messenger, to have any option about their decision: if anyone disobeys Allah and His Messenger, he is indeed on a clearly wrong Path.' Ali (n 7) 1068.

[1063] Interview 2.

[1064] Ha-Redeye notes that these dual verses 'essentially preclude modifications of estate distribution.' Ha-Redeye (n 9) 13. See note 9.

[1065] Ali (n 7) 188.

[1066] ibid. See also Sait and Lim (n 9) 109 naming the harsh penalties for consuming orphan's property in Qur'an 4:10.

[1067] See article 2(3). Article 260 defines a State organ as 'a commission, office, agency or' such other body established by the constitution.

For Believers, therefore, the Islamic familial 'order'[1068] between some males and some females would remain so even when a part of the former category has reduced its duties while a section of the latter category has increased its obligations.[1069] Human traditions, however well-intentioned, cannot re-adjust this arrangement.[1070] While circumstances may compel some women to support their children, parents and siblings (including their full or consanguine brothers), this help translates into kindness and not a legal duty.[1071] These females' good acts will be recompensed (in this world, in the next or in both). The *Qur'aan* prescribes compensation for one's good act innumerably.[1072] Contrarily, if a female relative cares for a family member who later dies, she can demand her compensation legitimately from the deceased's estate.[1073] But God's inheritance plan cannot be upset because of her charity.[1074]

Even then, there are no significant numbers of Muslim women globally[1075] who have assumed maintenance roles[1076] to validate (if at all) reforming the law. Thus the fact that men are not honouring their responsibilities is not a reason to make Muslims abandon the *Qur'aan*.[1077] These males' irresponsibility suggests two things. First, that these men are ignorant[1078]; or second, they are sinning intentionally. The antidote to the ignorant is to educate them on IIL.[1079] As for the deliberate violators of God's law, society must admonish them against their sin of omission[1080]. But if they persist in their vices, they remain

[1068] Interview 114; Interview with Mwinyi Khamis, Village Elder, Kichokwe (Pate, Kenya, 20 November 2015) [hereinafter Interview 96].

[1069] Interview 114; Interview 127.

[1070] Interview 114.

[1071] Interview 123; Interview 42; Interview 116.

[1072] See eg *Qur'aan* 2:110, 261 – 262, 272, 277.

[1073] Sharif Chaudhry (n 432) 75.

[1074] Interview 42; Interview 119; Interview 69; Interview 80.

[1075] Pew Forum, a US non-partisan and non-advocacy organisation, estimated the worldwide Muslim population at 1.6 and 1.9 billion in 2010 and 2020 respectively. A majority of this populace (87 – 90%) is *Sunni*. See Pew Research Center's Forum on Religion & Public Life (n 274) 14, 16 and 18.

[1076] Interview 40.

[1077] Interview 85; Interview 39.

[1078] See note 532.

[1079] Interview 2.

[1080] Interview 127.

individually answerable for breaking God's law.[1081] Their non-observance of IIL is a matter between them and their Creator.[1082] The rest of the society cannot bend the law because certain males contravene it.

3.5.1.2 IIL is an Enduring Law

Critics also note that because all other social-communal aspects of a Muslim community (eg governance and economy) have been secularized,[1083] Islamic family law should do the same.[1084] They construe the continued *Sharii'ah* guidance on this area of law as a 'political expediency'[1085] of Muslim societies to subject women to downtrodden positions, rather than the law's close association with the *Qur'aan*.[1086] As demonstrated above,[1087] however, IIL derives largely from the *Qur'aan* and *Sunnah* (including Makkan *Sunnah*).[1088] Indeed it is IIL detailed and explicit tenets[1089] which render any of its suggested reforms hotly debated and struggling for legitimacy.[1090] This reason also explains why IIL, today, remains largely in its original version.[1091]

Its only surviving change (in some countries) is the mandatory bequest to grandchildren.[1092] This 19th century addition, which is commonly referred to as an 'obligatory bequest', seeks to provide for the children of a predeceased son[1093] (or both sons

[1081] Interview 39; Interview 114; Interview 127. The accompanying text to note suggests 1131 another intervention.

[1082] An-Na'im, *IFL* (n 124) 18.

[1083] ibid 17–18; Sait and Lim (n 9) 107.

[1084] An-Na'im, *IFL* (n 124) 17–18.

[1085] ibid 18.

[1086] ibid 18–19. Sait, Lim and Anderson note separately that the *Qur'aan* exposes IIL more compared to other areas of law. Sait and Lim (n 9) 107; JND Anderson, 'Recent Reforms in the Islamic Law of Inheritance' (1965) 14 The International and Comparative Law Quarterly 349, 349.

[1087] See sub-sections 3.2.1 and 3.2.2.

[1088] The *hadiith* on the permissible size of a bequest is Makkan. See note 853. See also Goolam (n 12) 11.

[1089] Sait and Lim (n 9) 107; Anderson, *Modern World* (n 18) 59 and 60; Anderson, 'Recent Reforms' (n 1086) 349.

[1090] Sait and Lim (n 9) 142.

[1091] Interview 124; ibid 107; Fleming (n 189) 233; Anderson, *Modern World* (n 18) 75; Anderson, 'Recent Reforms' (n 1086) 351.

[1092] Anderson, *Modern World* (n 18) 76–77.

[1093] Article 267 Law of Personal Status 1953 (Syria); and articles 266-69 Code of Personal Status 1958 (Morocco). Khan (n 5) 180; Anderson, 'Recent Reforms' (n 1086) 358.

and daughters[1094]) where their deceased grandparent has failed to do so.[1095] Thus the court gives the orphaned grandchildren of what their predeceased parent would have received had s/he survived her or his parent provided that this portion does not exceed the bequeathable third. If (however) the grandparent has left a smaller legacy or gift for the grandchildren, the court will increase it to the equivalent of what the orphaned children's parent would have inherited or the bequeathable third – whichever is less. Where the grandparent has not made any bequest to the grandchildren, the court will assume s/he has. And where the grandparent has made bequests to such other persons or initiatives, the obligatory bequest takes precedence within the permissible third.[1096] The obligatory bequest is then apportioned among the grandsons and granddaughters in the ratio of 2:1.

But this reform violates IIL innumerably[1097] which fact undermines its validity. First, its origin is premised on the abrogated *Qur'aan* 2:180.[1098] Second, the obligatory bequest permits unchecked alteration of the grandparent's other legacies.[1099] This tendency defies *Qur'aan* 2:181[1100] which precept proscribes changes to a deceased's will.[1101] A variation is only allowed, vide *Qur'aan* 2:182, if the testator is partial, commits a wrong or violates the testamentary rules. Third, the obligatory bequest bestows on the grandchildren a right which did not even exist for their predeceased parent. As earlier outlined,[1102] inheritance rights ensue only after the death of the owner of the property. Fourth, the reformers assume (wrongly) that these grandchildren are destitute and therefore the grandparent should provide

[1094] Sections 78-80 Law of Testamentary Disposition 1946 (Egypt); articles 91 and 92 Code of Personal Status 1956 (Tunisia); articles 180 and 181 Personal Status (Provisional) Act No 61/1976 (Jordan); article 169 – 172 Law No 84-11/1984 (Algeria); and articles 227 and 291 Act No 51/1984 in the matter of Personal Status (Kuwait). Khan (n 5) 180; Anderson, 'Recent Reforms' (n 1086) 358.

[1095] Apparently, this method remedies the 'injustice' *Sharii'ah* inflicts on already orphaned children by allowing their uncles and aunts to bar the grandchildren from their grandparent's estate. Anderson, *Reforms* (n 831) 153–54; Anderson, 'Recent Reforms' (n 1086) 350 and 356. See note 837. The reform originated in Egypt and was adopted in the other countries with or without variations.

[1096] Where the deceased has died intestate completely, the obligatory bequest is extracted from the heirs' portions proportionately.

[1097] Khan (n 5) 183–91; Anderson, 'Recent Reforms' (n 1086) 360–62 highlight some of these deficiencies.

[1098] Sait and Lim (n 9) 124; Khan (n 5) 182; Anderson, 'Recent Reforms' (n 1086) 359; ibid 155. See notes 840 and 844.

[1099] Faruki (n 833) 259.

[1100] Appendix 1 reproduces it.

[1101] See also *Qur'aan* 5:106 reproduced in Appendix 1.

[1102] See note 5.

for them. Yet – unless their predeceased parent had nothing – the grandchildren benefitted from their parent's estate.[1103]

While the obligatory bequest continues to exist despite its shortcomings, provisions relating to general identical intestate shares between the sexes have since failed. First in some Arab countries, these provisions have been confined to the deceased parents' cultivation rights over government land (*mīrī*) and not the deceased's personal land (*mulk*).[1104] Thus while both daughters and sons receive identical user rights over the government land, IIL still governs the deceased's own property.[1105] Second in some Arab countries, even these identical cultivation rights have been stopped.[1106] Third, a group of Kenyan Muslim women demonstrated in the streets of Nairobi in 2000 against an Equality Bill which had proposed identical inheritance rights between all men and women.[1107] The demonstrators faulted the Bill for both contradicting their religion and for perpetuating the abandonment of their Islamic faith.[1108] To date, the Bill has not become law.

The difficulty of enjoining general identical inheritance shares between the sexes across all categories of familial relationship in predominant Muslim communities; and Muslim women's own rejection of this arrangement manifest Muslims' adherence to their Sacred Text and its values. Such compliance defeats the dismissal of IIL as antique by mainstream feminists. It also defies the categorisation of the continued application of the law as political machinery by Muslim leaders and countries to discriminate against women. Instead, such conformity showcases the Muslims' allegiance to their important personal values.

3.5.1.3 Reforming IIL causes a Substantial Burden on Muslims

[1103] But if they did not (or even if they did), both the voluntary legacies and compulsory charity suffice them.

[1104] See eg the position in Jordan. Lars Wåhlin, 'Inheritance of Land in the Jordanian Hill Country' (1994) 21 British Journal of Middle Eastern Studies 57, 61 and 68. Wahlin traces this arrangement to the Ottoman Land Code (1868). ibid 61.

[1105] Where a spouse or parent survives the deceased, s/he takes a quarter and a sixth cultivation right respectively. If the spouse or parent is more than one, they share their collective portion. Wåhlin (n 1104) 68.

[1106] See eg the 1959 Iraqi Law which got repealed in 1963. Anderson, *Reforms* (n 831) 150–51.

[1107] 'Muslim Women Reject Bill', *Daily Nation* (Nairobi, 6 October 2000) <https://www.nation.co.ke/news/1056-358604-l93g7oz/index.html> accessed 13 September 2018.

[1108] ibid.

Legally, calls for non-conformity with Islamic family law cause a substantial burden (or disadvantage) on Muslims' free exercise of their religion. Yet there is no compelling government interest(s) to doing that. Ordinarily reforms to a religious law only succeed, if they absent the possibility of a substantial burden on the religion's adherents.[1109] When this is so, the proposed reforms continue. But even then, there must be proof of a compelling government interest in introducing the changes; and that those changes must be the least burdensome means of achieving that interest.[1110] If, however, the proposals cause a substantial disadvantage, then they must stop.[1111]

Altering IIL such that sons and daughters; full or consanguine sisters and brothers; as well as widows and widowers receive identical shares upsets the entire Islamic family law. As a start, it is important to note that Islamic family law sits at the core of *Sharii'ah*[1112] because it consists of that part of the law which touches the 'everyday lives'[1113] of Muslims. As noted earlier, Islam is both about 'performing rituals'[1114] and observing religio-legal tenets.[1115] Thus requiring Muslims to vary IIL (and abandon other aspects of Islamic family law) is to dispossess them of their key Islamic identity.[1116] This tendency, contrary to the views of the 1967 Commission, causes Muslims a substantial burden in observing their religion.[1117] Yet because the understanding of the principle of equality is a substantive one, the existence of IIL in any country does not erode that country's obligation to treat its citizens equally.

[1109] Nussbaum (n 584) 111.

[1110] ibid.

[1111] ibid 112.

[1112] Abdulkadir (n 614) 330; Anderson, *Modern World* (n 18) 59; Sait and Lim (n 9) 109; Ali Khan (n 8) vii; Anderson, *Reforms* (n 831) 146.

[1113] Charles Njonjo, 'Foreword' (1969) 5 E Afr LJ 1.

[1114] Adamu (n 569) 58.

[1115] Tayob (n 638) 42; *Hakam Bibi v Mistry Fateh Mahommed* [1955] KLR 91, 95. See note 569 and the accompanying text to note 442.

[1116] Interview 130.

[1117] When Muslims opposed the amalgamation of the inheritance laws out of fear that the resultant legislation would abrogate the prescribed *Qur'aanic* portions, the majority commission rejected the Muslims' protest. The commission failed to appreciate how the upcoming universal law which was different from IIL would prevent Muslims from manifesting, practising or observing Islam especially when these Muslims could write wills and declare their intention to devolve their estates in accordance with IIL. See Commission on the Law of Succession (n 616) paras 23, 64, 67 and 68. One of the 11 commissioners, however, objected to extending the proposed intestacy provisions to Muslims. Cotran, 'MDSL' (n 614) 202; Read (n 642) 110.

In the foregoing, critics must view males' non-observance of their family maintenance duties as another infraction of the law.[1118] This habit is not far removed from the denial of women's right to inherit in the first place by some communities, particularly their male members. Thus some MFs – and other commentators – must isolate the Muslim males' patriarchal idiosyncrasy, just like other regressive practices, from Islam. In keeping with their philosophy, MFs must (particularly) next generate solutions to this present predicament within the Islamic paradigm[1119] – even if it means borrowing ideas from other cultures. This approach may influence the acceptance of those novel ideas by a majority of Muslims.

3.5.2 Some Possible Interventions

Undoubtedly, the dual realities of some women providing for their families and some men abandoning their maintenance duty demand an intervention. But as already explained, the adoption of identical shares between certain males and females where the males bear familial obligations results in some injustice. The doctrine of benefit, on the other hand, which scholars derive from *Qur'aan* 4:11 is misconstrued.[1120] Its usage in that precept justified the inclusion of ascendants in the intestate arrangement. Because this addition ran counter to the pre-Islamic system, the Holy Book explained that people should not be taken aback (nonetheless) because they 'know not whether your parents or your children are nearest to you in *benefit*.'[1121] Either could benefit one in this life or in the Hereafter.[1122]

The other methods used to supposedly enhance women's shares eg a lifetime gift, a family endowment and deferred dowry (whole or partial)[1123] are misplaced and risk infringing IIL. Though legitimate, these forms of property transfer are alien to IIL.[1124] They are property arrangements in their own right.[1125] And they function whether or not death is

[1118] Interview 114.

[1119] Esposito and DeLong-Bas (n 17) 158.

[1120] Interview 42; Interview 116. See the accompanying text to note 1038.

[1121] Ali (n 7) 187.

[1122] Kathir, *Kathir 2/10* (n 810) 293.

[1123] See accompanying texts to notes 203 and 209. See also Sait and Lim (n 9) 115–18; Esposito and DeLong-Bas (n 17) 45.

[1124] The Kadhis' court in *Kamran* was, therefore, erroneous to consider *hiba* and *waqf* as part of IIL. See note 12.

[1125] Sait and Lim (n 9) 134; Chaudhry (n 8) 545.

involved. While they may be associated with property division after its owner's demise,[1126] these methods may violate IIL if the basis of creating them is to benefit some heirs at the expense of others without a *Sharii'ah*-based justification.[1127] In an FGD with women in Pate, for example, the participants found their involuntary customary practice of lifetime gifts 'sinful' because it negated the *Qur'aanic* portions.[1128]

The first plausible adjustment to the divergent shares is *takhaaruj*[1129]. Thus, where the heirs willingly and properly informed agree to receive identical shares or such other divisions they deem fit (with or without waiving their corresponding duties and rights), *Sharii'ah* respects their new divisions. Similarly, where some of the beneficiaries relinquish their *Sharii'ah* entitlements in favour of the remaining heirs willingly, informed and with or without waiving their corresponding obligations and rights, IIL respects this choice. According to one of the interviewed male scholars, while '*Sharii'ah* never interferes in people's affairs, it remains the yardstick when there are disagreements' or violations'.[1130]

The second accurate way of meeting IIL's original objective is to compel the males who receive greater inheritance shares to fulfill their *Sharii'ah* obligations. Thus courts should confiscate these males' properties if the latter fail to care for their corresponding relatives.[1131] Such a step is in sync with substantive equality because it facilitates women's enjoyment[1132] of their other property rights within IIL. The point, here, is to ensure that women really[1133] – not rhetorically – get all their designated IIL rights. Thus the courts (as a representative of the State) should seize an equivalent measure of what would have been the females' maintenance from the defaulting males.

[1126] Hamid Khan, *Islamic Law of Inheritance: A Comparative Study with Emphasis on Contemporary Problems* (Law Times Publications 1980) 181.

[1127] Sait and Lim (n 9) 118.

[1128] FGD 11.

[1129] Arabic word for consensual estate distribution outside *Sharii'ah* portions. Literally, this Arabic term means disassociation or disengagement.

[1130] See Interview 121.

[1131] Interview 2; Interview with Soud Kamau, Advocate of the High Court (Nairobi, Kenya, 17 November 2015) [hereinafter Interview 126]; Interview 46.

[1132] Fredman (n 641) 228.

[1133] ibid 236.

This approach of forceful seizure is not very new to Islam. Immediately after the demise of the Prophet, some Muslims refused to pay *zakaah*[1134]. Caliph Abu Bakr vowed to fight them until they remit it because '*zakah* is the compulsory right to be taken from one's wealth.'[1135] He indicated that he would combat the defaulters even if they withhold 'a tying rope which they used to give'[1136] before. That is no matter how small the withheld wealth is. Thus just like *zakaah* is compulsory, so are the inheritance portions and their corresponding duties.[1137] The only difference is that the former largely benefits the Muslim community while the latter mainly profits family members.[1138]

But for this proposal to work, three things must happen. First is societal acceptance of the idea. It is still a maiden thought that relatives who are beneficiaries of certain males' greater fractions can move to court to complain of inadequate care by these males. In fact some *shuyuukh* (single *sheikh*)[1139] feel that it is unnecessary to do so.[1140] Second, the attending relatives must know of their right to enforce the court order which directs the inheritance divisions.[1141] As they would enforce their maintenance rights in a marriage or divorce matter, these beneficiaries should also assert their succession rights too. Third, the courts – particularly the Kadhis' courts – must appreciate their power to execute the order which distributed the estate.[1142]

This proposal may, however, be difficult to implement where estate distribution happens in quasi-judicial fora[1143] and those divisions are not later adopted in court. Yet a lot of inheritance divisions occur in these informal institutions.[1144]

[1134] Arabic word expressing the compulsory annual alms to identified recipients against specified amounts of Muslims' wealth.

[1135] Muhammad Zulfiqar, *Zakah According to the Quran & Sunnah* (Darussalam 2011) 53.

[1136] ibid.

[1137] In fact, the intestate fractions are called *faraidhw*, plural of the Arabic term *fardhw* which means a prescribed share or a religious obligation. See note 893. See also Anderson, *Reforms* (n 831) 146.

[1138] Goolam (n 12) 7.

[1139] Arabic word which literally means leaders. Muslims employ this word to refer to male Muslim scholars, which usage this thesis adopts.

[1140] See Interview 121.

[1141] Interview 46.

[1142] Sub-section 6.2.6 discusses some Kadhis' disbelief that they can punish contemnors of their orders.

[1143] See also note 38.

3.6 Conclusion

IIL offers women both testate and intestate opportunities irrespective of the size and nature of the property. These opportunities which are smaller, identical or larger than some inheriting males' have existed for over 14 centuries now and recognise the socio-economic interactions in a Muslim family. These benefits also remedied the pre-Islamic Arabian position which had permitted intestacy that had excluded women and unchecked testamentary power that had favoured men.

But because of the present realities of some women providing for their relatives and some males abandoning their maintenance duty, critics contest the women's lower intestate shares. Instead, they suggest reforming the law including adoption of identical portions between the corresponding sexes in all categories of familial relationships. This proposal, however, raises both legal and *Sharii'ah* complexities which render it nugatory. The finite exposition of IIL and its interplay with other aspects of Islamic family make changing or abandoning IIL impossible. It also causes a substantial burden on Muslims' practice of their religion, a fact which cannot be justified on any compelling government interest.

Thus, if at all, any efforts to enhance the females' apparent smaller fractions must be within Islamic principles. Otherwise, the understanding of equality as substantive makes these females' shares just because a plurality of women out of the over 1.6 billion global Muslims rely on their husbands and paternal relatives for maintenance. This fact notwithstanding, it remains important that States ensure that all women enjoy the justice embodied in IIL in fact. That is the dictate of the principle of substantive equality. Thus through the courts, for example, both the deceased's corresponding female beneficiaries and other family members should be able to enforce their inheritance divisions as well as their implicit right for maintenance. Chapter four begins to narrate Kenyan women's actual experiences with IIL.

[1144] Celestine Nyamu, 'Gender, Culture and Property Relations in a Pluralistic Social Setting' (SJD Dissertation, Harvard Law School 2000).

4 CHAPTER 4: SYNCRETIC PRACTICE: INTERWEAVING OF CUSTOM AND ISLAMIC INHERITANCE LAW

4.1 Introduction

Now that chapter three has spelt out the inheritance entitlements of Muslim women, this chapter begins to explore if Kenyan Muslim women enjoy these rights in fact. It does so by largely analysing the experiences of women among the Luhya of Kakamega County; the Somali of Garissa County; the Bajuni of Lamu County; and the individual ethnicities of Digo, Arab and Memon of Mombasa County. And one way of doing this is by assessing whether a deceased Muslim's often strong ethnic customs impact on his or her female relatives' ability to inherit. As some scholars intimate, women's access to property plays out through the dynamics of customs, family, kinship and the construction of property itself.[1145]

Thus this chapter first addresses generally how ethnic customs (ie the mores of a particular tribe, clan or sub-clan) overshadow IIL. It describes the instances in which individuals and communities privilege these customs or traditions over *Sharii'ah*; and or practise a mix of both without seeing incompatibilities or they allow their customs to influence their interpretation of IIL – which practice this study terms as syncretic. The chapter then focuses on four different customary practices (each elicited from the four research sites) which deny women of their stipulated inheritance. These practices are: wife inheritance among the Somali; women's transient kinship ties among the Luhya; women's contingent property rights among the Bajuni; and mandatory communal property rights among the Memon. While these practices are predominant among the studied communities, the chapter shows that these practices similarly exist in other Kenyan ethnic communities.

The chapter also discusses other general cultural norms which cross-cut among different ethnic communities in the country and which negatively impact on women's inheritance rights. These norms on women's appropriate behaviour consist of protection of the family honour; women's inherent inferiority; and exogamy. Finally, the chapter looks at how some disintegrating Islamic systems permit the infusion of individual and cultural perspectives into estate distribution to the detriment of women. Such crumbling ideals include: in-laws'

[1145] Sait and Lim (n 9) 135.

rivalry; widow's rivalry; unlawful enjoyment of individual estate by a section of the heirs; and disingenuous claims of illegitimacy and illicit marital relationships.

4.2 Privileging Custom to IIL and its Related Tenets

Many Muslims disregard women's succession entitlements because they subscribe to their culture more than Islam in social-communal matters. Literally in addressing these questions, ethnic traditions overshadow *Sharii'ah*[1146] because, first, the only Islam these Muslims conform to is the moral-religious especially *swalah*, *sawm* and perhaps *haajj*.[1147] Yet Islam is a way of life and encompasses both the moral-religious and social-communal acts.[1148] And that is why *Qur'aan* 2:208 and *Qur'aan* 2:85 calls for full submission to the religion and condemns its partial pursuit respectively.

The second reason many Muslims observe their cultures in addressing social-communal issues is because their powerful traditions subdue their knowledge or practice of full Islam. These tribal adherents often justify the customary practices on the premise that 'this is what we found our ancestors doing'.[1149] But this argument in itself is un-Islamic. The *Qur'aan* indicates numerously that God destroyed previous peoples because of this excuse.[1150] These preceding nations had declined to pursue monotheist belief and worshipped multiple deities as per the traditions of their forefathers.

This 'half-stepping'[1151] into Islam,[1152] however, condones ethnic practices which exclude women from inheritance, generally, and in the most prized property in their community. The coveted wealth which is often land among agricultural and agro-pastoral tribes; and domestic

[1146] Interview with Interview 36 (Garissa, Kenya, 15 December 2015); Interview 123; Interview with Ahmad Akida, Ustadh, MadrasatulTaqwa (Kakamega, Kenya, 5 November 2015) [hereinafter Interview 72]; Interview 86; Interview with Khamisa Ali, Judge, High Court (Bungoma, Kenya, 11 November 2015) [hereinafter Interview 84].

[1147] For example, a majority of the Wanga (and Luhya generally) whether religiously educated or not, admit openly that their only Islam is *swalah* and *sawm*. Conversation 2; Interview 76; Interview 77. Note 1594 explains why this is so.

[1148] See note 445. See also Interview 115; Interview 123.

[1149] Interview 36; Interview 7; Interview 129.

[1150] See eg *Qur'aan* 2:170.

[1151] 'Making Every Second Count' (1 January 2011) <https://www.youtube.com/watch?v=lYFhQ3RFGPQ> accessed 3 December 2018.

[1152] That is placing are one foot in Islam and one foot outside it (ie into personal traditions), which tendency Muslim scholars describe as 'cultural Islam' as opposed to 'true Islam'. See eg Interview 86; ibid.

animals among the predominant pastoral nations goes to the sons or the uncles in the absence of the sons.[1153] The widows, the daughters, the sisters and the deceased's mothers often receive, if at all, the less celebrated possessions (such as the deceased's personal effects) which may be of nominal economic value.

Muslims also prime culture over IIL when they conflate their practice of Islam with tradition such that they easily overlook the latter and still feel that they are on the right course.[1154] These people will thus justify a traditional practice on the basis of Islam even when that practice is far removed from the religion. In Garissa, for example, an old educated and respectable man indicated that Islam and Somali tradition are intertwined such that a woman cannot refuse wife inheritance.[1155] Yet as seen in chapter two, the *Qur'aan* outlaws wife inheritance unless a woman consents to it.[1156] But the Somali culture mandates it.[1157]

Thus the main cause of women's inheritance disentitlement among most ethnic communities such as the Somali, the Luhya, the Pate villagers and the Memon is their powerful culture.[1158] One of the interviewed female judges noted that '[I]t is so African to disentitle sisters and widows.'[1159] Similarly, a Kadhi noted that African culture and tradition are a hindrance to women's inheritance rights regardless of one's tribe.[1160] In fact, according to a women's rights activist in Garissa, about 30% of Somali women – especially those in the urban areas – fail to receive their Islamic entitlements because of their strong customs.[1161]

It also became evident during the research that daughters from farming communities fail to enjoy succession rights over land because of ethnic cultural reasons.[1162] Since land is

[1153] Interview 6; FGD 1; Interview 86; Interview 77.

[1154] See note 33 where Weiss describes a similar confusing pattern in Pakistan.

[1155] Sub-section 4.2.1 illustrates how this practice relates to inheritance of property.

[1156] See note 482. See also Interview 121.

[1157] This example confirms MFs' view that the sexist practices in Muslim localities derive from the Muslims' local traditions and not Islam.

[1158] Interview 36; Interview 129; Interview with Kulthum Abdulwahab, Project Officer, Femalekind (Garissa, Kenya, 11 December 2015) [hereinafter Interview 14]; Interview 114.

[1159] Interview with Rosalia Sitiwa, Judge, High Court (Kakamega, Kenya, 6 November 2015) [hereinafter Interview 74].

[1160] Interview 129; Ministry of Lands, 'Sessional Paper No 3 of 2009 on National Land Policy' (Republic of Kenya August 2009) para 220.

[1161] Interview 14.

[1162] Interview 86; FGD 9; Interview 77; Interview 76.

intimately associated with the wealth of these agricultural families, it is almost taboo to entrust it to women – who at some point in their lives – would marry and vacate their fathers' homesteads. The affected women included the Luhya of both Kakamega and Bungoma Counties; the Pokomo of Tana River County; the Taita of Taita Taveta County; the Ameru of Meru County and the Kikuyu of Central Kenya. Others were daughters from the agro-pastoral tribes of Borana and Orma of Tana River County.[1163]

Below is a discussion of specific prevailing customs which are behind women's failure to inherit in both the studied communities and the neighbouring ones.

4.2.1 Wife Inheritance

Forceful wife inheritance is a covert way of disentitling women of their inheritance.[1164] Often some of the deceased husbands' families harass and evict without any property widows who refuse these levirate unions.[1165] Among the Somali, a widow who refuses wife inheritance which is known as *dumaal* further risks alienation (including lack of economic support) by both her deceased husband's family and her own.[1166] Thus illiterate women and those who are too poor to support themselves constitute a majority of those being inherited.[1167] Formally educated women and those who live in the urban area, however, decline *dumaal* because they can both manage their wealth and raise their children.[1168]

Until 20 to 30 years ago, however, *dumaal* was a universal practice among both the rich and the poor, the literate and the illiterate.[1169] The custom is now fading especially in Garissa town because of several factors including: increased economic pressure, clinging to nuclear instead of extended family, and expanding religious knowledge (which enjoins that a woman

[1163] Interview with Mohammed Hassan (Garissa, Kenya, 30 September 2015);FGD 6; Interview 124; Interview with Muhsin Ahmed, Advocate of the High Court (Nairobi, Kenya, 17 November 2015) [hereinafter Interview 125]; Interview 129.

[1164] Interview 7; Interview with Yasin Aboud, Executive Director, Ukweli na Haki (Garissa, 12 September 2015) [hereinafter Interview 1]. See also accompanying text to note 238.

[1165] Interview 4; FGD 1.

[1166] Interview with Kauthar Daud (Garissa, Kenya, 13 December 2015) [hereinafter Interview 27]; Interview 5.

[1167] Interview 3.

[1168] Interview 3.

[1169] See Interview with Halima Abdi (Garissa, Kenya, 14 December 2015) [hereinafter Interview 34].

has a choice to refuse *dumaal*) explain this change.[1170] The increased incidences of HIV/AIDS in Garissa County also discourage the practice.[1171]

Thus in Garissa town when a man died and left two widows, one of them refused to marry her deceased husband's brother. Instead she married a person from an outside clan a year later. Her deceased husband's clan accepted her new union and allowed her to live in her former husband's house together with her children.[1172]

Ordinarily under *dumaal*, the deceased husband's relative (mostly his brother) known as *dumash* inherits the widow. But the widow chooses which brother to wed. If she fails to make this choice, her deceased husband's family will do it for her. The Somali contend that a woman may choose whom to *dumaal* but she cannot refuse it (*dumaal dhorosha muuwiye dile mali*).[1173]

Thus in the village of Raya, a widow's step-sons denied her and her biological son of their succession shares because she declined to *dumaal* her sick and bed-ridden brother-in-law.[1174] Since this brother-in-law had urinal and fecal incontinence which required round-the-clock care and the widow 'was very young (in my 20s)'[1175], she refused to marry him. Consequently, the step-sons sold their deceased father's two-bedroomed house in Garissa town and gave nothing to her barely one-year old son and herself.[1176]

In Garissa town, on the other hand, a widow who refused to marry her rural brother-in-law and opted for another man outside the deceased husband's family had both her family and the deceased husband's family, reject her choice. The widow has thus remained single

[1170] Interview 6; Interview 13. See also accompanying text to note 1168.

[1171] Interview with Hajir Mohamed (Garissa, Kenya, 13 December 2015) [hereinafter Interview 26]. As of 2015, the HIV/AIDS prevalence rate in Garissa was 1%. This was a sharp increase from the 0% rate in 2003. Garissa County Government (n 289) 23 and 31.

[1172] Interview 13.

[1173] Interview 6; Interview 3; Interview with Abdullah Arale, Naibul Boqor, Abdiwaq Clan (Garissa, Kenya, 13 December 2015) [hereinafter Interview 24]; Interview 13.

[1174] Interview 27.

[1175] Interview 27.

[1176] Interview 27.

and is raising her children by herself until they attain the age of 18.[1177] At that point, the widow intends to ask for her share of inheritance on the expectation that her adult children will then be able to manage the livestock estate or hire someone to do it.[1178]

The Somali premise *dumaal* on safeguarding both the widow's inheritance (particularly if it consists of animals) and the deceased's children's dignity.[1179] The Somali argue that unlike a strange step-father, the children' uncle can hardly exploit his nieces sexually.[1180] Again, the *dumash* assists the widow to look over her animal estate since women do not traditionally tend to animals.[1181]

But regardless of the reason for the practice, both *dumaal* and the corresponding tradition which entrusts the administration of the livestock estate with the deceased's eldest (or responsible) adult son until the younger siblings turn 18 put a widow at the risk of losing her inheritance share.[1182] If *dumaal* occurs before estate distribution,[1183] it is possible for the widow not to receive her inheritance portion at all because unless the remaining heirs prompt the distribution of the property, the administrator assumes its ownership to the exclusion of other family members including women.[1184] If the widow receives her share, nonetheless, the deceased husband's family mixes this share with the rest of the *dumash*'s estate.[1185] This family then keeps custody of the entire property and micromanages the widow's usage of her portion.[1186]

While a group of men in Garissa town felt that it is out of respect that the widow seeks permission from her new husband to use her wealth, in actual sense *dumaal* defeats women's

[1177] The Somali regard 18 as the age of majority. Interview 5; Interview 6; Interview 16; Interview 21; Interview with Ally Gullet (Garissa, Kenya, 12 December 2015); Interview with Khadija Omar (Garissa, Kenya, 14 December 2015) [hereinafter Interview 35].

[1178] Interview 5.

[1179] Interview with Ahmed Ismail (Garissa Township, Garissa, Kenya, 30 September 2015); Interview 3.

[1180] Interview with Ally Gullet Ahmed (Garissa Township, Garissa, Kenya, 12 December 2015).

[1181] Interview 1.

[1182] The Somali determine trusteeship to a deceased's estate in a similar fashion to an heir to their traditional kingdoms. They have royal families with kings or sultans called *boqor*. Interview 4.

[1183] Interview 4. In an FGD with men in Garissa town, the participants observed that *dumaal* happens after estate division. FGD with men (Garissa Township, Garissa, Kenya, 30 September 2015).

[1184] Interview 1; Interview 6.

[1185] Interview 3.

[1186] Interview 3. FGD with men (Garissa Township, Garissa, Kenya, 30 September 2015).

individual property rights. Thus, an inherited widow who had inherited a lot of animals from her wealthy deceased husband had her economic status worsen when the *dumash* entered into a subsequent marriage. The widow had no access to her animals including selling any of them for sustenance. She had to get permission from the *dumash* to do so. The best she could do was to milk the animals for sustenance.[1187]

4.2.2 Women's Transient Kinship Ties

Other than wife inheritance, the common tribal belief that women belong to the family of their (present or future) husbands (and not their natal ones) also perpetuates the displacement of women's *Qur'aanic* portions. Many communities believe that a woman (ie a daughter) must marry and when she does, she relinquishes her natal family ties and absorbs her marital ones.[1188] The natal family (including her mother) does not consider the daughter as belonging to this family indelibly.[1189] The Somali thus say: '*naag waa ninkii qabo*'.[1190] Similarly during Luhya weddings, the daughters say '*efue avarende kholetsira khuleshere veue ishialo*'[1191]. If they ever visit their parents' home, these married daughters do so as strangers.[1192]

The Kamba, on the other hand, equate a daughter to a castor oil seed which must grow wherever it is dispersed to or sort itself out when it fails to. This means that a woman must marry and leave her 'temporary'[1193] natal family. That is the traditional identity of a woman. And normally society speaks negatively about unmarried women. It sees them as having failed to erect the foundation to the performance of women's dual primary roles of giving birth and caring for her family (ie husband and children). And when a woman marries, society further expects her to thrive in that marriage because her marital family is her

[1187] Interview 3.

[1188] *Jesse* (n 295) 31; Nyamu, 'Property Relations' (n 1190) 246–47.

[1189] Nyamu, 'Property Relations' (n 1144) 246–47.

[1190] Interview 6.

[1191] 'We the guests shall vacate this homestead and leave it to its owners'. Interview 76.

[1192] FGD 9. Thus they cannot enter their mothers' kitchens, parents' bedroom, and cannot place a jerican of water inside their mothers' houses. Instead they would position it outside the house and their mothers would carry the jerican to their usual spots. Similarly, the visiting daughters cannot harvest bananas from its tree. Interview 76.

[1193] Nyamu, 'Property Relations' (n 1144) 245.

permanent home.[1194] If the marriage fails or has issues, the woman must resolve them. She has limited chances to back out of it.[1195]

In reality, however, this woman is a transplant in her marriage, which 'may or may not take root.'[1196] The claim that a woman belongs to her married family is therefore untrue because even there, the woman is disregarded. She does not belong to that family too. Her children, however, do. The woman is a vessel which gives others 'family' or 'lineage' but she seems to have none herself.[1197]

But this transient nature of a woman's family ties characterizes her relationship with both families' wealth, and defines her position in inheritance.[1198] The following comment from an elderly Kamba man illustrates this consequence: '[T]oday she will call me 'father' and call my wife 'mother'. Tomorrow she will marry and call someone else 'father' and someone else 'mother'. Now this person who has two fathers and two mothers, how can we all fit in here together?'[1199]

Thus when fathers, brothers, uncles, mothers and the general clan (or sub-clan), whether formally educated or not, divide inheritance property, they deprive daughters of it because they believe the daughters would receive their husbands' properties.[1200] According to one of the interviewed female judges, a Luhya man (for example) still believes that his daughter would get property from the family she is married to, not from himself, despite his advanced

[1194] Women's lasting fate with their marriages is seemingly sealed by the dowry paid to their families. That is why many women's natal families refuse their in-laws to bury their married daughters in the in-laws' compounds if the latter have failed to pay or complete the dower. The accompanying texts to notes 1001 - 1005 contrast this traditional perspective of dowry to the Islamic one.

[1195] In a discussion with women in Mumias town, for example, the participants indicated that their mothers or fathers normally ask them of their return-trip arrangements a few hours after arriving at their natal homes. And if the married daughters indicate the existence of a disagreement with their spouses, their families order them to return to their marital families to resolve the issue. See FGD 9.

[1196] Nyamu, 'Property Relations' (n 1144) 246.

[1197] Interview 4.

[1198] Nyamu, 'Property Relations' (n 1144) 246.

[1199] ibid 248.

[1200] FGD 9; Interview with Mwanajuma Swaleh, Advocate of the High Court (Mombasa, Kenya, 30 October 2015) [hereinafter Interview 57]; Interview 63.

secular education.[1201] Generally, Luhya tell a married daughter that: *watekha ulikabwa emali eno* [1202].

But these wedded daughters hardly have any specific inheritance shares in their husbands' families' property.[1203] When their husbands inherit ancestral property, the married daughters are presumed intrinsically to have also received the wealth. When their husbands die, on the other hand, the married daughters (now turned widows) only receive the property, mostly land, on behalf of their sons (young or old).[1204] If the sons are minors, the widows will hold these land portions until the sons attain 18 years or complete college.[1205] The widows are thus mere custodians or gateways of their sons' shares.[1206] And if a widow ever inherits, then the estate must be one which was acquired by the deceased husband as an individual, not an ancestral one.[1207] In essence, a woman lives on a piece of land 'as a guest of male relatives by blood or marriage.'[1208]

Because of their transient ties, for example, a majority of Luhya women[1209] continue to miss out from both their deceased fathers' and husbands' estates to date.[1210] Usually Luhya

[1201] Interview 74.

[1202] 'You are married; you will get your property at your husband's'. FGD with women (Lureko, Mumias, 8 November 2015) [hereinafter FGD 7]; Interview 85; Interview 76; Interview 79. Other tribes holding this perspective too include the Meru, the Kamba, the Kikuyu and some waSwahili. See Interview 124; Interview with Sauda Ahmed (Mombasa, Kenya, 23 October 2015) [hereinafter Interview 48]; Interview 125; Interview 46; Nyamu, 'Property Relations' (n 1144) 239–56.

[1203] Interview 85; FGD 6; Dzodzi Tsikata, 'Gender, Land Rights and Inheritance Securing Women's Land Rights: Approaches, Prospects and Challenges' in Julian Quan and others (eds), *Land in Africa: Market Asset or Secure Livelihood? Proceedings and Summary of Conclusions from the Land in Africa Conference held in London November 8 - 9, 2004* (International Institute for Environment and Development 2004) 91.

[1204] FGD 9; FGD 8; Interview with Peter Oyugi, Chief, and Salim Okongo, Sub-chief, Nabongo Location (Kakamega, Kenya, 9 November 2015) [hereinafter Interview 81]; Interview with Abida Onyunda (Kakamega, Kenya 6 November 2015) [hereinafter Interview 73]; FGD 7. See further Reema Gaafar, 'Women's Land and Property Rights in Kenya' (2015).

[1205] FGD 7.

[1206] Interview 81. In a discussion with women in Mumias town, for example, the participants described a widow as a simple *mchungaji* (Swahili word for a care taker). FGD 9.

[1207] Interview 63.

[1208] UN Committee on the Elimination of All Forms of Discrimination Against Women, 'Combined Fifth and Sixth Periodic Reports of States Parties: Kenya' [2006] UN Doc CEDAW/C/KEN/6, para 10.

[1209] Despite this research concentrating on the Wanga, the practices relating to women's inheritance rights across the larger Luhya tribe are the same. See FGD 10 and Interview 79 where the women of Isukha and Bukusu sub-groups respectively bear limited rights to a land estate just like their Wanga sisters. See also

fathers make wills (written or oral) which allocate specific parts of their lands to their sons only.[1211] This also happens when the property is small.[1212] Here, the will excludes the daughters because the land is insignificant. If a daughter ever receives land (in the presence of sons), then it is a small portion (perhaps a half acre),[1213] which guarantees her at least a home to return to in the event of divorce.[1214]

Thus when the father dies, the sons, other members of his family (nuclear and extended) and local leaders such as *a'immah* and the *liguru*[1215] conform to his will firmly since they adjudge it both sacred and Islamic.[1216] A female village elder in Mumias, for example, noted that because her area is largely Muslim, she handled fewer inheritance disputes since 'we Muslims automatically respect the deceased's will.'[1217]

When a Luhya man dies intestate, however, the *wichisala*[1218] assumes the responsibility of apportioning the deceased's inheritance.[1219] Thus, the *wichisala* divides the estate according to the size of the family (ie the number of sons a widow has) with the widows (in the often polygynous family) operating as the units of division.[1220] If there are three widows, for example, the wealth is proportioned into three clusters. And the larger the number of sons, the more land their mother receives on their behalf.[1221]

Interview 85 which narrates that the tradition of denying women interest in land extends to the Khayo, the Nyala, the Marachi and the Samia.

[1210] FGD 9; Interview 86; Interview 73; FGD 10.

[1211] Interview 79. The case of *Fatuma Maina Ndeta v Hamisi Maululwa and Another* [2008] KC Civil Case No 8 of 2008 (Bungoma) also confirms this.

[1212] FGD 6; Interview 79; FGD 8.

[1213] See note 303.

[1214] Conversation 1. The daughters' rights to a land inheritance are thus 'tentative or contingent on need'. Nyamu, 'Property Relations' (n 1144) 244. Sub-section 4.2.3 elaborates on this aspect.

[1215] A Luhya word for a village elder.

[1216] FGD 6; Interview 77; Interview 79. It is common to revere a deceased's word. Anderson, *Modern World* (n 18) 61. In fact, many Muslims assume an attested (written) will is too sound to revoke even if it is void. Interview 115; FGD 13.

[1217] Interview with Mwanajuma Ali, Village Elder, Lukoye A (Kakamega, Kenya, 10 November 2015) [hereinafter Interview 82].

[1218] A Luhya title for the chairman of an extended family.

[1219] FGD 8.

[1220] FGD 9. This arrangement is similar to the LSA one. See section 40 of the LSA.

[1221] FGD 9.

But like in the usual bequests, the *wichisala* excludes the daughters from their deceased fathers' land. According to a male respondent, unless a father bequeaths a portion of land to his daughter himself – the *wichisala* will not do it. Where the *wichisala* is a nice person or is educated (religiously or secularly), however, he may allocate a small portion of the land estate to unmarried daughters and widows especially when that *boma*[1222] has no sons.

While unmarried daughters may get lucky, the inheritance position of married ones is always negative.[1223] Wedded daughters get nothing at all.[1224] While they may farm on their father's land, married daughters cannot fully own this land.[1225] There are several Luhya sayings to indicate this stance, eg '*mkoko abula uridhi*'[1226] and '*mkoko sanyala kunyola omukunda tawe*'[1227]. Luhya treat their wedded daughters this way because, first, they believe that married daughters cannot customarily bring their husbands to live at the girls' homes. Second, because Luhya regard a married daughter comfortable in her husband's means.[1228] They thus find it greedy for her to seek a share in her deceased father's estate.[1229] Only when a wedded daughter is struggling economically, can she insist aptly on her deceased father's property.[1230]

Among the Somali, this tradition of relegating married daughters' property rights to their marital families prevailed until 20 to 30 years ago. Thus, generally, the sons got the animals. A daughter inherited very little.[1231] Where the family had no sons, the livestock went to the uncles.[1232] Meanwhile, the deceased's personal effects such as clothes and watches went to

[1222] The Swahili word '*boma*' which is common to many Kenyan ethnic tribes means family (both immediate and extended). It also signifies the homestead where any of these families is situated. Its usage is thus contextual.

[1223] Interview 73; FGD 7; FGD 6; FGD 9.

[1224] Sandra Fullerton Joireman, 'The Mystery of Capital Formation in Sub-Saharan Africa: Women Property Rights and Customary Law' [2008] Political Science Faculty Publications 1, 19.

[1225] FGD 8; Interview 83.

[1226] 'Amarried daughter does not get inheritance'.

[1227] 'Amarried daughter has no right to get land'. FGD 9.

[1228] Interview 73; FGD 8.

[1229] Interview 73.

[1230] Interview 73.

[1231] Interview 129.

[1232] Interview 6; FGD 1.

non-relatives outside the deceased's hitherto locality, as part of the tradition, in order to erase the memory of the deceased from his or her kinsfolk's minds.[1233]

Regardless of the community, however, sons often lead the pack which believes that wedded daughters do not deserve a share in their natal family's inheritance property.[1234] And they assert this conviction both before formal and informal probate fora.[1235] According to an FGD with women in Mumias town (*mjini*), Luhya sons (for example) never agree to the daughters inheriting their deceased father's land.[1236] And if the *wichisala* proposes to allocate some land to the (unmarried) daughters, the sons may object to it.[1237] Those sons who are persuaded to daughters succeeding a land estate cheat the latter out of the proceeds of the sugarcane plantations.[1238]

In Tana River among the Borana, on the other hand, a man died leaving a widow, three daughters and a son. His estate included a 15-acre parcel of land and a 10-acre piece of land in different locations. Since the son claimed that girls had no inheritance rights, he threatened to jail his mother when she attempted to sell part of the property to raise funds for her eye operation. He further dared the mother and the sisters to step onto the 10-acre parcel of land. He then subdivided the 15-acre piece of land into one-acre pieces and sold them. He spent the proceeds all by himself. His mother subsequently died without enjoying her fuller inheritance share.[1239]

Sons who seek legal assistance or approach court personally to inherit their deceased fathers' estates often omit daughters from the list of beneficiaries. Only those sons who get probed deeply by their lawyers acknowledge the existence of the daughters. And even then, the sons deny the daughters as heirs because of the daughters' marriages.[1240] It then becomes

[1233] Interview with Fafi Mohamed (Garissa, Kenya, 13 December 2015).

[1234] FGD 9; Nyamu, 'Property Relations' (n 1144).

[1235] Interview 46.

[1236] FGD 9. See also Audrey Wipper, 'Equal Rights for Women in Kenya?' (1971) 9 The Journal of Modern African Studies 429, 434.

[1237] Interview 83; Conversation 1; FGD 10.

[1238] Interview 83. The accompanying texts to notes 304 and 305 illustrate the significance of the sugarcane crop to the Luhya' economy.

[1239] FGD 6.

[1240] Interview 46.

incumbent upon the lawyers to educate the sons of the daughters' identical charge over their deceased father's property regardless of the latter's marital status.[1241]

In Meru, for instance, a father died and left a widow, three sons and two daughters. His estate was a nine-acre agricultural piece of land of approximate value of Ksh.s 9 Million (as of 2015) and a plot in Meru town where the family lives. The sons had wanted to inherit the property alone because the daughters were married. According to the sons, the daughters belonged to other families and had no right to their father's estate. The sons thus approached an advocate in Nairobi to facilitate the transmission of the estate in their names only. When the lawyer informed them that the daughters had succession rights under *Sharii'ah*, the sons sought time to consult about this information as well as to obtain the chief's 'estate letter'.[1242] As at the time of the research, the sons were yet to return to the lawyer despite the lapse of a year.[1243]

But the sons who attend court unrepresented or who provide their advocates with an incomplete history of the estate do sometimes succeed in obtaining a vesting order that excludes their sisters.[1244] Often the existence of the sisters only becomes known about after the court has issued the order and the ousted heiresses protest their exclusion.[1245]

While the ethnic cultural practices predicating disentitlement of women's inheritance violate *Sharii'ah*, widows and daughters largely embrace them without question because they too believe that they bear no succession rights either in general or with regard to socially significant forms of wealth.[1246] Regardless of their education levels (religious or academic), a majority of Somali and Luhya women hold the view that livestock and land are not

[1241] According to the lawyers that participated in this study, their clients' ignorance as to the right of their sisters to inherit is greed camouflaged in the excuse of marriage. Interview 46; Interview 125.

[1242] This is a forwarding letter by a local chief which identifies a deceased's heirs to other probate institutions. Interview 125; Interview with Kassim Bashamakh, Senior Chief, Mkomani Location (Amu, Kenya, 22 December 2015) [hereinafter Interview 118]; Interview with Dekho Mahmoud, Chief, Iftin East Location (Garissa, Kenya, 15 December 2015) [hereinafter Interview 37]; Interview 81. Often, it is done upon request by the other institutions. As one of the grassroots government officers, a chief is regarded (formally and informally) as possessed of true knowledge of his or her constituents. Interview 125.

[1243] Interview 125.

[1244] Interview 125; Interview 81.

[1245] Interview 125.

[1246] Interview 78; Interview 84; Interview 112. See also Nyamu, 'Property Relations' (n 1144) 252 narrating similar experiences among Kamba women.

something a woman could claim.[1247] A Kadhi of Somali origin that I interviewed noted that 'among the Somali, the boys [take] all the wealth and the girls … [know] of this definite communal position.'[1248]

Similarly in an FGD with women in Mumias town, the participants observed that they could not demand inheritance in a land estate since the practice of denying them this right emanated from their ancestors. 'You thus accept the custom.'[1249] According to Luhya male religious leaders it is such an '*itikadi*[1250] among the Luhya that daughters do not inherit land'[1251] that a married daughter often says: '*isienda tekha sienga uwa emali yewefutawe*'[1252]. The daughters, however, (whether married or single) inherit home items such as dresses and utensils when their mother dies.[1253] They also share their deceased fathers' employment terminal benefits and cooperative contributions alongside their mothers and brothers.[1254]

Thus in Lureko, an aged woman shared that when her brother who had inherited all their deceased fathers' farms died, she and her sister allowed their sister-in-law to take up the farms. The old woman noted that:

> Since she was in our *boma*, we told her to take care *of the property of her husband* and use it to educate the children. She sold some and used others to educate both the son and daughter up to Nairobi (...). We allowed our sister-in-law to take the property because she had a son.[1255]

In this case, while the sister-in-law (then widowed), her son and daughter bore entitlements to the farms in respect of their deceased husband and father respectively, the sisters missed an opportunity to claim their hitherto shares to their father's estate.

[1247] Interview 82; FGD 9.

[1248] Interview 129.

[1249] FGD 9.

[1250] Swahili word for a strongly-held practice.

[1251] Interview 86.

[1252] I am married. I would not get our family's property. Interview 76.

[1253] FGD 6.

[1254] FGD 6.

[1255] FGD 7. Emphasis added.

Because of the engraved belief that daughters do not receive land estate, a majority of Luhya daughters donate their land portions to the sons even when they do receive some.[1256] In Bungoma, for example, a majority of the few cases that reach the Kadhis' court involves females entering into a consent agreement with their male counterparts to abandon their shares.[1257] In Mumias, on the other hand, a daughter accepted that her brothers assume all of their father's four acres of land because the five sons were too many for that piece of property. The deceased had left two widows. While the first widow had five sons, the second had only a daughter. It is this daughter who permitted the sons to inherit all the four acres of land. Since all the sons have since died, their sons have now succeeded the property. The original daughter (their aunt), however, claims she is 'okay with the situation'.[1258]

But she is not. In her response as to whether she preferred the LSA to *Sharii'ah*, this daughter chose the latter law because 'it remembers those who have been forgotten like me.'[1259] Her answer reveals the simmering spirit injury within some dispossessed women. Even when they claim to have renounced their rights, these women have not done so wholeheartedly.

4.2.3 Women's Contingent Property Rights

Some Muslim women also miss out on inheritance or get inaccurate portions because the allocation of property in their communities is treated as contingent on need.[1260] In contrast to her male counterpart, a woman receives designated wealth not as of right, but in order to enable her fulfill some societal role or expectation, or as a reward for meeting such role expectations, such as caring for an elderly parent.[1261] This was, for example, the prevailing situation among Pate women until 30 to 40 years ago.[1262] But some respondents indicated

[1256] Interview 81; Interview 79.

[1257] Interview 79.

[1258] FGD 9.

[1259] FGD 9.

[1260] Interview 92; FGD 12; Interview 102.

[1261] Nyamu, 'Property Relations' (n 1144) 252.

[1262] While a majority of Pate respondents gave this estimation, some traced the abandonment of the customary practices to the last five years. See FGD 12. Others indicated it to between the past 10 to 20 years. See FGD 11.

that this customary 'inheritance'[1263] practice still persists in the *mitaa ya juu* area, the relatively rich section of the village.[1264]

While the custom is totally erased in Kichokwe (the poor section of the village), the residents of *mitaa ya juu* find it shameful, actually wrong, to abandon the traditional practice. Their dwindled agricultural economy, however, (among other factors) pushes them to leave the practice gradually. The Kichokwe inhabitants, who have been struggling economically[1265] and therefore observing the custom minimally, found it easy to abandon it.[1266] This interplay between the economic subtleties of the Pate people and their daughters' actual succession confirms critical race feminists' argument that women's intragroup differences vary their life experiences.

But under this once universal Pate practice, daughters receive houses and traditional beds[1267] from their parents (particularly the father)[1268] when they are about to get married or have reached marriageable age. On the other hand, sons get plots, lands, animals and their entire father's 'outside properties' (ie wealth situated away from the Pate residential area which is commonly referred to as 'town').[1269] The sons receive these assets about the same time or later, but way before their father anticipates his death. Usually this happens when the

[1263] The researcher has put this word into quotation marks because as explained in note 5 and the accompanying texts to notes 1328 and 1329, these property allocations are not inheritance. Instead they are lifetime gifts.

[1264] Interview 97.

[1265] They predominantly fish and harvest mangrove

[1266] Interview 97

[1267] These are exotic beds named as *kipilipili*, *samadari* and *malili*. The *kipilipili* is one bed that the daughter had to get. It was also prestigious to give her a *samadari* bed. This is a bed of mixed colours originating from India. Interview 89; Interview with Abeid Bini, Village Elder, MitaayaJuu (Pate, Kenya, 20 November 2015) [hereinafter Interview 94]. When Arab traders sailed from India and docked at Pate, they brought along this *samadari* bed. Interview 97.

[1268] Interview 95. Mothers often donated the houses they received from their fathers to their last born daughters. This gesture removed their husbands' burden of building houses for the last born daughters. Mothers also give gold to their daughters. FGD 11; Interview 107.

[1269] These include wealth in Pate farmlands and other parts of the world. Interview with Salim Ahmed (Pate, Kenya, 20 November 2015) [hereinafter Interview 101]; FGD 12; Interview 94; Interview 89; Interview with Hammad Bahero, Scholar (Pate, Kenya, 19 November 2015) [hereinafter Interview 90]; Interview with Sauda Athman, Ustadha, Madrasatul Fatihul Khayrat (Pate, Kenya, 19 November 2015) [hereinafter Interview 91]; Interview 95; Interview 102; Interview with Beduni Bwanamkuu (Pate, Kenya, 21 November 2015) [hereinafter Interview 105]; Interview 92; FGD 11; Interview 97.

father is no longer able to work or manage those properties personally.[1270] The sons then divide these assets as an 'inheritance' among themselves.[1271] Both sons and daughters also receive identical amounts of gold (mostly in coins)[1272] at their time of marriage if their father is rich.[1273]

In an FGD with women from both sections of the Pate village, a participant noted that: '*sisi hurisi kimila. Mwanamume atatukua vitu vyote. Mwanamke apewe nyumba tu. Kimila. Twatumia kimila. Hatwendi shariani. Twapanana sisi hivi hivi*'[1274]. Similarly in an FGD with men from the village, one of the respondents observed that: 'I will tell you and others will add. *Sisi mara nyingi twaenda kimila. Twaishi kimila. Hatuishi kiSharii'ah*'[1275].

According to most of the Pate villagers interviewed, this 'inheritance' tradition began from ancestral times.[1276] Respondents (aged and young; male and female; individuals and in groups) narrated that they received the practice from their parents and parents' parents HHS. An 80 year old male respondent, for instance, noted that he found '*wazee*'[1277] practicing the tradition as he grew up.[1278] Only one man attributed the start of the custom to a period before Kenya's independence.

[1270] An elderly man who has built five houses for each of his daughters and gave out his farms and plots to his four sons observed that 'I have looked after my children until they are grown up and married. I cannot work any longer. So with what they get, they look after me; they support me.' Interview 89.

[1271] Interview 89; Interview 94.

[1272] These were mainly coins with symbolical drawings (eg a mosque, a horse or a Saudi King) purchased from the Arab traders that sailed to the island. Moreover since gold was employed as a currency, Pate people preferred gold to the often depreciating local currency. Interview 107.

[1273] The quantity of gold each son or daughter receives depends on the parent's richness. Averagely, a person gets about *pauni mbili* (Swahili phrase for two pounds) of the gold which is equivalent to 16 grams. But the older sons and daughters seem to have benefitted more since the gold was in plenty when they got married as they are the first ones in line. The younger ones get less gold and sometimes a parent is forced to buy further gold. Since the price of gold has escalated in present times, parents can afford very little of it. Both the sons and daughters convert their coins into jewellery for their wives' and personal adornment respectively. Interview 107; Interview 89; Interview 95; FGD 11.

[1274] Bajuni phrases for 'we inherit according to tradition. A man takes everything. A woman receives a house only. Tradition. We employ tradition. We do not follow *Sharii'ah*. We distribute our wealth without Islamic guidance'. FGD 11.

[1275] Bajuni phrase for 'often we go customarily. We live by traditions. We do not follow *Shari'ah*'. FGD 12.

[1276] See eg Interview 89; Interview 97; Interview 94; FGD 12; FGD 11.

[1277] Swahili word for his parents and parents' parents' HHS. But the respondent actually meant his father and father's father HHS).

[1278] Interview 89.

He narrated that the tradition began because of the nasty outcome of a divorce. After the divorce proceedings at the then Kadhi of Lamu (Salim Basafir), the husband's father chose to evict his immediate daughter-in-law from his son's house. The wife's father found this act so ignominious that he picked up his daughter before the intended eviction. Ever since, Pate fathers resorted to allocating houses to their daughters when they reached marriageable age – such that if she were to wed, her husband would be the one to move into the bride's dwelling. And in case of a separation, it is the husband – not the wife – that would vacate the matrimonial home.[1279]

But regardless of the actual origins of the tradition, Pate villagers agree that a daughter's guaranteed right to a house primarily shields her against homelessness upon divorce.[1280] In an FGD with men, the participants indicated that they observe this custom for two reasons. 'First, *sisi twaishi kama kwetu ni imani ya sikitiko kumsitikia kumuonea huruma mwanamke*'[1281]. Second, *asitirike asiwe ni mwenye kubabaika kudhalilika. Vile vichu viwedhe kumuweka na kumjenga awe na mahala pake*'[1282]. An 80-year old male respondent summarized the logic of this traditional allocation, thus:

> Since *mwanamke ni nchu dhaifu*[1283]. So if you give her a house, *hua amestirika*[1284]. Otherwise, her wondering about without headway is a hardship. If her husband divorces her, where would this woman return? Her parents' place. That's why if she has a house from her parent, she is safe and protected. If she has no place to live, it would be a problem. It is obvious that when she is married that she would either be compatible with the husband and live forever or divorce at some point. That is *Sharii'ah*.[1285]

[1279] Interview 92.

[1280] Interview 90; FGD 11.

[1281] Bajuni phrase for 'we live feeling compassionate for a woman.'

[1282] Bajuni phrase for 'she is protected against want. The house and its furnishings give her economic security. She has her own place.' FGD 12.

[1283] Bajuni phrase for a woman is a weak person.

[1284] Bajuni phrase for she is taken care of.

[1285] Interview 89.

It is thus explicit that Pate forefathers and the subsequent generations predicated this customary allocation on *imani*[1286] for the female sex because they believe that women are naturally weak individuals.[1287]

Generally, the Pate tradition was premised on *kusikitiana*[1288] to those who are weak – whether male or female.[1289] To Pate Islanders, however, it is 'shameful'[1290] for a woman (whom they regarded the weaker being physically and socially) to exit her matrimonial house with her belongings and children on separation. It is right, nonetheless, for a man to do that because he is a flexible being. Among the Bajuni, and the waSwahili generally, a man can move out with his *buhusha*[1291] with ease, but not a woman. A man can sleep in the mosque, if he has nowhere to go – but not a woman; and not one who has small children under her care.[1292] Thus when a Pate daughter marries, she receives the house. It is then the son-in-law who moves into his newly-wedded wife's shelter.[1293] And the house becomes the couple's matrimonial home.

On the other hand, the father gives the sons his lands and the external properties because of the belief that daughters cannot attend to the farms (eg tilling, harvesting etc) under the scotching sun.[1294] Hitherto since Pate women were prestigious and had *mahadimu*[1295] who even cleaned their feet, they could not fetch firewood or water outside town.[1296] Thus virtually any property entailing service that a woman could not presumably perform went to

[1286] Swahili word for compassion. While the Swahili word '*imani*' means 'faith' literally, it comports other meanings depending on the context. Thus, it may also relate to being 'merciful' or 'hopeful'.

[1287] Respondents used phrases like: 'a woman is a weak person' and '*yule kijana mwanamke ni nyonge* (a Bajuni phrase for 'the female child is weak') to explain the rationale of the Pate custom. See eg Interview 97; FGD 12; FGD 11; Interview 89. The word '*kijana*' (plural *vijana* but pronounced as *zijana* in Bajuni) means a child.

[1288] Swahili word for feeling pity or showing kindness.

[1289] Interview with Waziri Khalid (Pate, Kenya, 21 November 2015) [hereinafter Interview 99]; Interview 94; Interview 107.

[1290] Interview 89; Interview 121.

[1291] Swahili word for a loose clothing carrying bundled up clothes equivalent to today's suitcase.

[1292] Interview 89; Interview 121; Interview 97.

[1293] Interview 90.

[1294] Interview 99.

[1295] Swahili word for serfs.

[1296] Interview 97.

the sons.[1297] Perhaps, that is why only one to two percent of Pate women own land.[1298] And this figure has been possible because of the dissipation of slavery. In the absence of the servants, Pate women now farm, fetch wood and water. And some own the lands they work on.[1299]

But the custom of depriving women of land 'inheritance' reigned among the Bajuni.[1300] According to one of the local Kadhis interviewed, since women spent much of their time at home, the Bajunis believed generally that women could not manage lands. Women thus only took houses and jewellery.[1301] Hence Amu Island also practiced this 'inheritance' tradition until the 1960s '70s or 80s'.[1302] But a women's rights activist in Amu opines that Amu women continue to inherit traditionally even in present times.[1303] In a discussion with women from the Island, however, the participants noted that the community succeeded their deceased relatives' wealth largely through *Sharii'ah*. Some families, however, opted for consensual distribution of the estate outside the IIL stipulated portions.[1304]

Amu people observed the traditional practice because, like their Pate counterparts, they believed that a woman could not manage the exigent care of a farm. To Amu Islanders, a farm requires daily visits (once or more times) to supervise the workers and estimate the likely harvests;[1305] and protecting young coconut trees from being consumed by goats by erecting a make-shift shelter around them.[1306] Yet a woman cannot handle this. That is why the Amu people would say: '*ukitaka shamba lianguke, liharibike, mpatie msichana*'[1307]. They thus awarded houses to their daughters. Since a dwelling is a complete structure, the daughter

[1297] Interview 99.

[1298] Interview 91. See also Lamu County Government, '1st CIDP' (n 314) 24.

[1299] Interview 97.

[1300] Interview with Twalib Heri, Kadhi (Amu, Kenya, 23 November 2015) [hereinafter Interview 108].

[1301] Interview 108.

[1302] Interview 116; Interview with Zuwena Riyadh, Ustadha, Madrasatul Mahdhratin Twayba (Amu, Kenya, 22 December 2015) [hereinafter Interview 117].

[1303] Interview 115.

[1304] FGD 13.

[1305] For example confirming the number of mature coconuts and mangoes. Interview 116.

[1306] Interview 116.

[1307] Swahili phrase for 'if you want a farm to waste or fail, give it to a girl'. Interview 116.

bore supposedly fewer burdens in maintaining it.[1308] And like in Pate, Amu sons then moved into their wives' shelter upon marriage.[1309]

Other than their 'inability' to care for land, Pate daughters also receive houses because it is expected that at least one daughter is likely to live with and care for her parents during their old age.[1310] That is why a parent, often, tells the sons not to ask about a house.[1311] According to a male aged respondent, '*awadhao ni kijana mwanamke si kijana mwanamume*'[1312]. Pate Islanders believe that a son cannot settle with either of his aging parents because his wife would treat the parents less favourably compared to their own daughter.[1313] Thus if a daughter were to let her parents to be cared for by a daughter-in-law, society would ridicule her.[1314] The villagers also believe that the son (whether married or single) might neglect his parents.[1315] Thus, even with the present increasing application of *Sharii'ah* to distributing inheritance in many Pate homes, some parents are still inclined toward gifting houses to their daughters.[1316] These parents surmise that if the son is rendered homeless upon divorce, he will retreat either to the daughter's house or his mother.[1317]

Because under the tradition a Pate father distributed his entire estate to his son(s) and daughter(s) during his lifetime, there remained hardly any wealth left to inherit upon his demise. Perhaps, only some cash at the bank.[1318] His widow, therefore, had nothing to succeed from him – save for this money.[1319] Neither did his mother.

[1308] Interview 116.

[1309] But while Pate villagers constructed separate houses for their daughters and sometimes several meters away from their parents, those in Amu were contained in one homestead. An Amu homestead was large with several segments: for the parents, for married individuals, and for single sons and daughters. Interview 116.

[1310] Interview 97; Interview 107; Interview 94; FGD 11.'

[1311] Interview 94.

[1312] Bajuni phrase for the one who nurses the sick is a female child not a male one. Interview 97.

[1313] Interview 97; Interview 94.

[1314] Interview 97.

[1315] FGD 11; Interview 97.

[1316] FGD 11.

[1317] Interview 97.

[1318] Interview 90.

[1319] Interview 90. She only had what her father gave her when she was equally about to get married. Interview 91.

But these Bajuni widows were less bothered by the nil estate of their deceased husbands because both the community and themselves felt that widows had 'no need for'[1320] the property[1321] since the widows spent their remaining lives with one of their daughters.[1322] Even if widows were to receive their 'inheritance' shares they would find this quite unnecessary since these properties would eventually transmit to their sons and daughters after the widows' death. Thus wives never demanded a portion of the 'inheritance' property during the traditional distribution.[1323] In fact, they consented to the arrangement.[1324] But if a wife had no child, she received her quarter fraction when the husband died.[1325] Similarly, when a widow disputed her deceased husband's property distribution (which happened in rare cases), it was to the Kadhi's court that she contested the customary allocation.[1326]

Thus during the full reign of the Pate tradition, actual inheritance only happened nominally. While the Pate locals (including their Muslim religious leaders) regard these primarily undocumented customary divisions[1327] as inheritance, they are not.[1328] Instead, they are lifetime gifts.[1329] This is because both sons and daughters receive and acknowledge their properties respectively during their father's lifetime and way before he anticipated his death.[1330]

In fact, the sons and daughters (including the deceased's other heirs) only inherited according to *Sharii'ah* in the event that the sons and daughters rejected their father's

[1320] Interview 95.

[1321] Interview 101; Interview 107; Interview 89; Interview 90; Interview 93; Interview 97; Interview 92; Interview 95.

[1322] FGD 11.

[1323] Interview 90.

[1324] Interview 107; FGD 11. See note 1268 which indicates the wives' overt contribution to the observance of the custom.

[1325] Pate men are predominantly monogamous and their widows rarely remarried. Interview 89; FGD 11.

[1326] Interview 97.

[1327] FGD 12; FGD 11. Because family members trusted and respected each other, there was no need for such documentation. FGD 11.

[1328] Only two female respondents (an interviewee and a participant in an FGD) accurately named these allocations. See Interview 91; FGD 11.

[1329] Interview 114; Interview 121; Interview 123; Interview 124; Interview 116. See also the accompanying text to note 210.

[1330] The researcher employs the word 'acknowledge' because as earlier noted, often the sons distribute their 'inheritance' share later from the time the daughters get houses.

arrangement.[1331] One male respondent put it succinctly: '[W]e do *Sharii'ah* if we dispute the traditional way done by the parents (...) but often we inherit traditionally.'[1332] IIL also applied when the father was too poor to construct houses for his daughters.[1333] Thus when it was necessary to apply IIL, the sons and daughters moved to the Kadhi's court or to the Naibul Kadhi[1334] for the estate distribution.[1335] The remaining deceased's surviving relatives also inherited unless one opted out of the estate voluntarily.[1336] According to an elderly male respondent, because the deceased's mother's portion is nominal, most mothers relinquish their shares to the deceased's sons and daughters.[1337]

Even assuming that the traditional divisions were true succession shares, the contingent nature of the daughters' allocations reveals the community's misogynist overtones.[1338] The guarantee of the house though seemingly positive,[1339] is less in recognition of the daughter's integrity as a person, and more about her physical and managerial limitations and future parental care duties. Instead of both the Pate and Amu customs matching the sons' and daughters' grants to their innate responsibilities, they center largely on women's frailty (their biology) to deprive them of prime properties. A Pate daughter also enjoys the house because

[1331] Interview 94; Interview 96; FGD 12; Interview 97.

[1332] Interview 107. See also Interview 93; Interview with Joha Abdulaziz (Pate, Kenya, 21 November 2015) [hereinafter Interview 104]; Interview 105; Interview 97.

[1333] Interview 101.

[1334] An Arabic phrase which means deputy magistrate. Herein it refers to a deputy Kadhi. A Kadhi normally appoints this Assistant Registrar of Marriages and Divorces among religiously educated male locals to assist him in officiating and annulling marriages in areas that are distance away from his court. Interview 93. But because of the Kadhi's court collected mandate of these two family law areas and succession issues, the Naibul Kadhi finds himself (naturally) handling inheritance matters too.

[1335] Interview 101; FGD 12; Interview 90; Interview 93; Interview with Abida Aboud (Pate, Kenya, 21 November 2015) [hereinafter Interview 98]; Interview 97.

[1336] FGD 11.

[1337] Interview 97. See eg FGD 11 where a middle-aged mother indicated that both the widow and herself left the entire estate of her deceased son to the orphans. The deceased left two daughters aged two years and four months. At the time of his death, the deceased had already received lands from his father. He had also acquired plots and built some houses. The respondent now manages the estate on behalf of the minors.

[1338] That is belittling tendencies, albeit indirect, towards women.

[1339] Interview 114; FGD 11.

her natural 'weakness'[1340] endears the society to erecting her matrimonial home out of pity, not entitlement.

Moreover, the 'shame' against which the Pate community purportedly guards a divorced daughter is really the community's, not hers. It is really her family's honour and reputation that is primarily at stake,[1341] since the major practitioners of this custom were prestigious people.[1342] The daughter functions as a symbol of family honour, and so the custom gets perpetuated oblivious of its *Sharii'ah* infractions. [1343] In an FGD with men in Pate, a participant confirmed this observation:

> *Wazee walikuwa na ile sifa ya uungwana: 'mimi ni muungwana. Itakuwaje ni mtoe binti yangu nimpeleke kwa mume amtaftie mahali ovyo ovyo tu amueke. Hapana. Mi nitajenga nyumba. Nitamjengea nyumba nzuri nione mtoto wangu nimemstiri kisawasawa*'[1344].

But this civilization is about regarding oneself better than others which defies the equality of humans embodied in *Qur'aan* 49:13.[1345]

The gifting of the house to a Pate daughter is also a self-preservation measure for her parents. The daughters receive the houses on a silent understanding that one of them, not any of the sons, would care for her aging parents. Yet this responsibility – unless the family has no surviving and able sons[1346] – rests with the male offspring under *Sharii'ah*.[1347]

But even then, the house is never a permanent property for the daughter. Were she to predecease her parents (particularly the father), the house reverts to her parents.[1348] The

[1340] The researcher has put this word into quotation marks because she disagrees that all women are innately ineffectual.

[1341] FGD 12.

[1342] FGD 12.

[1343] FGD 12.

[1344] Swahili phrases for '[O]ur ancestors bore civilized traits: 'I am civilized. How could I allow my son-in-law to accommodate my daughter in a shanty dwelling? I would build her a good house so that I get satisfied that my daughter is well protected and is comfortable.' FGD 12.

[1345] See note 390.

[1346] Interview 127.

[1347] See accompanying text to note 984 and note 986.

[1348] Interview 102.

parents claim that their daughter has abandoned her potential inheritance right. 'The narrative changes such that the shelter was only for the daughter to live in. It was not hers for good.'[1349] Thus upon the daughter's death, neither her widowed husband nor her offspring has a right over the house. In a certain case, for example, a daughter received a house from her mother before her marriage. She later wedded and got two sons. However, she predeceased her father. The shelter thus returned to her father. Only after the daughter's father died, did her two sons inherit the house.[1350]

Besides violating the *Qur'aanic* basis for correlative shares and obligations, the Bajuni tradition also infringes the express inheritance passages. The divisions among the Pate sons and daughters, for example, exceed the prescribed shares of one of the individual sexes, whether their father is poor or rich. A middle-aged male respondent noted that under the tradition, people took shares of properties without establishing or verifying if the shares were their due *Sharii'ah* portions.[1351]In fact, a group of women labeled the custom as *dhambi*[1352] because it negated God-given law.[1353]

For instance when the practice was universal and a family was poor, the daughters benefitted massively[1354] because their parents strove to give each a house.[1355] The father began constructing the houses (gradually) from the time the daughters were young.[1356] It was important – almost compulsory[1357] – that a daughter received the house, albeit one-bedroomed and a bed (even if a simple one such as *mwakisu*[1358]). But upon the demise of this

[1349] Interview 102.

[1350] Interview 98.

[1351] Interview 101.

[1352] Swahili word for a sin.

[1353] FGD 11.

[1354] Interview 101; Interview 107; Interview 90; Interview 105; FGD 11.

[1355] Interview 101; Interview 91; Interview 89.

[1356] Interview 90.

[1357] Interview 97; FGD 11; Interview 90; Interview 92.

[1358] Though almost in a similar design like *malili*, *mwakisu* beds are less sophisticated. They rank lowest in Swahili traditional beds. FGD 11; Interview 97. An aged male respondent from Kichokwe, for instance, indicated that he built a house and gave two rooms to each of his dual daughters. Interview 97.

impoverished father, however, the sons never asked about their share of wealth.[1359] Instead, they searched for their own properties.[1360]

If the sons of an indigent family ever received anything from their father, they shared a farm (the largest being three acres) or a one-acre plot.[1361] But since [present-day] Pate villagers regard a house as more valuable than a farm,[1362] the sons find it unjust (for example) 'to get a farm with 50 coconut trees whose value ranges between Ksh.s 20,000/= and Ksh.s 30,000/= while a daughter receives a house and its furnishings whose value ranges between Ksh.s 500,000/= and Ksh.s 600,000/='[1363]; yet God's law decrees that a son takes twice as much of a daughter's share.[1364]

But the tradition similarly disadvantages daughters when their father is affluent.[1365] Despite their fathers possessing massive wealth outside Pate town, daughters maintain only the right to gold and a house furnished with traditional beds.[1366] A middle-aged male respondent indicated that because of disregarding *Sharii'ah*, the sons '*muluku hujitukulia wao*'[1367]. Thus a Pate man who owned two big business premises in Nairobi, each of approximate value of between Ksh.s 20 and 30 Million (as of 2015), awarded these properties to his sons while the daughters received their ordinary houses in Pate.[1368] Yet currently the value of the houses Pate daughters get – absent the beds – range between Ksh.s 300,000/= and Ksh.s 600,000/=[1369] since the plots they stand on have no title deeds.[1370]

[1359] Interview 101; FGD 11; Interview 99.

[1360] Interview 91; Interview 107; Interview 101.

[1361] Interview 107.

[1362] Interview 108; Interview 90; Interview 91.

[1363] FGD 12.

[1364] FGD 12.

[1365] Interview 90; FGD 11; Interview 107.

[1366] Interview 107; Interview 91; FGD 11.

[1367] Bajuni phrase for 'taking lots of properties for themselves'. Interview 101.

[1368] Interview 107.

[1369] Interview 107. See also the accompanying text to note 1362.

[1370] The plots on which houses in Pate town stand on are yet to be surveyed. The only evidence guaranteeing a person's ownership to a particular space is a sale agreement if that person purchased the plot from someone else. Otherwise, Pate people took possession of their present plots and farms by settling on unoccupied lands. A person's efforts determined how much of the empty lands could be his. Interview 107. But according to one of the local chiefs, Pate farms got registered in 2013. Interview 92.

Again because of the current rarity and exorbitant cost of the exotic beds,[1371] parents now furnish their daughters' houses with modest ones[1372] thus further unbalancing the daughters' shares.

In fact unlike the present well-partitioned houses, the value of houses in the past was lower since a house was only *milia*[1373]. And it was sometimes made of mud. According to a female respondent, the status of the houses varied. Some were good and others were bad.[1374] Another male respondent confirmed this by observing that some daughters received dilapidated houses such that their husbands improved them.[1375] The mud houses remain a reality of the present poor families.[1376] Previous rich families, however, constructed their daughters' dwellings out of stones.[1377] Contemporarily, they use building blocks. And they choose to construct storey houses (so that each daughter occupies a floor) since they find it cheaper elevating an existing structure than starting a fresh one.[1378]

Notwithstanding the shortcomings of the Pate tradition, however, its proponents (mainly the elderly) continue to treat it as consistent with Islamic law.[1379] They surmise that since *Sharii'ah* is about *kusameheana*[1380] or *kuridhiana*[1381], 'children of one mother ought to accept the distribution, whether they have got something or not.'[1382] An 80-year old male

[1371] The beds have become both rare and expensive because the European residents in Shella collect them for display in their houses. Interview 89; Interview 107; Interview 94.

[1372] Interview 89.

[1373] Swahili word for an open verandah. See Interview 104; Interview 90. Because the couple's adult children would move out of the house upon their marriage, the open space was an adequate shelter for the newly weds and their future offspring. Today private needs, however, necessitate the partitioning of the open verandah into rooms. Interview 89.

[1374] Interview 91.

[1375] Interview 101.

[1376] See note 1358.

[1377] FGD male Pate; Interview 90; FGD 11.

[1378] Interview 90.

[1379] This conclusion derives, perhaps, from Islamic law embrace of local customs. But as al-Hibri and Interview 108 note, *Sharii'ah* only accommodates traditions that are consistent with its rulings. See note 574.

[1380] Swahili word for forgiving one another.

[1381] Swahili word for indulging one another. Literally, it means agreeing with one another ungrudgingly.

[1382] Interview 89. See also Interview 101; Interview 90.

respondent supported the tradition thus: '[I]nheritance is about *kustahmiliana*[1383], *kusameheana* even if one *atadhulumika*[1384]. But they (sons and daughters) would agree to each other's share because they are siblings.'[1385]

To the elderly it is wrong for siblings to fight over the allocations, however unbalanced.[1386] According to the elderly, even if daughters fail to inherit land, they can always ask the sons for a share of the farm produce particularly the coconuts – which are an integral ingredient in Bajuni cuisine.[1387] Thus while previously misgivings arose among the sons and the daughters,[1388] society expected the beneficiaries to embrace their father's divisions. And a majority of them did[1389] – a behavioural practice that was construed as being compassionate to one's sibling. A son never questioned a daughter's share and vice versa.[1390]

But these forceful traditional allocations distance the custom from IIL.[1391] As earlier explained, IIL only permits voluntary surrender of one's rights. The tradition's only compliance with *Sharii'ah*, therefore, is its recognition that a marriage (like any other consensual agreement) may either subsist or terminate – and therefore strategic responsive measures are vital.[1392] But a response which violates Islamic law is invalid to the extent of its violation.[1393]

4.2.4 Mandatory Communal Property Rights

[1383] Swahili word for accepting what each other has got.

[1384] Swahili word for suffering an injustice.

[1385] Interview 89. See also FGD 11.

[1386] FGD 12.

[1387] Interview 90.

[1388] Interview 89.

[1389] FGD 11.

[1390] Interview 104.

[1391] FGD 12; Interview 101.

[1392] Because of this truth, a person officiating an Islamic marriage normally enjoins the groom to co-exist with his wife harmoniously; and to part with her amicably if that need arises. This counsel derives from *Qur'aan* 2:229 and 231 among other precepts. See also Susan F Hirsch, *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* (University of Chicago Press 1998) 17.

[1393] Interview 114.

Unlike the specific tribal norms in Lamu, Garissa and Kakamega which largely disadvantage women, some minority communities in the Kenyan cosmopolitan towns and cities practice group rights which limit both males' and females' independent property entitlements. Under the mandatory communal property arrangement, property is rarely distributed. Instead, it rests in the care of the family's men. While seemingly neither sex owns the property, the males are actually in control and females benefit from it only through payment of their expenses. This form of property ownership, which seemingly traces its origins from the practitioners' original ethnic customs, happens predominantly among the Asian Muslims such as the Memon and some affluent Arab families.[1394]

The Memon, for example, hold their deceased relatives' estate communally[1395] with the males (particularly the deceased's eldest son) managing the wealth as well as maintaining the females.[1396] Because the females receive money for their subsistence (either daily or monthly) and shelter, the community downplays the import of dividing the estate.[1397] One of the reasons for barring Memon women from acquiring individual shares is to avoid enriching their husbands, whom the community regards as 'strangers', unless they are relatives.[1398] This practice reflects the Hindu customary law of succession[1399] which the Memon have been applying before their conversion to Islam[1400] and migration from India.[1401]

But unless Memon women give informed consent to this communal arrangement, the practice erodes their *Sharii'ah* independent economic freedoms including owning their share of the property and deciding how to dispose of it.[1402] It is probable that a majority of Memon women accept the tradition passively. Since incoming generations find existing ones

[1394] Interview 116; Interview with Muhdhar Khitamy, Chairman, SUPKEM – Coast Branch (Mombasa, Kenya, 2 November 2015) [hereinafter Interview 68]; Interview 57.

[1395] Interview 68; Interview 114; Interview 114.

[1396] Interview 116.

[1397] Abdulkadir (n 41) 279.

[1398] Interview 116.

[1399] Interview 114; Ali Khan (n 8) 30. See also the accompanying texts to notes 252 and 253.

[1400] Gibson Kamau Kuria, 'Religion, the Constitution and Family Law and Succession in Kenya' (Faculty of Law Seminar, Nairobi, 1977) 112 and 121 <http://uonlibrary.uonbi.ac.ke/content/religion-constitution-and-family-law-and-succession-kenya-paper-prepared-1> accessed 20 February 2019.

[1401] Narain (n 26) 48. See also note 301.

[1402] Interview 69.

observing the custom, the former hesitate to alter the status quo and the practice endures. But while communal property ownership is recognized under Islamic law,[1403] forcing individual members (overtly or covertly) to participate in it is not.

To conform to *Sharii'ah*, therefore, the Memon ought to make the participation in the group ownership practice optional. Such an option will avail to the women both their individual *Qur'aanic* portions and their maintenance rights from the respective male relatives.[1404] But even if the Memon women opt to manage their inheritance wealth communally, their families must still appreciate that '[S]uch an arrangement unlike Hindu law does not create joint-tenancy or joint family'[1405] wealth. Instead, the female beneficiaries together with their male counterparts are 'tenants-in-common owning well defined and specified shares'[1406] which they can separate and possess any time they want without any technical, legal or family hindrances.[1407]

Among the Arabs, while greed seems to inform their mandatory communal property ownership, the practice actually replicates some aspects of the inheritance trends of pre-Islamic Arabia.[1408] Thus, sons exclude their sisters from their father's estate. And if they recognise the latter's rights to this property, the sons decline to divide the wealth on the premise that the sisters' needs are cared for by the sons.[1409] Similarly, if a son dies, his surviving brothers assume his share of their father's estate and refuse to distribute it to the deceased's widow and children. It takes a spirited legal fight to compel the surviving heirs to relinquish the withheld portions.

[1403] Sometimes because of amiable relations between the heirs, a family may forfeit or defer division of the property and opt to use it as family wealth. Interview with Abdultwalib Hameed (Mombasa, Kenya, 30 October 2015) [hereinafter Interview 65]; Interview with Fauzia Baktayan (Mombasa, Kenya, 27 October 2015) [hereinafter Interview 55].

[1404] Interview 127.

[1405] Ali Khan (n 8) 30.

[1406] ibid.

[1407] *Re the Estate of Sheikhuna Mohamed Habib and Re the Estate of Amina Kombo and Re the Estate of Abubakar Mohamed Habib, Mohammed Madhubuti v Jelani Mohamed Habib* [2015] KCC (S) No 140 of 2013 (Mombasa) 9.

[1408] Interview with Shuwekha Mohamed (Mombasa, Kenya, 19 October 2015) [hereinafter Interview 43]. See the accompanying texts to notes 865 - 878.

[1409] Interview 63.

Thus when one of the richest Arab men in Mombasa died in 1980, his three adult sons assumed all his three big flats and a small one to the exclusion of his adult daughter. When one of the sons died years later, the remaining two sons succeeded their deceased brother's portion of their father's estate while giving material support to his immediate family. When the remaining two sons also died, their families as well as that of the demised first son inherited the wealth. Their sister received nothing out of her father's estate all those (30) years. After much persuasion from her own immediate family, this sister sued her three brothers' families for a share of the original estate. But while the case was ongoing, she got divorced. Then aged sixty (60) and with no property of her own, the sister stayed with her daughter. It is at this point that her brothers' families then offered her a two-bedroomed apartment from her father's original estate to live in.[1410]

In another case, three Arab brothers ran a family business. The business had multiple interests: general wholesale and retail; rental houses and car-hire. When the second born brother died, the eldest brother assumed the enterprises as his. The widow to the second brother thus claimed her inheritance portion from her deceased husband's business share. The older brother indicated that the widow had already spent Ksh.s 450,000/= which constituted her portion. The widow's children have since dropped out of school while the elder brother's children go to expensive academies in the city.[1411]

Other economic and sentimental reasons may still determine whether or not women receive their individual inheritance shares. Some beneficiaries, for example, may refuse to divide the property for fear of fragmenting the family wealth into unproductive portions.[1412] Others may even hesitate to sell it (when it is necessary to do so to facilitate its distribution) because they want to retain their parents' identity in the wealth.[1413] In fact, some heirs may claim falsely that their deceased parent had sold a part of the estate to them.[1414]

[1410] Interview 43.

[1411] Interview 47.

[1412] Interview 53; Interview 116.

[1413] Interview 116.

[1414] FGD 13.

In Garissa, for example, it is rare to divide immovable properties such as land and buildings because the customary manager endears to keep these possessions intact.[1415] According to the Public Trustee in Garissa, his office hardly receives immovable properties of the estate because family members claim that this wealth is not registered in the deceased's name but rather, is communally owned. While the family's claim may be suspect, it nonetheless succeeds in discouraging the Public Trustee from considering such properties as part of the deceased's estate, since the Public Trustee Act precludes a Public Trustee from dealing with communal property.[1416]

4.3 Norms on Appropriate Female Behaviour

Women also risk losing their inheritance portions because of women's own and societal dented definitions of women's roles and rights. Often, a majority of women believe that they are too weak to fight against the dispossession of their succession entitlements. Thus women's own low self-esteem contributes to defeating their rights. But the women's families and cultures nurture these women's sense of inferiority. Because of their continued (overt or covert) desensitization of women from their identities as God's full vicegerents,[1417] these relatives and family settings condition women to refrain from demanding or defending their inheritance shares. This section now shares some of these individual and societal beliefs on women and how they impact on women's ability to inherit their stipulated portions.

4.3.1 Protection of Family Honour

Among the waSwahili, women hesitate to pursue their rights in court because it is 'culturally unacceptable'[1418] both to sue a relative and to litigate over a deceased relative's estate.[1419] These legal fights are ignominious to the women's families because they strain relations between close family members.[1420] Thus the dispossessed women just cover up the

[1415] Interview 7; Interview 11.

[1416] See section 3 Public Trustee Act (Chapter 68).

[1417] The accompany text to note 413 explains this point.

[1418] FGD 13.

[1419] Interview 44; FGD 13; Interview with Swafiya Noor (Mombasa, Kenya, 29 October 2015) [hereinafter Interview 62].

[1420] Interview with Asma Shamsan (Pate, Kenya, 21 November 2015) [hereinafter Interview 103]; FGD 13.

issue.[1421] Hence in Mombasa when a daughter chose to sue her paternal uncle over her father's share in her grandfather's estate, her aunts prevailed over her because it was dishonorable 'for a niece to sue her own uncle'.[1422]

Similarly in Pate, a widow who suffered disentitlement of her succession portion and delayed allocation of the proportions of her two sons and daughter from her parents-in-law refused to approach the Kadhis' court because it would bring bad blood between the in-laws and her. '[M]y in-laws are related to me. I fear there would be bad blood between me and them if I go to a further audience. *Itakuwa si ni kupigana, insnadi mbaya*?[1423] I feel it is better I leave it to God (…). Isn't it better that I do not pursue this issue?'[1424]

Because court cases are heard in public and some of the audience could be people known to the warring family, disentitled women may choose or their families may persuade them not to institute a case. Hanging one's dirty linen in a familiar public is very shameful among both male and female waSwahili. It is almost homicidal. Thus three adult half-siblings (two sons and a daughter) in Mombasa, for example, are reluctant to determine the distribution of their deceased father's estate at the Kadhis' court because the deceased 'was a respectful man and we should not disrespect him by taking the matter to court.' Yet these siblings, including the widow's adult daughter, have each taken an apartment in their deceased father's flat of five apartments and given the widow nothing despite her incessant demands of her an eighth share. The widow has since ceased the pursuit of her right.[1425]

Again because a majority of waSwahili believe (erroneously) that a dispute over a deceased relative's property disrespects and punishes the deceased, disentitled women refrain from contesting their shares.[1426] To the waSwahili, the tussle signifies that the deceased erred in leaving some wealth behind. It also renders the deceased's soul restless in the grave.[1427]

[1421] FGD 3.

[1422] Interview 61. See also the attending paragraph to note 1410. The daughter there had hesitated to sue her brothers earlier for dispossessed inheritance share because she found it shameful to sue a relative over a deceased's property.

[1423] Bajuni phrases for 'it would be like fighting them, it would leave a bad seed between us?'

[1424] Interview 103.

[1425] Interview 62.

[1426] FGD 3; FGD 13; Interview 44; Interview 62.

[1427] FGD 13; Interview 44; Interview 62.

That is why a female respondent in Pate preferred to let greedy relatives keep the ill-gotten wealth rather than pursue her right, if to do so meant constantly 'mentioning negatively'[1428] her deceased relatives.[1429]

But defeating one's rights at the expense of family honour contravenes *Sharii'ah* since Islamic law enjoins Muslims to fight for their rights.[1430] One of the prophetic sayings on injustice was to protect both the perpetrator and the victim of an injustice from the Hell fire. According to the Prophet (PBUH), while the perpetrator has definitely erred, the latter risks suffering punishment if s/he fails to pursue his or her rights.[1431]

4.3.2 Women's 'Inherent' Inferiority

Besides choosing to uphold their families' honour, women's nurtured feeling of weakness also prevents them from pursuing their rightful portions. Because most cultures rank females' status as below males',[1432] women over-revere both their traditions and men.[1433] This custom-conditioned excessive respect (which often translates into fear)[1434] causes a majority of women to inherit either less than their stipulated shares or nothing at all. Sometimes, they die without inheriting the attending estate.[1435]

In families where dispossession of inheritance is likely or has happened, only the 'noisy females' (ie those who claim their rights) get their shares.[1436] This is because the perpetrators cannot withstand the women's continued nuisance.[1437] But this treatment hardly happens to men. According to a male Muslim scholar in Mombasa, men are 'trouble makers'[1438] and

[1428] Interview 102.

[1429] Interview 102.

[1430] FGD 13.

[1431] Interview with Najma Daudi (Mombasa, Kenya, 27 October 2015) [hereinafter Interview 54]; FGD 13.

[1432] Interview 6; Interview 62; Interview 61.

[1433] Interview 85; D Mutua (n 37) 7.

[1434] Interview 92.

[1435] Interview 69. See eg in *Re Habib* (n 1407) where a widow of one of the two joint tenants to the suit property died without demanding her inheritance share from the remaining tenant despite the tenants having agreed to honour her portion.

[1436] Interview 61.

[1437] Interview 61.

[1438] Interview 124.

they fight against violations of their rights.[1439] Therefore, the heirs in charge of an estate (for example) cannot risk eliminating males from property division – unless such dispossessed males have low self-esteem.[1440]

Thus among the Somali where someone has to trigger off the conversation on estate distribution,[1441] women would hesitate to commence this discourse because 'Somali women are submissive (ie they are expected to be seen and not to be heard)'[1442]. It would be regarded as unusual if women demand the apportionment of the estate.[1443]

Among the waSwahili, on the other hand, women fear that if they ask for their proportions, they will be regarded *kimbelembele*[1444] by the other members of the family.[1445] Often when a widow demands her succession share, she is regarded as greedy or without compassion. She receives taunts such as: 'this man just died and you want your portion.'[1446] Thus even if the female family members are poor, they would continue living indigently instead of demanding what is rightfully theirs.[1447]

In many Mombasa homes, for example, even the common one eighth widow's entitlement may never be discussed. Yet these proportions are women's legitimate *Sharii'ah* rights and it is their kinsfolk's perspective about women's inheritance which is wrong. Thus a young female respondent in Mombasa, for instance, noted that: 'I am hesitant to start the conversation on my mother's share because I am young. My half-siblings would also argue

[1439] Interview 124.

[1440] Interview 124.

[1441] The accompanying text to note 1184 explains what would happen if this is not done.

[1442] Interview 6.

[1443] Interview 6. As Abu-Lughod intimates, a woman's failure to exhibit modesty deprives her of moral worth. See Lila Abu-Lughod, *Veiled Sentiments: Honor and Poetry in Bedouin Society* (University of California Press 1988) 33.

[1444] Swahili word for 'being greedy or uncaring'. While the word *kimbelembele* may mean outspoken, its usage is often derogatory and intended to disparage the character of the bearer.

[1445] FGD 3; Interview 114; Interview 92.

[1446] Interview 114.

[1447] FGD 3. See further Ritu Verma, *Gender, Land, and Livelihoods in East Africa: Through Farmers' Eyes* (International Development Research Center 2001) 151.

that I have got more than I deserve. But their reluctance to declare my mother's inheritance share is making her *mnyonge*'[1448].

In this case, a man died leaving a widow, two adult sons and two daughters. One of the daughters belonged to the widow; while the second one and a son were children of another mother (divorced) and live in the UK. The other son had a different mother (divorced). The deceased's estate was a titled building with five apartments. He had also given a car to the widow during his lifetime. Because he was a former diplomat, the deceased man could only import a single car duty-free on his retirement. He thus had this second car enter Kenya in the name of the widow. But once the car arrived in the country, the man chose to retain it in the wife's name so that they could both drive separate cars.

A separate conflict between the sons, however, forced them to divide the apartments such that each son and daughter received one. Each of the two-bedroom apartment collects a monthly rent of Ksh.s of 13,000/=. The widow, however, got nothing although she stays with her daughter in the fifth apartment (a three-bedroomed one). Every time the widow asks about her share, the step-siblings indicate that the fifth apartment is a family house.

When the widow decided to sell her car (whose salvage value was about Ksh.s 50,000/= as of 2015), the UK step-son and step-sister objected because they considered the car as part of the estate. The widow has since stopped demanding her portion. She argues that she got a lot from her deceased husband during his lifetime and is encouraging her daughter to work hard and fend for her. Presently, her daughter's rent maintains both of them.

But both women's inferiority feeling and innate considerate nature also make them lethargic to demanding their rights.[1449] Because a majority of women feel they lack the tenacity to follow up on their entitlements, they give them up easily.[1450] Thus a male Mombasa lawyer observed that most of his inheritance briefs are filed by men. 'Normally, it

[1448] Swahili word for 'suffer an injustice'. While the literal meaning of this word is 'weak', its present use is contextual and signifies 'one deprived of her right'. Interview 62.

[1449] Interview 57; FGD 13; Sait and Lim (n 9) 129.

[1450] FGD 13.

is a dispute between brothers or uncles and the woman ends up being the beneficiary of someone else's dispute.'[1451]

Other women, particularly mothers, assume (gullibly) that if one of their family members has received wealth, they have also benefitted. They would indicate, for example, that: 'if my children get, I have got it too'.[1452] Thus the Luhya widows, for example, are least worried about not receiving a share of their deceased husbands' land estate because they believe that if the sons get the property, the mothers have also acquired it.[1453] Similarly, dispossessed Somali, waSwahili and Bajuni mothers hide themselves under their children's portions because they contend that their children would never abandon them.[1454] Instead these sons and daughters would care for their mothers until the mothers die.[1455] Yet these very offspring sometimes dislodge the widows out of what is considered 'family property'[1456].

In Amu, for example, a divorce woman initially consented to her adult step-son and daughter receiving a massive share of their deceased father's estate relative to her two younger sons on grounds that '*mukipata nyinyi ndo wamepata hawa wadogo* (…) *nyinyi ndo mkono wangu wa pili*'[1457]. The matter, however, later reached the Kadhi's court because the adult step-son and step-daughter continued to appropriate the estate to the exclusion of the other heirs.

4.3.3 Widows' Re-Marriages and Daughters' Marriages to Strangers

Society also treats widows' further marriages and daughters' marriages to non-relatives as a bar to these women's inheritance. Some deceased husbands' families deny widows their allocations if the prospects of the latter remarrying are high[1458] because, perhaps, of the women's relatively young age. Sometimes, however, these deceased husband's relatives also

[1451] Interview with Yahya Abdulkarim, Advocate of the High Court (Mombasa, Kenya, 17 December 2015) [hereinafter Interview 58].

[1452] Interview 57.

[1453] FGD 7.

[1454] FGD 3; Interview 89; Interview 90; FGD 13; Interview 90; Interview 93.

[1455] Interview 92; FGD 11.

[1456] Interview 57.

[1457] Bajuni phrase for 'if you benefit so have the younger ones (...) you are my second hand (ie alternate means of help after oneself'. See FGD 13.

[1458] FGD 3; Interview 63.

deny inheritance to widows who have already remarried and may even revoke wealth already allocated to them.[1459] Thus in Mombasa, former in-laws forced a widow who had successfully inherited from her deceased husband to forfeit the property upon her remarriage.[1460]

Ordinarily among the Luhya, a widow re-marries immediately after her husband's death without observing the waiting period.[1461] But this speedy movement of a widow from one family to another paradoxically denies her a claim over her erstwhile deceased husband's estate because she now belongs to another family.[1462]

But the practice of denying widows inheritance because they have remarried contravenes *Sharii'ah* in two respects. First, it defies the *Qur'aanic* license enjoining widows to remarry – if they so wish – after observance of their waiting periods.[1463] Second, it ties the widow's independent inheritance share to her deceased husband's allegiance which contravenes *Qur'aan* 4:11.

On the other hand, some family members or clans refuse to grant inheritance to their female relatives because the latter are married to people outside their extended family. These women's families, clans or sub-clans may liken allocating property to such women to enriching the husbands' families or clans.[1464] These females' relatives treat the women's shares as the entire family's or clan's wealth. But this intentional blurring of boundaries between individual and community or family property infringes IIL.[1465] In actual sense, the properties that the family withholds are the females' guaranteed *Sharii'ah* portions, and they have no interest in them.

[1459] Interview 47; Interview 115; FGD 13. Incidentally, the LSA enjoins a similar outcome. See sections 35(1) and 36(1). The proposed section 13(a) of the Draft LSA Bill, however, remedies this legislative treatment. See Appendix 2.

[1460] Interview 47.

[1461] See note 841. The duration of the waiting period of an expectant widow, however, is the remaining term of her pregnancy – whether a longer or shorter period than the general four months and 10 days term.

[1462] Interview 77; FGD 8.

[1463] See *Qur'aan* 2:234.

[1464] Interview 4.

[1465] Interview 63.

Even then despite the 'outsider'[1466] or stranger mentality pervading many tribes, some of these communities require exogamy as a marital rule.[1467] In fact among the Digo, this 'outsider' treatment extends to widows and their orphans. Thus the deceased's brothers may block the widow from her inheritance because she is a distant person. Sometimes, they dislodge their nieces and nephews from the estate if these offspring are perceived as too close to their mother.[1468]

4.4 Disintegrating Islamic Systems

The crumbling of Islamic ideals among some Muslims makes them invoke personal or cultural perspectives during estate distribution in order to displace legitimate heiresses. Enveloped in their patriarchal or misogynist tendencies, these (sometimes) male and female immediate and extended family members may, for example, oppose a widow from inheriting; or raise disingenuous claims of illegitimacy against her marriage and children. These disentitling relatives are often ineligible heirs or dominating ones who want to assume more than their actual portions.[1469] This section shares some of these instances which wrongfully legitimise themselves as being consistent with *Sharii'ah*.

4.4.1 In-laws' Rivalry

Sometimes, a deceased's extended family may disallow a widow to inherit its deceased son's or brother's massive properties.[1470] Intrinsically as the deceased's natal family, the in-laws assume that their loss (in the deceased's death) is greater than the widow's.[1471] '*Hua mtu yuaona kama ambaye pengine yule mume umemuondoa duniani wewe. Kwa hivyo wewe hustahili ukakaa maisha mazuri ikiwa yule mume hayuko. Manake maisha mazuri ni*

[1466] This phrase is borrowed from a male lawyer in Mombasa. See Interview 63.

[1467] Cotran, 'Unification' (n 36) 214. See eg the Somali and the Luhya. Interview 4; Interview 79; Interview 81.

[1468] Interview 63.

[1469] Interview 115. Domination here means greater physical strength; higher literacy levels and/or knowledge of the estate through its management; and having rapport with influential public or private officers. Salma Abeid (Mombasa, Kenya, 28 October 2015) [hereinafter Interview 59]; Interview 124. This sense of domination correlates with MFs' definition of patriarchy. See note 117.

[1470] Interview 115; FGD 4.

[1471] Interview with Bintishungu Juma, Chairlady, Sauti ya Wanawake – Likoni Chapter (Mombasa, Kenya, 31 October 20150 [hereinafter Interview 66].

yakustirika[1472]. In fact in Kakamega, mothers-in-law normally fault the widows for bewitching their sons to their death.[1473]

Consequently, the in-laws would make the widow's life unbearable including evicting her from her matrimonial home.[1474] Mothers-in-law often partner with fathers-in-law or their remaining sons and daughters to commit this violation. Sometimes (however) because a mother-in-law receives maintenance from her subsisting sons and daughters, she hardly counters her sons' and daughters' infraction[1475] even when she disagrees with it.[1476] Instead, she plays it safe to avoid antagonizing the surviving offspring.

The deceased's siblings, on the other hand, may claim a share in the inheritance forcefully even when their deceased brother or sister has left a son.[1477] Thus a widow in Mumias described brothers-in-laws as 'the biggest beasts. When they gang up, you will see fire.'[1478] Similarly in Amu, a widow and a mother of three minor sons and two minor daughters described her brothers-in-law and step-sons as 'snakes'[1479].

In Mombasa, for example, a widowed village elder shared how she prevented her deceased husband's family from seizing his estate of a 10-acres farm and a house. The deceased was survived by the widow and a young son. While the presence of the son excluded the deceased's extended family from the estate, the deceased's nephew went to the chief and then a lawyer to demand it. Supported by the deceased's other relatives, the nephew claimed that the estate was in the hands of someone unrelated to the deceased since his wife and son had predeceased him. When the widow proved her identity to the lawyer,

[1472] Swahili phrase 'the in-laws regard you (the widow) as the cause of their son's death. They thus reckon that you are less suited to lead a good life in the absence of the husband. A good life means a comfortable one (with less economic struggles including an assured accommodation)'. Interview 115.

[1473] Interview 81.

[1474] Interview 115.

[1475] Interview 63; Interview 69.

[1476] Interview 69.

[1477] See Interview with Rahma Kawira (Mombasa, Kenya, 24 October 2015) [hereinafter Interview 50]; Interview with Mr. and Mrs. Abdulghafur Masoud (Garissa, Kenya, 31 October 2015) [hereinafter Interview 67]; Interview with Amana Mohdhar (Garissa, Kenya, 11 December 2015).

[1478] FGD 6.

[1479] FGD 13

however, the in-laws summoned her to a further lawyer. She declined to go and the in-laws eventual gave up their pursuit.[1480]

In another case in Mombasa, a man who lived in a family house renovated the same and demarcated it such that he lived with his wife in the front part of the house and his siblings occupied the rear. When the man died, his siblings chased the widow away and claimed that the house was their deceased father's, and not their deceased brother's. Despite the widow protesting that she had a share in the house since it was her husband who renovated it, she got nothing.[1481] While the repairs done by the deceased have little bearing on the widow's inheritance share,[1482] the widow (however) maintained a right in her deceased husband's portion to his father's estate. The in-laws thus erred in excluding her completely from the house.

These in-law rivalries often push some men to bequeath their properties to their wives during their lifetime to obviate the possibility of their disentitlement upon the husbands' deaths.[1483] While it is a wrong move under IIL, the husbands assume it as the practical way to safeguard their immediate family's economic rights.

4.4.2 Unlawful Enjoyment of Undivided Estate

Some heirs may employ the estate to the exclusion of others before its distribution. Such beneficiaries include the deceased's traditional successor[1484] and the favourite sons or daughters of a deceased parent who ordinarily possess or manage the parents' estates.[1485] Often among the waSwahili, a parent may entrust a certain son or daughter with the family property or wealth secrets during his or her lifetime because that son or daughter is more

[1480] FGD 4.

[1481] FGD Likoni women.

[1482] Unless the deceased agreed with his family for refunds of the renovations, his gesture was simply *ihsaan* (Arabic word for kindness or benevolence) to the family. It was actually *swadaqah* (Arabic word for charity, herein voluntary charity) which God promises to reward in many *Qur'aanic* prescriptions. See note 1072 above.

[1483] Interview 115.

[1484] This is a person who both inherits the deceased's property and assumes the deceased's obligations and status in the community. Kameri-Mbote (n 267) 377.

[1485] Other may also be poor beneficiaries who assume it is their right to live in a family property. See Interview 116.

responsible, respectful, educated or dear to him or her than the rest; and is thus best fit (in the parent's assessment) to develop or manage the estate.[1486]

According to a male lawyer in Mombasa, holding to account such a person is a 'delicate'[1487] family issue – which even the Kadhis have difficulties addressing – since this very person (if an older sibling) is the one who brought up his or her siblings and married them off.[1488] Caring for a young sibling or relative until his or her marriage is one of the cultural noble duties among the waSwahili. It often starts with an older sibling quitting school to allow his or her poor parents to educate his or her younger siblings; or to assist his or her parents to fend for his younger siblings. While the benefactor's generosity to his or her younger brethren least affects the succession divisions under *Sharii'ah*, the inherent human tendency to reciprocate goodness may later preclude his or her siblings from reproaching him or her.[1489] Undoubtedly, however, the appropriated and unaccounted for portion of the inheritance results in unbalanced eventual shares since some heirs would have benefited more than others.

Sometimes the beneficiaries in charge of the estate do not inform their own families that the property belongs to other heirs as well. Thus these family members treat the property as their own.[1490] In fact, the caretakers' sons and daughters use the family wealth as if they have a better right to it compared to their cousins, uncles and aunties. And when the excluded rightful heirs demand their inheritance shares in the original estate, a family tussle ensues between them and the benefactor's families.

4.4.3 Disingenuous Claims of Illegitimacy and Illicit Marital Relationships

Apart from appropriating the estate alone, some family members prevent others from inheriting it because the latter were seemingly sired outside wedlock[1491] or had illicit marital

[1486] Interview 63; Interview 116.

[1487] Interview 63.

[1488] Interview 124.

[1489] Interview 63.

[1490] Interview 63.

[1491] Interview 44; Interview with Mamuu Suheil (Mombasa, Kenya, 24 October 2015) [hereinafter Interview 51]; Interview with Zuhura Nahad (Mombasa, Kenya, 28 October 2015) [hereinafter Interview 60].

relations with the deceased.[1492] While illegitimacy is a legitimate ground to bar a son or a daughter from his or her father's estate,[1493] the claimants are usually motivated by selfishness rather than sincere commitment to Islamic tenets.[1494] A male Muslim lawyer in Mombasa noted that if some of his clients make illegitimacy allegations against others, he requires them to substantiate the claims and warns them of *Qur'aan* 24:4 – 5.[1495] They then usually abandon their claims.[1496]

Often until the deceased's demise, the claimants recognised his unlawful union(s) as marriage(s) and acknowledged his would-be beneficiaries.[1497] They were silent over these equally grave matters under *Sharii'ah*.[1498] But only at the division of his property, do these kinsmen now find it contrary to *Sharii'ah* for both the 'widow' and the 'orphans'[1499] to succeed the deceased's wealth.[1500] The in-laws would, for instance, insist on the marriage certificate of the two before they allow the widow to inherit.[1501] In essence, they are applying double-standards in adhering to Islamic precepts (to satiate their interests) contrary to the reprimand in *Qur'aan* 2:85.[1502]

Thus in Mumias, brothers-in-law successfully prevented a widow from succeeding her deceased husband's estate because she had abandoned him on his death bed and had no proof of her marriage to him. While the widow claimed to have to have entered into an Islamic marriage (*nikaa-h*) with her husband, the brothers-in-law objected to this fact. The in-laws

[1492] Interview 69.

[1493] See the accompanying texts to notes 18 and 926. An illegitimate son or daughter, however, succeeds his or her mother because it is certain that she is so because she carried the son's or daughter's pregnancy.

[1494] Interview 44; Interview 69.

[1495] See note 483.

[1496] Interview 69.

[1497] Interview 69; Interview 47; Interview 81.

[1498] Interview 69. See *Qur'aan* 17:32; 24:2; 25:68. See also generally Jadeed (n 88).

[1499] The has put quotation marks on both the words 'widow' and 'orphans' connote the doubtful legitimacy of these deceased's immediate relations.

[1500] Interview 69; Interview 77. See also *Chuba* (n 805).

[1501] Interview 81. While a marriage certificate offers solid evidence to the marriage of a particular couple, it is not a necessity in Islam. The two male witnesses to the officiating of the union suffice to attest to its legitimacy. See note 987. While The Marriage (Muslim Marriage) Rules 2017 require the registration of all Muslim marriages, rule 15 thereto also recognises that failing to register a marriage does not invalidate it.

[1502] Interview 69.

further argued that the widow failed to take care of her husband when the latter was terminally ill. Because of these dual failures, the in-laws surmised that the widow lost the right to inherit the deceased. Despite the woman explaining that her absence was occasioned by her husband's threat to beat her up for failing to provide him with food, the *liguru* upheld the brothers-in-laws' case.[1503]

Similarly in two separate cases in Mombasa, relatives denied widows and their children of their deceased husbands' and fathers' estates respectively because they ensued from illicit relationships with the deceased. In one instance, a father-in-law assumed all the employment terminal benefits of his deceased son (about Ksh.s 3 to 4 Million) to the exclusion of the widow and his 'illegitimate' grandchildren. While the widow and the deceased were first married traditionally, they later solemnized their union at the Kadhi's. But she was denied access to the property and her children were excluded from the estate because they were born out of wedlock. Consequently, the children were forced out of school since the widow could not afford their fees.[1504] While the children may have no claim to their father's property if they were born out of an invalid union, the widow has a definite share because she was later legally married to her deceased husband.

In the second matter, a man died and left two minor daughters and a minor son. He had divorced his wife at the time of his death. His only estate was a house. His two full sisters occupied this house. About 25 years later, the daughters returned to their aunts (the two sisters) to claim their father's property. The aunties rejected this demand on the basis that the daughters (including the son) were misbegotten since the deceased had not married the daughters' mother. Again since the deceased was suffering from diabetes, he was impotent and therefore could not possibly have fathered the daughters and the son. Furthermore, because their own sons and daughters had improved the house (which valued at Ksh.s 1.2 Million in 2015), the aunts demanded a stake in it. The parties finally approached the Kadhis' court.

[1503] Interview 77.

[1504] Interview 47.

Because the whereabouts of the daughters' brother (the son) was unknown, the court granted the daughters two-thirds of the estate.[1505] The aunties received a sixth share of the estate which would have gone to their now deceased mother who had survived her deceased son.[1506] The remaining sixth, supposedly, went to the aunts too because they were the existing agnates.[1507]

4.4.4 Widows' Rivalry

Despite Islam permitting polygyny, most co-wives harbour hatred against each other. And sometimes, this hate transcends their husbands' lives such that a widow, or two or three may displace the counterpart(s) that they had always despised from their deceased husband's estate.[1508] This exclusion may also extend to the step-offspring, especially when the mother of these children was divorced or had pre-deceased the deceased husband. Often, the main perpetrator or instigator of these disentitlements is the first or last widow in the union.[1509] Each mistakenly believes that she owned the deceased husband including his wealth more the rest because of her position in the union. And, sometimes, culture supports this perspective.

In many Kenyan ethnic tribes, for example, the first wife is revered because she is believed to have endured more hardship with the husband in acquiring his property; and/ or her wifely duties preceded the subsequent wives. Her family is normally described as *nyumba kubwa*[1510]. Consequently, she receives or takes a larger share of the inheritance on behalf of her family, mostly the sons.

But *Sharii'ah* does not differentiate the widows' shares in a polygynous union. Since all wives rank identically regardless of their positions in the union, they share the widow's a quarter or an eighth entitlement (as the case may be) identically. If a particular widow contributed to the acquisition of a matrimonial property, her contribution must be excised off the deceased husband's estate prior to division. It is her property and not part of the

[1505] This coincides with *Qur'aan* 4:11. See also Diagram 1 above.

[1506] Interview 69.

[1507] See note 911 and its accompanying text.

[1508] FGD 13.

[1509] FGD 13.

[1510] Swahili literal phrase for 'big family'. It is, however, used contextually and may mean either the first family or the first wife. Interview 81; FGD 8; FGD 9; FGD 7.

deceased's.[1511] Similarly, IIL treats all sons in a polygynous marriage the same regardless of the seniority of their mothers in the union or the sons' birth order. They thus share identical portions. And this treatment also extends to the daughters of such a union.

Despite this Islamic position, widows' rivalry still permeates in estate division. Thus in a discussion with women in Amu, a participant narrated how her step-mother's opposition to her mother's marriage has deprived her of her deceased father's estate for 29 years. The respondent is the eldest offspring in a family of two sons and two daughters. Her mother was the second wife to her deceased father. The first wife had six daughters and a son. After the respondent's birth, the first wife demanded the husband to divorce either of the wives. While the husband cheated the first wife that he had separated from the respondent's mother, he did not. Instead, he sired the three subsequent offspring with her. As of 2015, about 29 years since the demise of the respondent's father, the families are yet to share the estate because the first family regards the respondent's siblings illegitimate.

The first family took the deceased's entire employment terminal dues to the exclusion of the second family. It continues to appropriate the immovable properties (three houses and a 10-acre land in Lamu). The Public Trustee Office, however, has withheld the title documents to this wealth until both families reach an amicable distribution formula. Because the first family refuses the respondent's siblings' inclusion in the estate division, the respondent has declined to receive a share of the property. 'When I asked the first family to give me my fraction and I would share the same with my siblings, they refused. That is why I chose that either my siblings be included in the distribution or the property goes to the state; and both families miss out.'[1512]

In Garissa, on the other hand, a man died and left a widow, five daughters and two sons. The mother to the first three daughters, however, had divorced the deceased at the time of his demise. The deceased's estate was his pension and two rental houses in Garissa and Gilgil. But the widow (and a mother of the remaining children) has since assumed both houses and collects their monthly rent of Ksh.s 12,000/= and 14,000/= respectively. The older three daughters of the divorced wife receive nothing and their mother struggles to retain them in

[1511] See note 822.

[1512] FGD 13.

school. When one of the step-daughters mentioned this fact to the widow, the widow alleged the girl had insulted her and reported the matter to the police. Because the girl was a minor, the police arrested her mother instead. But the deceased husband's former employer has since refused to release the pension until the erstwhile co-wives appreciate the rights of all legitimate heirs. At the time of the research, the deceased husband's clan elders had appointed the deceased's brother to pursue the pension on behalf of the dual families. This brother-in-law accepted the appointment on condition that the surviving deceased's mother also receives her inheritance share.[1513]

Sometimes, adult step-sons and step-daughters join their mothers' rivalry.[1514] Thus, some step-sons and step-daughters assume their deceased father's property to the exclusion of the existing widow(s) and step-siblings.[1515] In an FGD with women in Amu, an affected participant related dispossession of inheritance shares among half-siblings to their belonging to different mothers. If they were full siblings '*hawangetesana*'[1516]. On the other hand, some step-issues tell off the widow (ie who is not their biological mother) that they only allowed her to enjoy their father's wealth during his lifetime out of respect for him. Thus in his absence, the widow must relinquish such benefits.[1517]

Because co-wife jealousy seems natural, many husbands resort to marry subsequent wives secretly to avoid negative reaction from their existing spouses.[1518] This practice, however, risks eliminating these covert families from their deceased husbands' or fathers' estates especially when the latter die without introducing the further families to the earlier ones.[1519]

In Amu Island, for example, a man married a second wife without the knowledge of his first wife. He, however, informed his four close friends about the consequent union. A few

[1513] Interview with Amina Abdi (Garissa, Kenya, 11 December 2015).

[1514] Interview 124; FGD 13; Interview 118; Interview 115.

[1515] Interview 118; Interview 124; FGD 13; Interview 118; FGD 3.

[1516] Swahili word 'for not troubling each other'.

[1517] FGD 3.

[1518] Interview 118. A secret Islamic marriage happens when the groom's family (whether immediate or extended) are ignorant of it. It is sound if the covert wife agrees to its terms, some of which erode the standard rights of an ordinary marital partner. For instance, the husband can only sleep over at this hidden spouse's home after lying about his absence in the earlier home.

[1519] Interview 69; Interview 118.

months later, nonetheless, the man died leaving both widows pregnant. While the deceased's friends were pained to notify the first wife of the existence of the second wife, they did it in order to safeguard the inheritance rights of both the subsequent widow and her unborn baby.[1520] Both widows delivered their pregnancies at the same time. While the first one got a baby girl, the second had a baby boy who resembled his father. It is at that point that the first widow accepted the boy as her husband's child. Both the boy and his mother finally received their inheritance portions.[1521]

4.5 Conclusion

Despite IIL's expressed provisions on women's inheritance rights, the deceased Muslim's ethnic customs seem to dictate women's inheritance in many Kenyan communities. The privileging of these customs over IIL and its related tenets is common in the four studied communities despite their varying livelihoods. And still cultural perceptions on the roles and rights of women within their families and clans continue to limit women when they claim for these rights. Moreover, the disintegration of Islamic ideals across some families (immediate and extended) allows the infiltration of enculturated personal idiosyncrasies which exclude legitimate heiress from their inheritance.

In the upshot, women miss out from the properties which are significant in their ethnic communities' economy such as land and livestock. Women only have a guarantee in that part of the estate which is linked to their feminine identity and roles such as their deceased mother's dresses and utensils. They also share in identical measures with their male counterparts other available properties which are insignificant to their community regardless of the males' receipt of the celebrated properties. Sometimes, women are constricted into mandatory communal property arrangements such that they benefit from periodic subsistence payouts instead of their individual holistic *Qur'aanic* portions. Other times, women receive nothing. These experiences position Kenyan Muslim women's inheritance rights as a mirage.

[1520] An unborn child inherits if s/he is conceived during the life of the deceased and is born alive (whether or not s/he survives thereafter). The sign of life is elicited from the infant's cry, voice or movement of any part of his or her body. See generally Interview 124; Hussain (n 5) 256–62; Ali Khan (n 8) 186–87.

[1521] Interview 118. While the first wife's acceptance of the step-son is inconsequential to the second family inheritance rights, it is however material in facilitating the probate process. Otherwise a legal battle may have involved DNA testing and taking of oaths by the deceased's friends to substantiate the second marriage in the absence of a marriage certificate.

The next chapter unravels how ignorance of IIL further contributes to the dissipation of these rights.

5 CHAPTER 5: IGNORANCE OF ISLAMIC INHERITANCE LAW AND ITS CONSEQUENCES

5.1. Introduction

While chapter four has looked into how entrenched customary practices and beliefs defeat women's stipulated inheritance rights, this chapter now explores how insufficient or erroneous understanding of IIL among key stakeholders contributes to this situation. The chapter, therefore, assesses the position of ordinary Muslim men and women; religious leaders and legal practitioners (both bench and bar). It also delineates the consequences of having inadequate knowledge on IIL among each of these individual categories. While ordinary men and women are often the beneficiaries of the law, they sometimes apply it especially when estate distribution is done at home or at another extra-judicial forum. Both the religious leaders and the legal practititioners, on the other hand, interpret and apply IIL whether the property is divided at home or at the courts.

In addition to demonstrating the dangers of ignorance of both the letter and spirit of IIL, this chapter also shares preliminary positive pointers towards women's inheriting opportunities because of recent expansion of Islamic knowledge in some parts of the country. This part underscores the significance of adequate and accurate knowledge on IIL in safeguarding women's inheritance rights. Overall, the chapter is based on the findings of the field data.

5.2. Ignorance among Women

The dominant view that emerges from the research is that a majority of women are oblivious of their inheritance rights. Most of them do not know that they have these rights in the first place.[1522] And the few women that do, are ignorant of their actual portions[1523] or how to claim them.[1524] In fact, women from tribes which practice patriarchal cultural succession norms or communal property ownership make a majority of the first category. In an FGD

[1522] Interview 4; Interview 126; Interview 85; Interview 84; Interview 58; FGD 3; Interview 22; FGD 13.

[1523] Interview 4; Interview 58.

[1524] Interview 126; FGD 13.

with women in Mumias, for example, a participant noted that: '[W]hat kills us[1525] is that we do not know that we women have rights. We get oppressed but *tunavumilia tu*'[1526].

Many women in predominantly Muslim localities, on the other hand, belong to the second group. Thus they believe that any part they receive from the estate, if at all, satisfies their *Qur'aanic* entitlements.[1527] They may, therefore, become content with a paltry portion of an otherwise massive estate. In Mombasa, for example, women from families with little knowledge on Islam do not know what constitutes their shares.[1528] Often, widows are heard saying: 'I am waiting for my 1/8 share'. Yet they do not understand the meaning of 'the 1/8': what it entails or how it is calculated.[1529] To them, this *thumun*[1530] (but loosely referred to as *sumni* or *sumuni*[1531]) is a token.

In Amu, for instance, a widow and a participant in an FGD with women claimed to have received her rightful inheritance portion. But she only got Ksh.s 300,000/= of the deceased husband's Ksh.s 2 Million which was the cash component of the estate. Yet a number of houses remained undivided, since the deceased's son and daughters (from a previous marriage) were hesitant to divide the estate fully. Hence at the end of the FGD, all the participants suggested that every religious educational session on inheritance should include detailed illustration of how the one-eighth entitlement is calculated.[1532] They wanted male Muslim scholars and *ustadhaat* (single *ustadhah*)[1533] to inform their audience on what constitutes this portion if, for example, the deceased's estate is 10 houses.

In Mumias while the respondents in an FGD with women indicated that they inherited according to *Sharii'ah*, their individual stories demonstrated that their divisions failed to

[1525] Contextually meaning 'what oppresses us'.

[1526] Swahili phrase for 'we just persevere patiently'. FGD 6.

[1527] Interview 58; FGD 13. The societal misconstruction of the 'one eighth' fraction is one of the motivating grounds of this study.

[1528] FGD 3; Interview 57; Interview 58.

[1529] FGD 3.

[1530] *Thumunu* (pronounced as *thumun* at the end or mid-way stoppage of an Arabic sentence) means an eighth.

[1531] *Sumni* or *sumuni* is a Swahili corruption of the Arabic word *thumun*. Ignorance of the Arabic language or infusion of mother tongue brings about these varied pronunciations.

[1532] FGD 13.

[1533] Arabic word for female Muslim religious teachers.

conform to IIL. In one case, for instance, a man died and left three sons, three daughters and four widows. The first widow had no child; the second had two sons; the third had a son and a daughter; and the fourth had two daughters. When the *wichisala* divided the estate, the first son got nine acres of land; the second son got eight acres and the last son got seven acres. The daughters and the widows received nothing. Although the daughters faulted this arrangement and demanded a share of the estate, it was by then exhausted. The widows, on the other hand, were comfortable with the divisions because the sons were taking care of their needs.[1534] Yet under *Sharii'ah*, the widows were to share three acres (ie an eighth of the 24 acres). The sons and daughters were each to receive four point seven acres and two point three acres respectively.

In two further separate stories, the allocations contradicted *Sharii'ah* yet the beneficiaries were content with their respective irregular proportions. In the first case, a man left five widows and an 18-acre parcel of land. The first widow had two sons; the second had three daughters; the third had two sons and two daughters; the fourth had three daughters; and the fifth had no child. The family met and assented to the first widow getting nine acres; the second taking two acres; the third got four acres; the fourth got two acres and the fifth got an acre. The family then moved to the High Court and appointed the first son of this polygynous family as the administrator of the estate. The court subsequently ordered the family to survey the land and each widow received the share agreed upon by the family.[1535] Under *Sharii'ah*, however, the distribution would exclude the fifth widow because she exceeds the permissible number in a polygynous relationship. While the remaining four widows would have shared two and a quarter acre of the land, each son would have received one point nine acres and each daughter would have taken almost an acre.

In the second case, a man left two widows and a 14-acre farm. While the first widow had four sons and four daughters, the second one had three sons and two daughters. Both the village elder and the sub-chief adjudicated the divisions. The first widow got 10 acres and the second one received four. Under *Sharii'ah*, however, the widows would have shared one point seven five acres identically. While each son would have taken one point two three acres, each daughter would receive half as much this size of land.

[1534] See FGD with women of Lureko (Mumias, Kakamega, Kenya, 8 November 2015).

[1535] FGD with women of Lureko (Mumias, Kakamega, Kenya, 8 November 2015).

While IIL permits consensual distribution of an estate outside the *Sharii'ah* stipulated portions (which principle validates the divisions in both these two last cases), it seems the Luhya custom which primes the first wife in a polygynous relationship prevailed in determining the traditional portions. In fact, the second widow in the second case indicated that her co-wife had the right to get a larger share because she was the first wife. Because of this same tradition, the sons of the first wives benefitted more than the sons of the subsequent wives in both these two cases.

And because of the common Luhya tradition of excluding daughters from a land inheritance, the daughters' shares were disproportionate among them. Those daughters who had full brothers got nothing as was the case of the second widow's daughters in the second story. This widow and her three adult sons took an acre each of their four-acre division. The daughters who had no full brothers received some land, albeit in very low proportions compared to some of their consanguine brothers as it was the position in the first case.

Women's ignorance of IIL is explicit in their conversations. They have limited understanding of its application and they offer superficial reasoning to explain its practice. In an FGD in Garissa town, for example, the participants questioned the infiltration of the deceased's brothers in a deceased's estate where daughters are the only beneficiaries.[1536] Yet the inclusion of the uncles in such a situation is valid because the deceased's father is also dead. When the daughters take their *Qur'aanic* portions of a maximum of two thirds of the property, a part of the estate subsists. It is this remainder which goes to the deceased's father or brothers (in the absence of the father) ie the proximate agnates.

In Amu, a female respondent noted that two sons are enough to exhaust their deceased father's estate.[1537] While this statement is truthful, its veracity pertains only where the sons are the only heirs of their deceased father. If that is so, even one son could exhaust the entire estate. But where the deceased has left other heirs such as a widow and or daughters, the sons only succeed the property after the females have assumed their portions. The participants in

[1536] FGD 1.

[1537] Interview 115.

an FGD in Amu, on the other hand, got astounded when they learnt from the researcher that a widow had no right to her husband's bequest.[1538]

In Mombasa while a respondent acknowledged that IIL did not discriminate against women, her justifications revealed that she was uneducated of this law. To her, a widow's eighth entitlement is adequate since she is guaranteed of an identical further fraction if her subsequent husband (upon re-marriage) dies. She thus found that a widower deserved a larger share because he has no second chance to inherit if his subsequent wife (upon re-marriage) dies. To this respondent, it was therefore unjust for males and females to demand identical portions because while a woman receives inheritance from both her deceased father and deceased husband, a widower gets nothing from his deceased wife when the wife has children and siblings. These reasons are clearly inaccurate because as seen in chapter three both surviving spouses inherit the properties of their subsequent partners. And they do so as principal beneficiaries.

5.2.1. The Consequences of Women's Ignorance

Both women's ignorance of IIL and the concept of justice in Islam lead some of them to adopt a fatalistic attitude such that instead of fighting their disentitlement,[1539] they desert their entitlements. These women remain silent over their dispossession or resign to it even when they desire that their matters be resolved within 'God's law'[1540]. It is thus common across many communities to find dispossessed women favouring to abandon their rights so that God recompenses them in the Hereafter.[1541] Statements such as: 'I leave everything for Allah to adjudge for me';[1542] '*arichireni Mlungu*. *Haki taizama*'[1543]; '*Mungu atanilipia*'[1544] abound.

[1538] See FGD 13.

[1539] Interview 124.

[1540] al-Hibri, 'Law and Custom' (n 56) 3.

[1541] FGD 3; Interview 27; Interview with Dannah Adnan (Garissa, Kenya, 14 December 2015) [hereinafter Interview 32].

[1542] FGD 3.

[1543] Digo phrase for 'leave these affairs to God. One's rights never diminish'. FGD 4.

[1544] Swahili phrase for 'God will recompense me against the injustice'. FGD 4.

Other women also fail to pursue their entitlements because of their narrow view on worldly possessions. One would claim that 'if the owner of the property left it in this world, why should I insist on it? The perpetrator would also leave this wealth behind when s/he dies.'[1545] In an FGD with women in Mumias town, for example, a participant indicated that she allotted three acres of land to each of her two deceased husband's 'illegitimate' sons when the two were introduced to her family. She retained two and a half acres for her three daughters and herself. According to the respondent, 'I gave out this land out of my own volition. This is just temporal property. *Vingi vinaisha, vidogo vinaisha*[1546].

Sometimes, women abandon their rights because they fear for their safety and that of their loved ones. In Raya, for example, a widow failed to claim her displaced inheritance rights at the Kadhis' court because she feared for her life and that of her barely one-year old son. According to the respondent, she feared pursuing her rights as she would be a nuisance to her step-sons who 'may kill me yet I have children. So I leave everything to God to resolve the issue for me. I also feared for my small son. He had just lost a father. Now if I pursued my rights and I get beaten, my son would lose me too. He would lose twice.'[1547]

In Amu, a woman indicated that she lost the drive to pursue the succession right of her two minor sons for fear of *hasad*[1548] befalling them. The respondent, who is an ex-wife of the deceased, had petitioned the Kadhis' court against her adult step-son and step-daughter on behalf of her two minor sons. Because the petitioner had two sons whose collective inheritance share is larger compared to the deceased's other children, her former co-wife and the deceased's paternal sisters (who are family with this co-wife) expressed fear that the petitioner's sons would exhaust the estate.[1549]

But for whatever reason, the renunciation of their rights disfavours the women because the perpetrators embrace the surrendered wealth without remorse or further recourse to the

[1545] Interview 61. See also FGD 13.

[1546] Swahili phrase for both massive and minor property dissipate. FGD 9.

[1547] Interview 27.

[1548] Arabic word for envy. It is a verbal expression of the evil eye. The evil eye (*al-'ayn* in Arabic) happens when a person looks at or desires another person's possession invidiously. Though curable and preventable, *al-'ayn* dispossesses the victim of the envied blessing and or incapacitates him or her including causing him or her death. Muhammad Tim Humble, 'The Evil Eye' <http://notes.muhammadtim.com/ruqyah/evileye> accessed 21 February 2017.

[1549] FGD 13.

eligible heirs.[1550] In Pate, for example, a young widow who had two sons (aged six and five) and a daughter (aged one and a half years) gave up on her inheritance and that of her children. Since her deceased husband's family failed to distribute the estate after the Naibul Kadhi determined the share of each heir, the widow chose not to follow up the issue. 'I have chosen to leave alone these issues; not to pursue the inheritance.'[1551] Other than his immediate family, the deceased was survived by his parents. His mother now controls the estate (two farms in rural Pate, and a house and farm in Pate town). The deceased's mother indicates that she will manage the property until the orphans mature.[1552]

In Garissa town, a dispossessed daughter narrated that her father died in 2006. Though he had divorced the respondent's mother, the deceased was survived by another wife. This widow had eight children (four sons and four daughters). The respondent also had a brother. But the widow and her offspring took the entire deceased's estate (a residential house, goats and cattle) by herself. She sold the animals. The respondent and her brother did not contest this move. They surmised that: 'we are of one family, there's no need to tussle'[1553].

5.2.2. Women's Learning of IIL

When some women acquire knowledge relating to their succession entitlements, however, their male relatives oppose them from pursing those rights or studying further. Women in Kakamega, for example, get less support from their fathers, husbands and brothers to approach the Kadhis' court for redress.[1554] Though some daughters know of their inheritance rights, their families invoke traditions to prevent these daughters succeeding their entitlements.[1555] Husbands, in particular, disallow their wives who attended a previous *darsah*[1556] and became enlightened on a particular religious aspect from attending further learning.[1557] Sometimes, they beat them up.[1558]

[1550] Interview 115.

[1551] Interview 103.

[1552] Interview 103.

[1553] FGD 1.

[1554] Interview 85; FGD 9.

[1555] Interview 85.

[1556] Arabic word for learning or a lesson. It is commonly used to refer to a learning session.

[1557] FGD 6; FGD 9.

Men also cite religion wrongfully to claim that women have no rights before men. But these patriarchal men, as MFs would call them, just love to see women remaining unenlightened or in their culture-orchestrated inferior positions.[1559] They thus assert suitable discriminatory religious interpretations to suit their own interests and pull their ignorant females into these interpretive 'straitjackets'[1560]. Therefore even if these women feel oppressed, they remain mum because of what the men tell them.

While patriarchy is a factor, the tendency of many Muslims to withdraw pubescent daughters from '*Qur'aan* schools'[1561] before they complete their studies, also contributes heavily to women's limited knowledge of *Sharii'ah* generally and of their inheritance rights in particular.[1562] This behaviour is rampant, for example, in Garissa, Mombasa and Lamu.

Ordinarily, the *Qur'aan* schools 'offer elementary Islamic education including Arabic language, Qur'aan recitation and memorization',[1563] jurisprudence and Prophetic sayings. But a majority of them admit children of various ages and both sexes; and operate an unstructured curriculum which is silent on the pupils' progression.[1564] Thus when girls start menstruating and or their breasts start showing, they feel too old to attend these institutions alongside smaller children. Their families – particularly mothers – withdraw them on account of fear that if such girls frequent the mixed-sex institutions, they may get pregnant from the older boys or ill-behaved tutors.[1565] Society also regards such girls as ripe for marriage. Their stay at home, therefore, coincides with their grooming to become wives and mothers.

[1558] FGD 9.

[1559] Interview 126.

[1560] Interview 126.

[1561] Commonly referred to as '*vyuo* (single chuo) in Swahili or *duksi* in Somali.

[1562] Interview 4; Interview 26.

[1563] Newton Maina Kahumbi, 'The Role of the Madrasa System in Muslim Education in Kenya' in Mohamed Bakari and Saad Yahya (eds), *Islam in Kenya: Proceedings of the National Seminar on Contemporary Islam in Kenya* (Mewa Publications 1995) 323.

[1564] Other forms of Islamic education system include *madrassah* (plural *madaaris*), Arabic word for a school or learning institution; and *ma'ahad* (Arabic word for an institute). An Islamic school normally offers the *Qur'aan* schools subjects at an advanced level and further studies including *tawhiid* and *usuul al-fiqh.* It also has various learning levels from pre-unit to secondary depending on the academic structure of the given school. The institute, on the other hand, are tertiary institutions and provide Islamic studies alongside other mainstream units such Home Economics, Political Science etc. ibid 323, 330–32.

[1565] Paradoxically, these apprehensions are absent when the girls attend mixed mainstream learning institutions such as schools, colleges and polytechnics.

But failing to seek alternative learning arrangements for these girls (including home-schooling) make them mature into women who have only a faint mastery of both their religious rights and obligations. These women are more likely to accept patriarchal interpretations of their religion as true Islam and or fall victim to inheritance disentitlement. As MFs opine, women's ignorance of Islamic law is an invite to the erosion of their rights. That is why they encourage fellow Muslim women to learn both *Sharii'ah* and mainstream law in large numbers.[1566] Again, as noted earlier, knowledgeable women make better life choices[1567] and have increased access to justice.[1568]

The usual male clerics' preaching in the mosques, however, sidelines a plurality of women from relevant religious information.[1569] Since it is optional for women to attend *masaajid* (single *masjid*)[1570], many mosques (in both rural and urban Kenya) have no sections for females.[1571] In Garissa, for example, 99% of the mosques have no women's praying spaces. Thus a majority of Garissa women do not attend the mosques except during the month of *Ramadhwan*.[1572] During this month, the mosque hangs a curtain to partition a temporary females' area from the males' so that the former can join the special *taraweh* prayers.[1573]

5.3. Ignorance among Men

[1566] See the accompanying text to note 165.

[1567] See the accompanying texts to notes 1167 and 1168.

[1568] See the accompanying text to note 1868.

[1569] Interview 4.

[1570] Arabic name for mosques. Prophetic tradition endorses a woman's home as her best place for her prayers. But if exigencies necessitate (eg she has no space in her work place to say her prayers or she is in a foreign area and the *masjid* is the only place she could pray); and or there is no societal immorality to prevent her turnout, a female believer may go to the mosque. These rulings form part of the *hijaab* tenets.

[1571] Other than for a married couple and relatives outside prohibited degree of marriage, Muslim men and women often observe *swalah* separately. This is because of the nature of the prayer which involves several bodily movements. Generally, a specified prayer has between two or more units; and each unit encompasses two standings, a bow and two prostrations. See 'The Prophet's Prayer - According to the Authentic Sunnah' (11 January 2011) <https://www.youtube.com/watch?v=VVCa8WoRGqc> accessed 16 March 2019. Because of a woman's bodily curves, segregation of the sexes during prayers is observed to further conform to the tenets on *hijaab*.

[1572] Interview 4.

[1573] Interview 4. These are optional prayers offered after the late evening mandatory prayer, '*ishah* during Ramadhwan.

This research has also established that a majority of men, just like women, possess limited knowledge on IIL. And this ignorance relates to knowledge on the legitimate heiress, the inheritance fractions and how to make a valid will. Thus in Pate, for instance, an aged male respondent surmised that a deceased's mother only inherits in the absence of a beneficiary barring her from the estate.[1574] Yet a deceased's mother, just like his or her father, is a primary heir.

In Garissa, another male respondent believed (just like some females in his town)[1575] that a divorced woman had a right over her deceased ex-husband's estate.[1576] But while a former wife (whether or not maintained by the deceased immediately before his death) is a dependant under the LSA and therefore inherits from him,[1577] this does not happen under *Sharii'ah*. A divorcee only accrues rights in a former deceased husband's property if that previous husband dies before the expiry of her waiting period for revocable divorce.[1578] Ordinarily during that period, either of the surviving ex-spouses maintains his or her right to inherit from the other.[1579]

In Mumias while participants in an FGD with men indicated that their families followed IIL, their accounts revealed that they actually followed ethnic traditions. It emerged, for example, that a widow from a powerful Wanga sub-clan has a stronger voice than her counterparts from weaker sub-clans during family meetings for estate distribution. And power here is measured in population size or prestige. An example of prestige is proximity to the traditional Luhya royal family of Nabongo Mumia or its close relatives.[1580] Thus regardless of her ranking in the polygynous union, this widow participates in talks on

[1574] Interview 97.

[1575] See FGD 1.

[1576] Interview with Bare Dabor, Coordinator, Garissa Paralegal (Garissa, Kenya, 30 September 2015) [hereinafter Interview 10].

[1577] See section 29(a) of the LSA.

[1578] Note 1009 outlines the various durations of this waiting period. Islam permits a revocable divorce (approximate to decree *nisi*) twice in a marriage. See *Qur'aan* 2:229. During the waiting period of any of these two repudiatory divorces, the erstwhile couple can resume cohabitation without performing another marriage. See *Qur'aan* 2:228 and 231. See also Abdul-Azeem Badawi (n 925) 436–37.

[1579] Interview 123; Balchin (n 246) 158.

[1580] FGD 8. The most supreme Wanga clan is the Washitsetse (the clan of King Mumia). Next follows the Wakolwe. Then the Wamwima, the Wamnenda and the Ngahwa. The Auka is the most inferior clan because of its low population. FGD 8; FGD 6.

property division (and receives more wealth if widows are getting anything) because the Wanga believe that *ukhurisia akhupa mao niwikhane*[1581] which means that the powerful win.[1582] Under IIL, however and as noted earlier, widows bear identical rights and always inherit irrespective of their natal ties.

This story from Pate further demonstrates both men's and women's unawareness of IIL. A married sister took in her sick brother and cared for him because their two brothers abandoned him. This brother died 15 years later and, being single and without surviving parents, his three brothers and the sister who cared for him were his heirs. His estate was Ksh.s 800,000/= in cash which he had entrusted it with one of the brothers for safe-keeping before his demise. The family appropriated Ksh.s 200,000/= out of this estate for the deceased's burial expenses. At the time of the research, two of the three brothers intended to exclude the sister from the net estate. The third brother argued that since the sister nursed their deceased brother, she must receive something from that property. The sister, on the advice of her daughter however, wanted the money to be divided informally without conforming to IIL. She thus insisted that if the brothers wanted to inherit according to *Sharii'ah*, then all her expenses for caring her late brother should be charged on the property.[1583]

Clearly the sister, her daughter and brothers are misconstruing the attending issues. First, while the sister may have cared for her diseased brother – her kindness (as earlier noted)[1584] fails to affect the estate distribution. Inheritance follows its own arrangement.[1585] Second, the present property is inheritance and merits allocation as such. It is not any other wealth. It cannot, therefore, be divided in any other form unless all the heirs agree to such other division. While if the property is shared identically among all the four heirs, the sister will get a larger portion than her IIL entitlement, such distribution is contingent on all the beneficiaries' consent – not the sister's kindness to her now deceased brother. Third, the sister has a right to the estate. Her portion is not a conditional payment borne of her gracious

[1581] 'S/he who feeds you can beat your mother in your presence'.

[1582] FGD 8.

[1583] Interview 94.

[1584] See the accompanying text to note 1074.

[1585] Interview 80.

nature as contended by one of the brothers. Nor can the remaining brothers choose to disentitle her of this portion.

5.3.1. **The Consequences of Men's Ignorance**

Men's unfamiliarity with IIL risks or causes the disentitlement of their female relatives' portions whether or not such a consequence is intended. In Amu, for instance, a wealthy man had numerous sons and daughters with his first wife. During his lifetime, he bequeathed properties to each of these offspring. A few years before his demise, however, he married a second wife and got more children. He had no extra wealth in Amu to bequeath to these further offspring. He then went to Nairobi and married a third wife. When he acquired a house and land there, the third wife had the properties registered in her name. Thus when the man died, there was no more property in his name. Yet his minors in the second marriage had no assigned wealth.

While the second widow accepted this fact, she requested her step-sons and step-daughters to educate her children. The step-siblings declined. The widow resorted to seeking donations from well-wishers to educate her children. Eventually, she approached the Kadhis' court. The court voided all the bequests and ordered fresh distribution of the entire estate such that the children of the second marriage also benefitted. The step-siblings have since appealed against this decision.[1586]

Some male heirs also take advantage of the ignorance of their female counterparts to benefit from the estate alone. These male heirs can go as far as choosing probate fora which would apply the LSA or customary law in order to exclude beneficiaries who would have inherited under IIL.[1587] A female lawyer in Mombasa, for example, noted that one of her clients preferred the LSA to IIL in order to deny his sister and brother a share in their deceased aunt's property.[1588]

This client thus applied for letters of administration at the High Court such that he could manage the estate. The deceased, who had no children, lived with the claimant. Her estate

[1586] Interview 115; Interview 116; Interview 114.

[1587] Interview 46; Interview 125; Interview 69. See further Tanja Chopra and Deborah Isser, 'Access to Justice and Legal Pluralism in Fragile States: The Case of Women's Rights' (2012) 4 Hague Journal on the Rule of Law 23, 34.

[1588] Interview 46.

was some bank savings and two houses without land which collected monthly rent.[1589] The claimant took care of this aged woman, assisted her (logistically) to erect the houses and was collecting the rent on her behalf. Because of this help, the claimant felt that he was the only relative deserving to inherit her. And his siblings hesitated erroneously to object to his application on the same belief.[1590] Yet under *Sharii'ah*, they would have a right on the estate unless they opted out of it willingly and informed of their subsisting rights.

5.4. Ignorance among Religious Leaders

Beyond the ordinary populace, the unfamiliarity with IIL extends to several Muslim religious leaders. According to a former long-serving registry clerk of the Kadhis' courts, several *asaatidha* (single *ustadh*)[1591] are incompetent in succession issues despite their appreciation of other branches of Islamic knowledge.[1592] Thus during the research, several *a'immah* in Mombasa and Kakamega admitted their limited knowledge in IIL and excused themselves from responding to its substantive questions. In fact, in Kakamega an *imaam* requested the researcher to send him materials on IIL so that he could acquaint himself with the subject and share the information with the worshippers in his mosque.[1593] Generally, Luhya Muslims attribute their community's unawareness of the law to the limited Islam introduced to the early Luhya Muslims by the waSwahili traders. When these merchants settled in Mumias, they only taught the Luhya reverts on *swalah* and *sawm*.[1594]

The religious leaders' ignorance relates to both substantive IIL and its application. In Garissa, for instance, some leaders opined that there was no Prophetic saying relating to

[1589] A house without land is a unique ownership of properties at the Coast. In this ownership system, somebody else other than the proprietor of the house owns the land or plot on which the house is erected. It began during the reign of the Sultanate where the Arabs allowed the natives to build temporary houses on the former's lands at a fee called the ground rent. This arrangement facilitated shelter for the natives. This system, however, continues today even among non-Arabs. *Shaban Juma Ulaya v Mwajuma Juma Ulaya* [2013] HCCA No 74 of 2007 (Mombasa) explains this ownership system and summarises several inland judges' bewilderment over this concept.

[1590] Interview 46.

[1591] Arabic word for male religious trainers.

[1592] Interview 110.

[1593] Interview with ARS (Mumias, Kakamega, Kenya, 8 November 2015) [hereinafter Interview 133]. The identity of the *Imaam* is concealed to protect him.

[1594] Interview 75; Interview 79. *Swalah* and *sawm* constitute two of the five pillars (ie acts of worship) of Islam. The remaining three are *shahadah* [Arabic word meaning belief in Oneness of God and Prophet Mohamed (PBUH) as His Messenger], *zakaah* and *haajj*.

inheritance.[1595] Similarly, several clerics held that no inheritance precepts preceded the instructive ones in *Qur'aan* 4.[1596] But as discussed earlier, the law relating to a valid will ensues from Prophetic sayings[1597] Again, the *Qur'aan* contains previous prescriptions relating to both unspecified testate and intestate dispositions[1598]. In fact, both *Qur'aan* 8:75 and 33:6 limited inheritance to blood relations from the faith-based kindred which existed when the nascent Muslims from *Makkah* migrated to *Madinah*.[1599] And when the present inheritance precepts were revealed, *Qur'aan* 4:33 emphasised this changed position.[1600]

Other areas of substantive IIL that seemed foreign to scholars included the identical shares of a deceased's parents and his or her uterine siblings. A majority of clerics were unaware that the deceased's parents receive identical shares. Similarly, some leaders had little knowledge of the uterine sister succeeding an identical portion to her male counterpart. Like most people (Muslim and non-Muslim), the clerics assume that *Sharii'ah* has universally prescribed males' inheritance as twice as much as females'.

5.4.1 The Consequences of Religious Leaders' Ignorance

Because both Muslim men and women often approach Muslim religious leaders for advice on how to distribute their deceased relatives' estates, the leaders' limited knowledge risks defeating women's actual succession rights.[1601] Thus in Kakamega, for example, an *imaam* observed that he encouraged his constituents to write wills in the presence of religious

[1595] Interview 2.

[1596] Interview 127; Interview 95.

[1597] See note 20 and the accompanying texts to notes 846 and 853.

[1598] See notes 840, 841 - 843 and their accompanying texts. Interview 124.

[1599] When early Muslims migrated to *Madinah* from *Makkah*, they left their wealth in *Makkah* and became destitute. The Prophet (PBUH) paired a male from the *Madinah* Muslims who gave refuge and stood by the *Makkan* Muslims, known as the *al-Answaar* (Arabic word which means the helpers or allies literally), with a male from the *Makkan* Muslims, known as the *al-Muhaajiruun* (Arabic term for the migrants). This faith-based brotherhood was so strong that some *al-Answaar* shared their possessions with the *al-Muhaajiruun*. And if any of the helpers or migrants died, his brother-in-faith inherited him. But this meant that some relatives failed to succeed the properties of their blood brethren. Thus in 2 AH when the migrants' economic situation improved (through trade, farming among other activities), *Qur'aan* 8:75 was revealed. Al-Mubarakpuri (n 1010) 265–66. See also Kathir, *Kathir 4/10* (n 846) 368. *Qur'aan* 33:6 reiterated this position. Interview 7; Interview 79; Interview 80; Interview 39; Interview 71; Kathir (n 1058) 643–44.

[1600] It indicated, among other things, that the only subsisting rights between the *al-Muhaajiruun* and *al-Answaar* estate was through a will or their previous pledges. Kathir, *Kathir 2/10* (n 810) 440–41.

[1601] Muslims ordinarily seek the religious opinion of a Muslim scholar over a myriad of issues. Interview 116. MFs, for example, describe women as 'highly religious' persons who would largely 'not want to act in contradiction to their faith'. al-Hibri, 'Law and Custom' (n 56) 3.

leaders since bequests provide for female relatives.[1602] Yet bequests only benefit those who are ineligible in the intestate regime. Women (as mothers, daughters, sisters or widows), as the case may be, are automatic heirs. A deceased brother could only bequeath up to a third of his property to his sister when neither his father nor his son survives him.

This same *imaam* had once insisted on adherence to a will even when its effect is to dispossess daughters of their father's estate. Briefly in the case in question, a father arranged a ceremony in which he bequeathed his wealth to his sons and three wives. While some sons received a portion of their father's farm, other got money to purchase new plots. Each wife got a rental unit which collected a monthly rent of Ksh.s 5,000/= as of November 2015 in addition to her matrimonial home. The daughters received nothing. One of the sons protested this arrangement and sought its variation at the chief's office. But the *imaam* advised the son to either approach the Kadhis' court for the adjustment of the will or to accept it.[1603]

5.4.2 Other Failings of Religious Leaders

But alongside their limited knowledge on IIL, local scholars' observance of and silence over traditions that discriminate against women's inheritance entitlements further perpetuates the erosion of these rights. Since '*mbora wao*'[1604] in the community engages in the unfavourable customs, the rest feels justified to practise them.[1605] And as years go by, it becomes natural to deny women of certain inheritance rights. MFs actually find the infusion of discriminating local customs in explaining *Sharii'ah* a facet of patriarchy.[1606]

An *imaam* in Kakamega town, for example, noted that the Luhya practice of denying women succession rights to a land estate '*lishakomaa limetoka kitambo. Lina mizizi*'[1607]. The (male) scholars of previous times did not speak against it. So if you start talking against it, people will find you *kizuka umekuja na dini mpya*'[1608]. Hence when a religious leader directs

[1602] Interview 133.

[1603] Interview 133.

[1604] Swahili phrase for 'the best among them'.

[1605] Interview 86.

[1606] Barlas (n 102) 3; al-Hibri, 'Law and Custom' (n 56) 5–9; Mir-Hosseini, 'Strategies' (n 90) 8.

[1607] Swahili phrases for 'has been around for ages. It is deep-rooted.'

[1608] Swahili words for 'an innovator who has come with novel religious teachings'. Interview 86. See also Interview 78; FGD 8.

on the Islamic way of inheriting, he risks dismissal on account of being perceived as interfering in peoples' private affairs[1609] and disseminating 'distorted'[1610] information. *A'immah* in rural Mumias cited this fear as their reason for not speaking against dispossession of women in prevailing inheritance practices.[1611]

Religious leaders also fail women when they do lopsided preaching on women's issues. Even when they are educated on IIL, scholars focus their regular sermons or darsah on women's obligations and failures compared to the subject of inheritance.[1612] More attention is given to admonishing women for failing to observe the *hijaab* and disobeying their husbands.[1613] Yet the *Qur'aan* enjoins Muslims to remind each other of (all) *Qur'aanic* teachings because such remembrance is beneficial to the Believers.[1614]

This selective admonition happens among both male and female religious leaders. An *imaam* in Mombasa, for example, admitted that he never preaches on the subject of inheritance and attending women's rights in his sermons.[1615] After participating in this study, the *imaam* indicated that he felt challenged to base his next Friday prayer sermon[1616] on the subject of inheritance. Similarly, in a discussion with female religious teachers in Mombasa, the participants conceded that they had failed to consider knowledge on inheritance rights in their *da'awah*[1617]. In Kakamega, on the other hand, the *a'immah* concentrate on *swalah* and *zakaah* in their sermons and hardly talk on family issues such as succession and marriage.[1618]

5.5. Ignorance among Legal Practitioners (both Bench and Bar)

[1609] Interview 77; Interview 79.

[1610] The researcher has put quotation marks on the word 'distorted' because the prescriptions are not indifferent despite the traditional locals regarding them as such.

[1611] Interview 78.

[1612] Interview 4.

[1613] Interview 48. Obedience to husbands includes a woman refraining from leaving her house without the husband's permission; and from admitting persons to her house that the husband disapproves of. This duty emanates from *ahaadiith*.

[1614] See *Qur'aan* 51:55.

[1615] Interview 52.

[1616] Two (brief) sermons normally precede the weekly congregational Friday afternoon *swalah* in the mosques. The themes of the sermons range from religious to topical societal issues.

[1617] Arabic word which means invitation literally. Herein it refers to propagating Islam.

[1618] Interview 85.

Like religious leaders, a majority of lawyers, judges and magistrates are unfamiliar with IIL. Presently, for instance,some advocates who are uneducated on the law employ the LSA to prosecute Muslim succession cases. One of the interviewed male non-Muslim lawyers, for example, conceded that: 'Myself, I argue a Muslim petition on the basis of a common law matter instead of what the *Qur'aan* says. But I am learning about Muslim law gradually.'[1619] Other advocates,who are also ignorant of IIL, allow the Kadhis to determine the rightful shares of their clients without persuasion.[1620]

About five of the seven High Court judges who participated in the research also conceded ignorance of this law.[1621] In fact one of the judges indicated that it was the common ignorance of *Sharii'ah* among judges which necessitated the requirement for the Chief Kadhi or two Kadhis to sit as assessors with a High Court judge when hearing an appeal from a Kadhis' court.[1622] While the assessor's opinion is persuasive,[1623] most judges (nonetheless) adopt it 'because they have no alternative source of information on the substantive matter before them.'[1624]

But while the law has accommodated the High Court appellate situations, both the Court of Appeal and the High Court trial judges still struggle to apply IIL.[1625] These judges either apply the law wrongly or (in the case of the High Court ones) seek the assistance of Kadhis to try Muslim cases. Sometimes, the High Court judges remit the cases to the Kadhis' courts

[1619] Interview with Kennedy Njogu Kuria, Advocate of the High Court (Amu, Kenya, 17 December 2015) [hereinafter Interview 113].

[1620] Interview 69; Interview 57.

[1621] See eg Interview 129; Interview 69; Interview 48.

[1622] Interview 130. See also section 65(1) (c) of the Civil Procedure Act (Chapter 21) .

[1623] Constitution of Kenya Review Commission, 'The Final Report of the Constitution of Kenya Review Commission' (10 February 2005) 203.

[1624] Interview 130.

[1625] This position has since extended to the Magistrates' courts following the enactment of the Magistrates' Court Act (No 26 of 2015). This Act, which became operative on 2 January 2016, repealed section 48(1) and amended section 49 of the LSA in order to establish the Magistrates' courts as automatic probate institutions for any succession matter in which the estate's approximate gross value is Ksh.s 20 Million or below. See section 23 read together with section 7(1) of the Act. Until these changes, only a designated Resident Magistrate could hear a non-Muslim succession matter if his or her locality had no High Court; and the gross value of the estate was Ksh.s 100,000/= and below.

because they construe them to have been wrongly filed before them when the Kadhis' courts are better suited to hear such matters.[1626]

In *Saifudean*, for example, the Court of Appeal gave a wrong 'literal reading'[1627] of both *Qur'aan* 4:12 and 176. The court indicated that both these precepts guided a man that in the absence of his direct descendants or ascendants, he should bequeath his property to his wife and siblings (whether full or half). But unlike the court's construction, these dual precepts mandate the allocation of the deceased's property to the surviving specified heirs in their stated fractions. They ensue automatically and are not subjects of a bequest.

The court also declined to find the deceased's paternal cousin-brother, an agnate, and therefore entitled to the remainder of the estate after the widow's share. The court viewed that the appellant showed no economic need to merit a portion in the deceased's estate. But IIL does not take into account the beneficiaries' economic need. Both the rich and the poor; the healthy and sick receive their decreed inheritance. While a lifetime gift allows consideration of these exterior factors, the fixed inheritance portions do not.[1628]

Moreover, the deceased's failure to provide for the appellant in the will was no good reason for the court to hesitate to nullify it. That is why in *Noorbanu Abdulrazak [HC 2017]*,[1629] the High Court after receiving guidance from another Court of Appeal nullified a will because (among other reasons), the will provided for heirs whose inheritance portions are outlined in the *Qur'aan*.

When High Court judges try succession cases, some of them advise disputants to refer their substantive questions to the Kadhis' court for determination and then adopt the latter

[1626] See Interview with Joshua Keynan, Judge, High Court (Garissa, Kenya, 30 September 2015) [hereinafter Interview 8]; Interview 79; *Ashraf Abdu Kassim v Karar Omar & 3 others* [2014] eKLR.

[1627] *Saifudean* (n 17) 8.

[1628] Interview 124. Some scholars opine that while *Sharii'ah* recommends identity during lifetime gifting, it does not prescribe it. Thus a parent may give some sons or daughters larger endowments than others. This may be because of such sons' or daughters' illness, disability or needier conditions. Interview 121; Interview 123; Interview 124. But if all the sons and/or daughters are of relatively the same age and in similar conditions, then a parent would be unjust if s/he gifts more wealth to one or several of them. While the gifts would be *Sharii'ah* sound, the parent will be answerable before God for his or her injustice. Interview 124.

[1629] *Noorbanu [HC 2017]* (n 17) [25].

court decision.[1630] While the High Court in *Bibi* held that a trial judge could consult with scholars and freely quote their opinions in the court's judgments,[1631] it is unlikely that this possibility extends to scholars who are themselves judicial officers and serve in the same legal system.

Still, this arrangement is different from having the Chief Kadhi or two such other Kadhis as assessors during the High Court appellate function. Instead it makes two competent probate courts to deal with different aspects of a single matter. The court in *Re Abdalla* found such an approach unconstitutional because it delays justice contrary to article 159(2) (b) of the 2010 Constitution.[1632] It also abuses the court process.[1633] In the upshot, there is still need for an alternative arrangement which would offer a lasting and legitimate reprieve to the inadequacy of IIL knowledge among most judicial officers in the mainstream courts. Perhaps the solution lies in heeding the call for codifying IIL. During the constitutional review process in 2000, Muslims submitted requests for the codification of their personal law – including inheritance.[1634]

5.6 Preliminary Positive Pointers Because Enhanced Knowledge on IIL in the Country

Notwithstanding the widespread ignorance of IIL among key stakeholders, there have been some positive pointers towards women's inheritance rights in the last two to four decades. The increasing expansion of Islamic knowledge across the country and the locals' exposure[1635] have ameliorated the situation of women within their communities since *Sharii'ah* is increasingly sought as an instrument for apportioning estates at the family level.[1636] As the present generation becomes more aware religiously, its understanding of

[1630] See eg *Ashraf* (n 1684); *Saida Bashir v Hussein Bashir & another* [2014] eKLR; *Re Ali bin Khalifani alias Muinde Kasyoki* [2010] HC Succession Cause No 1515 of 2008 (Nairobi) (HC); *Re Abnoor Shariff Mohamed* Succession Cause No 162 of 2000 (Nairobi) (HC). See also Interview 130.

[1631] *Bibi* (n 1161) 96.

[1632] See *Re Estate of Saidi Abdalla (Deceased)* [2012] HC MiscAppn 736 of 2011 (Mombasa) [11].

[1633] Interview 8; Interview 64.

[1634] Kimeu (n 177) 19; Chesworth (n 300) 8.

[1635] Interview 116; FGD 12.

[1636] Interview 6; Interview 24.

Islamic law has also improved.[1637] Moreover, the continued foreign travel of some contemporary youths[1638] such as those of Pate predisposes them to practise authentic Islam like their brethren in other parts of the Muslim world.[1639]

Muslim scholars opine that some present heirs recognise that whenever one of them receives a share larger or smaller than her or his stipulated proportion, the deceased carries the blame unless the beneficiaries who suffer disadvantages because of this inaccurate divisions forego their original rightful shares.[1640] Thus to remove their parents from this religious censure, the heirs choose from the very beginning to conform to IIL.[1641]

Hence as numerous Amu young males seek employment in other parts of the country and abroad, the Bajuni tradition in Amu has dissipated.[1642] Presently, both males and females share house entitlements and sons construct their own houses wherein they shelter their wives away from the wives' families.[1643]

Among the Somali, on the other hand, girls began to inherit regardless of the nature of the estate from 'the reign of former President Moi'[1644] such that 'boys and girls each get their shares.'[1645] Widows too get their shares even if married for a day and the husband dies provided that the marriage is Islamic.[1646] And if the deceased's mother is alive, she also receives her portion.[1647] But like in Pate, the caring nature of women often endears the

[1637] Interview 116.

[1638] Wandera (n 34) 18.

[1639] FGD 12.

[1640] Interview 116; Interview 124.

[1641] Interview 116; Interview 124.

[1642] Interview 116. The erosion of the Amu custom is also as a result of the expanding Amu town and alteration of farms into residential areas.

[1643] Interview 116.

[1644] Interview with Osman Galgan (Garissa, Kenya, 14 December 2015) [hereinafter Interview 33]. This is approximately 40 years ago. Moi became president in 1979.

[1645] Interview 33. See also Interview 14; Interview 24; Interview 6; Interview with Zayana Ahmed (Garissa, Kenya, 12 December 2015) [hereinafter Interview 22].

[1646] Interview 33.

[1647] Interview 24.

deceased's mother to forgo her share in favour of her widowed daughter-in-law and her grandsons and granddaughters.[1648]

These changing inheritance trends among the Somali are true of both urban and rural Garissa.[1649] While tradition continues to settle other issues,[1650] it no longer extends to inheritance.[1651] The deputy *boqor* of one of the clans in Garissa town indicated that: '[P]eople go to a *Sheikh* and *Qur'aan* is followed; and the deceased's parents, widows and orphans get their respective shares. Culture is not involved in *dahl*[1652].' But according to the *boqor* of one of these clans, his mandate includes adjudicating inheritance issues. He thus advises the disputants on both cultural and *Sharii'ah* tenets on succession.[1653]

A discussion with women in Garissa town, however, confirmed the changed position.[1654] Thus when a man who had two wives died, his rural widow approached the Kadhis' court to contest a will which had bequeathed her town counterpart and herself the man's respective plots in Garissa town and rural area. The court voided the will and directed that the estate be collected before distribution takes off. The deceased husband had also left four sons and four daughters from the first family; and two sons and two daughters from the second. The first widow acceded to the court's decision.[1655]

Like the Somali, both Pate sons and daughters (but particularly sons) have insisted on inheriting according to IIL in the past 30 to 40 years.[1656] In an FGD with women from the village, a participant commented on the fading Pate tradition, thus: '[*H*]*iyo ni thamaduni ya zamani. Ya skuizi haiwezekani. Fungu kwa fungu: mwanamume mafungu mawili, mwanamke*

[1648] Interview 24.

[1649] Interview 33.

[1650] For instance some aspects of criminal law such as murder and sexual harassment; and tussles of ordinary ownership of livestock between the owners and their caretakers. FGD with men (Garissa Township, Garissa, Kenya, 30 September 2015); Interview 24; Interview 26.

[1651] Interview 24; FGD with men (Garissa Township, Garissa, Kenya, 30 September 2015); abdiMuhamed; Interview 29; Interview with Ebla Hassan (Garissa, Kenya, 14 December 2015) [hereinafter Interview 31].

[1652] Somali word for inheritance. Interview 24.

[1653] Interview 28.

[1654] FGD 1. See also Interview 28; Interview 29; Interview 35.

[1655] FGD 1.

[1656] Interview 89; Interview 101; Interview 95; FGD 11.

fungu moya. Thena hii ardhi, ukiangalia piga fungu kwa fungu; ni nyumba thuthagawanya. Yake pale, nina fungu; ni mnadhi: mwanamume miwili mwananmke moya[1657].

The main reason for resorting to *Sharii'ah*, among contemporary Pate sons and daughters, is to defeat their unbalanced shares under the tradition.[1658] In an FGD with women, participants indicated that at present, sons challenge the custom since it sometimes leaves them without property when the houses, sometimes the only family wealth, go to the daughters.[1659] A local scholar also estimated that 'future generations will inherit according to *Sharii'ah* because men will not accept that a woman succeeds to more property than a man.'[1660]

Thus, at present, in order for a Pate traditional allocation to succeed, a parent must disguise it as a sale, despite the absence of consideration.[1661] Otherwise in the absence of these fictitious written sales which are later 'legitimised' (through attestation) by one of the local government agents such as the chief, the headman or the Naibul Kadhi, a son will disregard the gifts.[1662] He will not tolerate his mother granting a house and some furnishings to the daughter and can even harm the mother for this.[1663]

The customary practice became more painful to the sons because they helped their father, literally, to construct the daughters' houses. Together with his sons, the father harvested lime and roasted it; and quarried the building stones.[1664] This family team work happened even

[1657] Bajuni phrases for '[T]hat was our previous custom. Presently, it cannot apply. We distribute portions: a son two; a daughter one. If it is land, we divide it that way. If there is a house, we apportion it likewise. If the property is coconut trees, a son takes two and a daughter one.' FGD 11.

[1658] FGD 12; Interview 92.

[1659] FGD 11.

[1660] Interview 90.

[1661] FGD 11.

[1662] FGD 11. The researcher has put quotation marks on the word 'legitimised' because she does not believe that the official's signature validates an otherwise inexistent sale. But Pate society (like its Luhya counterpart), including authorities, seemingly respect documented exchange of properties – albeit fallacious.

[1663] FGD 11.

[1664] FGD male Pate; Interview 90; FGD 11; Interview 91.

among the rich.[1665] While the father hired a mason to erect the houses, the sons became the mason's helpers.[1666]

Daughters also expressed a preference for IIL in the distribution of their deceased father's because the tradition shortchanges them too when their father is rich. In an FGD with women, the participants found it unjust for the sons to assume their fathers' entire wealth within and without Pate and restrict the daughters to houses and house furnishings.[1667] One respondent noted that:

> *Lakini urathi wa baba hauhusiki na hicho tu. Mpaka na mimi nirithi maadam ni baba alojiweza. Sasa wakudhulumu sampuli namna hii. Basi sisi husubirie thena. Thamuathia Mungu. Mungu ndo mwenye kunilipia. Basi Kiswahili chetu ni hiko. Haya hatufanyi cha uhaki wala hatufanyi kwa Sharia la Mungu*[1668].

But many Pate villagers, particularly the elderly, treat this return to *Sharii'ah* as lack of compassion especially on the part of the sons.[1669] They fault the sons for labeling the distribution 'biased'[1670] and leaving the present-day Pate woman burdened.[1671] To the traditionalists, the daughter's house was never about enriching her;'[1672] but availing her secured shelter. Thus since under IIL, today's Pate daughter may or may not get her individual house, she may be forced to vacate her matrimonial house upon divorce. And if her siblings have exhausted the family's property or her family is too poor to absorb her, the

[1665] FGD 11.

[1666] FGD 12.

[1667] FGD 11.

[1668] Bajuni phrases for '[S]ince my father's estate is not limited to this (the house and house furnishings) only, I also have to inherit the remaining properties because dad was well-off. But the sons are this unjust (by giving me the house and its furnishings only). So we just exercise patience. We leave the affair to God. He is the one to recompense me. This is our tradition. But we are neither just nor are we conforming to God's law.' FGD 11. Sometimes the word 'Kiswahili' which means the Swahili language means the practices of the waSwahili too.

[1669] Interview 99; Interview 89; Interview 107; Interview 97.

[1670] Interview 99.

[1671] Interview 107.

[1672] Interview 107. See also Interview 89.

Pate divorced daughter may endure difficulties in finding a further shelter and fending for her children and herself.[1673]

The concerns of the Pate elderly, however, disregard the existing cushions for a divorced woman and her children under *Sharii'ah*.[1674] Were a Pate daughter to be divorced, *Sharii'ah* guarantees her (like other women) continued stay in her matrimonial house during her '*iddah* period.[1675] If she does not reconcile with her husband during or after this period or the divorce is an irrevocable one, the daughter would return to her deceased father's house. But if the house has already been inherited, then the sons – as indicated earlier[1676] – assume the responsibility to shelter their sister as their father would have done had he been alive. The sons could either accommodate their sister in their individual homes or arrange private accommodation for her. Meanwhile, the daughter's children remain the responsibility of their father (the sister's immediate former husband).

In the foregoing while *Sharii'ah* has succeeded in permeating the strong Bajuni and Somali cultures with outcomes that mostly favour women, adverse ethnic customs still remain normative in several other Kenyan communities such as the Luhya. The dominant view that emerges from the research indicates that Luhya continue to hold that daughters have no right to land estates.[1677] Thus unless a family is educated religiously and committed to its practice, disregard for IIL comes naturally.[1678] A religious family, however, takes its inheritance issues to the Kadhis' court for redress.[1679]

Presently, very few Luhya daughters inherit according to IIL. While some respondents estimated this at 'no more than 1%'[1680] others assessed it at 10% and 40%[1681]. And even then,

[1673] Interview 107.

[1674] See the accompanying text to note 1008 and note 1009.

[1675] See note 1579.

[1676] See the accompanying text to notes 984 - 986.

[1677] See eg FGD 6; Interview 86; Interview 85; Interview 73; Interview 76; Interview 77.

[1678] Interview 73; Interview 86; Interview 72; Interview 78.

[1679] Interview 72.

[1680] Interview 86; FGD 9.

[1681] See Interview 76; Interview 77.

these figures are drawn from the past 20 to 40 years[1682] because of increasing knowledge of enabling government laws and religious sermons which emphasise on girls' rights.[1683] The present government insistence on the observance of the constitutional equality provisions, for example, forces some Luhya families to give their daughters some portions of land.[1684] Similarly, local Muslim religious leaders have begun preaching about succession matters in the mosques.[1685] They also attend women's groups' meetings[1686] and the bereaved families' *boma*s[1687] to educate them on the subject. Even then, a majority of women acquiring the *Sharii'ah* allocations remain the non-Luhya (especially the waSwahili and the Somali) living there.[1688]

5.7. Conclusion

It is emerging from this research that a majority of Muslim women, men and religious leaders as well as legal practitioners are uneducated on IIL. Their common knowledge on this branch of *Sharii'ah* relates to only its dual aspects, viz: the widows' one eighth entitlement; and the general ratio between males and females of 2:1. Many are oblivious of the remaining females' fractions. They also assume erroneously that males always inherit twice as much as females. Some do not know the qualities of a valid will. And some women are unaware that they have inheritance rights in the first place.

This widespread ignorance of IIL results in the importation of unrelated factors during estate distribution which, often, lead into women receiving less or nothing of their prescribed portions. Thus legitimate heiresses may abandon their rights or accept patriarchal interpretation of Islam which displaces them of these rights. Men may divide the estate

[1682] Interview 72.

[1683] Interview 76; FGD 10; FGD 8; FGD 9; Interview 86.

[1684] See articles 27 (4) and (5) of the 2010 Constitution which outlaw discrimination on the basis of sex and marital status among other grounds. Article 60 (f) also enjoins that one of the principles for owning, using and managing Kenyan lands is eliminating 'gender discrimination in (…) customs and practices relating to land and property in land'. See also Cornelius Wekesa Lupao, 'Under Current Constitution Married Daughters Have a Right to Inherit Parents' Estate', *KLR WEEKLY e-NEWSLETTER* (Nairobi, 25 January 2011) <http://kenyalaw.org/newsletter/20110225.html> accessed 3 December 2018.

[1685] Interview 85; Interview 76; Interview 77. Another *Imaam* in Kakamega town also proposed this initiative as one of the ways to reducing disentitlement of Muslim females in Luhya land. See Interview 86.

[1686] Interview 76; Interview 77.

[1687] Interview 77.

[1688] Interview 79.

wrongfully or approach probate institutions that hardly apply IIL to exclude their female counterparts. And both religious leaders and judicial officers may apply the law wrongly. But as anecdotal evidence suggests that a gradual increase in knowledge of IIL is already having the desired impact of reducing the likelihood of disentitlement among women, the need for more learning and practicing of this law among all stakeholders is apparent and urgent.The next chapter now examines women's experiences when they interact with probate institutions, judicial or extra-judicial.

6 CHAPTER 6: BARRIERS IN THE PROBATE INSTITUTIONS: JUDICIAL AND EXTRA-JUDICIAL

6.1 Introduction

While chapter five has looked at the unfamiliarity of IIL and how it impacts on women's stipulated inheritance rights, this chapter now discusses the challenges which women face when they approach probate institutions to determine their rights. There are generally two broad categories of institutions which deal with inheritance questions in the country. These are judicial (meaning the courts) and extra-judicial or informal systems (meaning institutions without a statutory mandate to hear inheritance matters). These latter institutions, nonetheless, assume this role because of their status in the community.[1689] They include: the family, the village elders, the chiefs, the Deputy County Commissioner and religious civil society organisations. The challenges in the court system such as divisive, protracted, expensive and technical court processes also make women to avoid the judicial processes.[1690]

The Constitution, the LSA, the Kadhis' Courts Act and the Public Trustee Act establish the judicial institutions and the Public Trustee Office as the formal probate processes. While the Public Trustee Office is not a court, it nonetheless has legislative authority to distribute estates worth up to Ksh.s 3,000,000/= without a court order under the Public Trustee Act.[1691] The Constitution, the LSA and the Kadhis' Courts Act establish the Kadhis' courts with a mandate to adjudicate Muslim estates. These courts hear cases relating to estates of all value because they have no pecuniary limitation. The LSA (as recently amended)[1692] further establishes both the High Court and the Magistrates' courts as Muslim probate courts. While the High Court adjudicates estates of the value of Ksh.s 20,000,001 Million and above, the latter courts entertain estates of Ksh.s 20,000,000 Million and below.

This chapter now assesses the barriers Muslim women face when they adjudicate their inheritance questions before the Kadhis' courts, the mainstream courts, the Public Trustee Office and generally all the extra-judicial processes. It first starts with the challenges at the

[1689] Chopra and Isser (n 1588) 28.

[1690] ibid.

[1691] See section 8(1) of the recently amended Public Trustee Act.

[1692] See note 1625.

Kadhis' court. The chapter identifies these setbacks as inaccessibility of the courts; protracted litigation; unprofessional judicial conduct; judicial incompetence and inability to enforce decisions. The unique challenge that women encounter at the mainstream courts is substitution of IIL with the LSA. Some Public Trustees' continued misconstruction of the Kadhis' courts' mandate delay estate distribution as the Public Trustees shuffle between the High Court and the Kadhis' courts to administer the same estate. At the extra-judicial processes, barriers such as families' weak religiosity; division of unvalued properties; partial distribution of estates; and delayed inheritance distribution plague women.

6.2 Challenges in the Kadhis' Courts

The Kadhis' courts are the foremost judicial avenues which hear matters relating to Muslim estates. And they always grant women their decreed inheritance shares.[1693] According to one of the interviewed male Muslim lawyers, there has never been a decision of the High Court which cites wrongful application of *Sharii'ah* by the Kadhis' court; for example, a particular heiress is entitled to receive portion 'x' but a Kadhis' court has failed to grant her that share.[1694] Indeed, all the Kadhis' court cases which were reviewed in this study revealed that women received their guaranteed fractions notwithstanding the complexity of a case.

But even then, these courts are plagued with practice challenges which defeat these women's stipulated rights. These setbacks include: inaccessibility; protracted litigation; unprofessional judicial conduct; imposed alternative dispute resolution mechanisms; judicial incompetence; and inability to enforce their decisions.

6.2.1 Inaccessibility

The courts remain inaccessible to many women. Accessibility here points to three of its four overlapping indices: location of services within safe physical reach; affordable services; and the right to seek, receive and impart relevant information.[1695] Thus, for example, a

[1693] Tayob (n 616) 63.

[1694] Interview 69.

[1695] The fourth element of accessibility is receipt of services without distinction. See UN Committee on Economic, Social and Cultural Rights, 'General Comment 14' [2000] UN Doc E/C12/2000/4, para 12.

majority of women continue to find the court process expensive and technical.[1696] Consequently, these women either abandon pursuing their rights entirely before the courts or settle for alternative informal fora which may or may not award them their Islamic rights.[1697]

6.2.1.1 High Litigation Costs

Both court and advocates' fees are unaffordable to many women.[1698] A Kadhi who once served in Nyeri County, for example, shared that since a majority of Nyeri Muslims were poor and lived in Majengo (an informal settlement area), it was hard for them to afford court fees.[1699] Because these indigent Muslims have difficulties affording food, raising court fees is exacting for them.[1700] In Mombasa, several female respondents found it unbelievable that the Kadhis' court would require filing fees for a case.[1701]

Similarly in Mombasa, when a Digo paternal uncle failed to comply with a consent order to provide for his niece and nephew from their deceased father's estate, the orphans' maternal grandfather (who was their next friend) abandoned efforts to enforce the order. According to the heirs' maternal grandmother, her family failed to return to court despite the infraction because '[I]t is expensive to go to court. The pleadings are expensive. It cost my husband Ksh.s 48,000/= and took us two years to finalise the case.'[1702]

But while the concern over expensive legal costs is genuine, sometimes the fear of failing to afford court fees is exaggerated. Middle-class women also cite lack of money for their hesitance to approach the court and prosecute their rights.[1703] Yet instituting a case at the Kadhis' court, regardless of the value of the estate, costs about Ksh.s 2,500/=. And unless the opposing side raises technicalities, this court's environment remains friendly and

[1696] Ruth Nekura Lekakeny, 'The Elusive Justice for Women: A Critical Analysis of Rape Law and Practice in Kenya' (LLM Dissertation, University of Cape Town 2015) 66.

[1697] Interview 26; Interview 103.

[1698] FGD 3; Interview 41; FGD 4; Interview 61; Interview 65.

[1699] Interview 7

[1700] Interview 7

[1701] FGD 3; Interview 41; FGD 4; Interview 61.

[1702] Interview 67.

[1703] See eg Interview 61. Sub-section 4.3 enlists other reasons precluding women from approaching the courts.

conducive.[1704] There is hardly any need for an attorney. Women thus lose a bigger right because of their unwarranted fear of litigation expenses.

In Pate, for example, a sister who risked dispossession from her brother's estate hesitated to take the matter to court because 'court is expensive. It may cost us Ksh.s 100,000/= to get justice. (…) The court wastes money. The rights to inheritance suffer.'[1705] While narrating this story on his wife's behalf, the husband intimated that his wife would only go to court when the family fails to agree. The sister and her three brothers survived the deceased brother. His estate consisted ofKsh.s 600,000/= (in cash).

6.2.1.2 Geographical Distance

Litigation also becomes costly when litigants or potential ones are a distance away from the courts.[1706] Because of the attending transport costs, some women opt not to approach the court to defend their entitlements or give up their challenge mid-way.[1707] The wide dispersion of the courts is, for example, one of the reasons discouraging some females in Kakamega from accessing the Kadhis' courts.[1708] The Kadhis' court in Kakamega, for example, covers both Vihiga and Kakamega Counties. Yet travelling from Vihiga to Kakamega costs Ksh.s 200 by public transport (as of 2015), or a 30-kilometer trek.

On the other hand, despite Mumias hosting the highest number of Muslims in the Western region,[1709] its residents still travel to either Kakamega or Bungoma towns to access the courts.[1710] Though some Assistant Registrars in Mumias substituted the Kadhis in the past, they no longer exist.[1711] Perhaps, that is why some local *a'immah* sought to be allowed to adjudicate on inheritance disputes before parties reach the Kadhis' courts.[1712] Doing so, these leaders observe, would also guarantee the court of credible background information to the matter.

[1704] Interview 69.

[1705] Interview 94.

[1706] Lekakeny (n 1697) 66.

[1707] Interview 27; Interview 76.

[1708] Interview 77.

[1709] See note 310.

[1710] Interview 76.

[1711] Interview 76.

[1712] Interview 77.

Presently if both or all disputants live in Mumias, the Kadhis conduct mobile courts there to facilitate access to justice.[1713] But the continued absence of a Kadhis' court alongside the area Magistrates' courts strain Mumias women (among others) as confirmed by a Kadhi in Bungoma:

> People also do not come to the Kadhi because of distance. My court covers Bungoma and Busia. About 80% of the people I serve, however, come from Mumias. If you give someone a mention date and this person lives in Busia or Port Victoria, she would not come until a year ends and sometimes I dismiss the file. Sometimes, I am the one moving to these stations. Again, if I hear matters from these places, I hear them the same day and give decision by the end of the day or after 3 hours because I know the parties will not come back if I give them another date.[1714]

Incidentally, (former) Chief Justice Mutunga admitted that 'access' was a factor to the lodging of cases before the Kadhis' courts in his inaugural report of the State of the Judiciary and Administration of Justice (SOJAR).[1715] This fact was confirmed by the Chief Kadhi who emphasised the establishment of Kadhis' courts in Kenyan rural areas.[1716] Thus in his second SOJAR, the Chief Justice noted that the Judiciary had appointed 20 more Kadhis[1717] and posted them to marginalised areas whose people hitherto trekked long distances in search of justice.[1718]

6.2.1.3 Inadequate Information on the Presence and Functions of the Courts

But establishing new courts without publicizing them and or educating the constituents of the courts' role still hampers both males and females from attending them.[1719] Again, since

[1713] Interview 76.

[1714] Interview 79. As of February 2016, both Busia County and Butere Sub-County (in Kakamega County) got their individual Kadhis' courts. Interview 129.

[1715] The Judiciary of Kenya, 'State of the Judiciary 2011 – 2012' (The Kenya Gazette 2013) 26.

[1716] Interview 40. See also Interview 85.

[1717] Until this 2012 recruitment, the country had 15 Kadhis including the Chief Kadhi. The Judiciary of Kenya, 'SOJAR 1' (n 1716) 26.

[1718] These places included Habaswein, Kakuma and Daadab in North Eastern region; Kwale in Kwale County and Faza Island in Lamu County. The Judiciary of Kenya, 'State of the Judiciary and the Administration of Justice: Annual Report 2012 – 2013' (The Kenya Gazette 2014) 38. See also Interview 129.

[1719] Interview 26; Interview 53.

many uneducated Kenyans believe a court 'just jails people',[1720] they choose to adjudicate their issues traditionally. A young woman in Garissa town, for instance, indicated that her family failed to go to the Kadhis' court for estate distribution when her father died because she was still a child and her mother 'did not know anything of that sort.'[1721]

A former Kwale Kadhi (on the other hand) narrated that until his posting there, the court only heard 30 cases annually which included inheritance matters. But during his tenure, the number increased to 200 with succession cases leading the volumes.[1722] The Kadhi attributed this growth to publicity of the court functions. 'Since Kwale estates are mostly land and there was no High Court there, Muslims had no alternative way of dealing with inheritance of land. It was expensive to come to the High Court in Mombasa (...) Maybe the people of Kwale did not know that the Kadhis' court could handle those matters.'[1723]

The failure of the Kadhis' court in Kakamega to hear any inheritance case despite its existence for two years could be because of the locals' ignorance of the presence of the court.[1724] Many Muslims of Mumias were learning of the existence of this court for the first time from this researcher. Yet a judge in Kakamega indicated that the court was launched in the presence of the Muslim leadership in the county.[1725]

6.2.1.4 Intimidating Court Procedures

Women (educated and uneducated) also shy away from instituting cases or enforcing previous court orders because they find court procedures technical and therefore intimidating.[1726] This fact is also true of the Kadhis' courts – despite them being more approachable to the litigants (represented or self-representing). But as the courts increasingly apply the Civil Procedure Act and adopt mainstream adversarial tendencies to erase their hitherto negative image of a 'kangaroo' court, they alienate women. Yet acceding to the Civil

[1720] Interview 22.

[1721] Interview 21.

[1722] Interview 53.

[1723] Interview 53. The accompanying text to note 1868 indicates that Muslims in predominant Muslim areas often choose *Sharii'ah* to adjudicate their issues.

[1724] Note 1867 gives another reason.

[1725] Interview 74.

[1726] Interview 46; FGD 13.

Procedure Act is mandatory for the courts in the absence of the Kadhis' Court Procedural & Practice Rules (KCPPRs) envisioned in section 8(1) of the Kadhis' Court Act.[1727]

Previously, the courts were excessively informal such that litigants treated them 'as an extension of the mosque'[1728] and sought advice relating to their cases from a Kadhi who could then adjudicate on the matters at a later date.[1729] Though this court friendliness made some litigants disrespect the institutions,[1730] it made women access the courts with some comfort.[1731] Unlike men, women are more at ease when dealing with informality.[1732] According to a male lawyer in Mombasa, because a Kadhis' court is 'moderate', a litigant expresses 'her bitterness visibly unlike in the ordinary courts where she fears to do so.'[1733]

The practice of litigants first seeking the Kadhi's advice privately before filing a case to be adjudicated by the same Kadhi is now on the wane. It was wrong to do so because the potential defendant would perceive the Kadhi as compromised. But the need for both procedural justice and discerning whether one's story is justiciable in *Sharii'ah* remains. Presently, most court and registry clerks offer this advice to the would-be litigants. But this staff is uneducated in both Islamic and mainstream laws. It is also has insufficient time to listen to the disputant's entire story.

The Kadhis' courts has for long developed standard pleadings to soften the obvious technical pleadings[1734] for its litigants – a majority of whom are unrepresented and uneducated (either generally or in law). But some lawyers find the usage of pre-formulated documents to present one's case improper.[1735] According to these lawyers, the condensed

[1727] See s 8(2) of the KCA; Interview 125.

[1728] Interview 79.

[1729] Interview 79; Interview 125; Interview 69; Interview 128.

[1730] Interview with Marende Omwenga, Advocate of the High Court (Amu, Kenya, 23 December 2015) [hereinafter Interview 120]. For example, while advocates address the court with dignity, unrepresented parties talk to the Kadhi as if he were their peer 'seated at the beach'. Interview 120.

[1731] Interview 46; Interview 69.

[1732] Interview 46. Gilligan, a cultural feminist, would have made a similar assertion. See note 557.

[1733] Interview 69.

[1734] Interview 44.

[1735] See eg Interview 47.

precedents[1736] sometimes fail to capture the litigants' individual issues. Yet it is hard for both the claimant and the court to address a question that is not pleaded.[1737]

While this may be true, the Kadhis' courts' initiative is not a unique thing although it often happens in statutes. But in the absence of the KCPPRs and the nature of the litigants, this move became natural. Presently, most procedural laws including the Civil Procedure Act and the LSA have published specimens which parties modify to suit their individual cases. In fact in January 2016, the Judiciary also launched the Magistrates and Kadhis Courts Registry Manual to 'standardize registry procedures' across all Magistrates' and Kadhis' courts in the country. This manual, which enjoins usage of probate documents similar to the LSA, is touted as a fulfillment of the Judiciary's constitutional obligation to 'simplify court procedures'.[1738] The Deputy Chief Kadhi found it to embodying some of the envisaged KCPPRs.[1739]

But lawyers also fault the courts' employment of court clerks as interpreters as defeating women's access to justice. When one party has a lawyer and the other side is unrepresented, the court clerks offer the translation of the ongoing English or Swahili proceedings. But since these renditions capture the conversations inaccurately, lawyers fear that a miscarriage of justice happens.[1740] In Lamu, for example, a male lawyer found the court clerks' interpretation of the dialects of rural Bajuni into Kiswahili wrong.[1741]

6.2.2 Protracted Litigation

Because some matters take longer to determine than they should, some female litigants (including potential ones) form negative opinions of the courts and take measures which are detrimental to their inheritance rights.[1742] Ordinarily, it takes a shorter time to conclude a probate matter at the Kadhis' court than in the ordinary courts because of the former court's

[1736] Practitioners also term pre-determined versions of court pleadings as precedents.

[1737] Interview 47; see also Interview 128.

[1738] The Judiciary of Kenya, 'Magistrates and Kadhis Courts Registry Manual' (2015) 2, 34–36.

[1739] Interview 129.

[1740] Interview 125.

[1741] Interview 120.

[1742] Interview 41.

lower volumes of cases.[1743] Thus, while a case may take three months in the Kadhis' courts, it takes a minimum of nine months to obtain letters of administration in a similar case in mainstream courts.[1744] But when matters become protracted even at the Kadhis' courts, some litigants consider transferring their cases to ordinary courts[1745] or adopting traditional alternative dispute resolution mechanisms which may or may not give them their stipulated shares.[1746]

Others abandon the litigious journey along the way or avoid attempting it at all to escape the seemingly hopeless and dear road to justice. According to a participant in a discussion with women in Amu, it is hard to convince someone to go to court because of the nasty experiences they witness from previous litigants.[1747] In another case, a divorced woman indicated that she failed to pursue the succession portions of her two sons and daughter for 18 years because she had no time '*ya kupanda ma-ofisi nkishuka*[1748]'. Instead, she chose to concentrate on the upbringing of her children and build their future. Presently, these offspring are adults, responsible, and able financially to engage advocates to pursue their rights. The woman, their mother, supports them in their cause. But throughout the 18 years, her older step-son appropriated her ex-husband's expansive estate.

Complaints of delayed justice at the Kadhis' courts, for example, were common among female respondents in both Mombasa and Amu.[1749] In Mombasa, a family hesitated to challenge a member who had dispossessed his sisters and brothers' families for this reason.[1750] Thus after hearing the experiences of fellow discussants, an Amu widow who intended to file her disentitlement dispute in the court the following day made this appeal: -

[1743] Interview 125; Interview 112; Interview 69; Interview 58; Interview 7; Interview 53.

[1744] Interview 125.

[1745] Interview 59; Interview 66; Interview 10.

[1746] Interview 10.

[1747] See FGD 13.

[1748] Bajuni phrase for 'ascending and descending relevant offices' which implies pursuing the inheritance endlessly. FGD 13.

[1749] See FGD 3; FGD with Likoni women; FGD with women (Mkomani, Amu Island, Lamu, Kenya, 20 December 2015).

[1750] Interview 61.

> *[W]atuchukulie muhimu watu kama sisi ili haki itendwe kwa kila mtu haraka haraka. Mimi kesho nkenda niwe nenda rudi panda rudi (...) wengine wathatishika moyo wakiona namna hiyo (...) watu maskini wavunjika moyo. Watasema: sasa mimi naatha kazi zangu. Kwa siku napata ata kama ni mia tano. Naenda kukaa kwa Kadhi. Na siku ya pili kwa Kadhi. Sasa kazi yangu nakosa na kule sipati kitu*[1751].

Kadhis' court proceedings in particular seem lengthy because they lack finality. Several women's rights advocates complained that while a court may issue its judgment, it will continue hearing further substantive applicationson the same file.[1752] The researcher confirmed these occurrences while perusing court files in two of the research sites. Numerous determined cases had the files reopened for a further ruling on the actual estate division after ordering its valuation; or for hearing of a related application. When interviewed, one of the Kadhis explained that the rationale for the practice was to value the property (or a part thereof) and to resolve disputes relating to its physical division since some heirs refuse to divide the estate or be bought out of it.[1753] Yet procedurally, the courts should have ordered the estimation of the estate before issuing their judgments and only reopen the matter to hear an application for review of their orders.

This ongoing erroneous practice, therefore, results in uncertainties and delays in concluding the matter. It also hampers the litigants from making the next step of litigation which is either appealing against an unfavourable decision within the stipulated time,[1754] or enforcing the court decree. Instead, it makes the pursuit of justice through litigation unnecessarily winding. For example, one Kadhi determined the heirs and their respective portions in January 2015. But as of December 2015, the court was yet to demarcate the actual

[1751] Bajuni phrase for 'let them pay particular attention to (poor) people like us so that justice is speedy to everyone. I am going (to court) tomorrow. If the situation would be numerous trips (to the court) (…) some people would be disheartened by that (…) indigent people would lose hope. They would say: I am abandoning my (odd) job. Yet I earn (from it) at least Ksh.s 500/= daily. I go sit at the Kadhis' court. And I do the same thing the next day. I am losing both my income and justice.' FGD 13.

[1752] See eg Interview 47.

[1753] Interview 53.

[1754] Interview 47.

property to the heirs because some of the beneficiaries were reluctant to value the estate as per the court decree.[1755]

6.2.3 Unprofessional Judicial Conduct

Besides delayed justice, the unprofessional conduct of some Kadhis encourages some female litigants to discontinue prosecuting their cases or to forgo their rightful fractions.[1756] Both male and female respondents in Mombasa and Amu accused some of these judicial officers of receiving bribes to prevail over weak litigants[1757] or to decide in favour of such other powerful people[1758] instead of applying *Sharii'ah*. In a discussion with women in Amu, for example, the participants feared that some cases failed openly – regardless of the attending facts and law – just because a litigant had no money. According to some women's rights activists, some women mistrust the Kadhis' courts because they believe these courts habitually back men.[1759] A male respondent also attributed some disentitlement situations to his area Kadhi. '*Ikiwa mmoja hana nguvu basi naye hakuhukumu* (…)[1760] [He gives] *haki kwa yule mwenye nguvu, mwenye pesa*[1761].

In other situations, the courts fail inexplicably to enforce their orders against continued appropriation of a disputed estate by some heirs.[1762] In a certain case, for instance, a Kadhi who had determined the heirs of a certain estate and decreed its valuation to facilitate its actual distribution released the title documents to the respondents despite the respondents hesitating to value the wealth for almost a year and intimating their desire to appeal against the court decision.[1763] While refusing to accuse the Kadhis of taking bribes, on the other hand, a disentitled daughter living in the UK indicated that the judicial officers were

[1755] FGD 13.

[1756] FGD 13.

[1757] FGD 13; FGD 3; Interview 101.

[1758] Interview 59. See also Chopra and Isser (n 1588) 28.

[1759] See eg Interview 66; FGD with Likoni women.

[1760] Bajuni phrase for 'if one has no power, the Kadhi does not rule in your favour'.

[1761] Bajuni phrase for 'justice or favourable ruling to the one with power, with money.' Interview with MNO (Kenya 2015) [hereinafter Interview 134]. The location of this respondent is blocked to protect the relevant judicial officer.

[1762] FGD 13.

[1763] FGD with women (30 December 2015). The date of this discussion is fictitious. It is so concealed together with the locality of the conversation to protect the identity of the relevant judicial officer.

amenable to influence. 'They believe what powerful people tell them. And women risk losing their shares in the long run.'[1764]

Her assessment is confirmed by some lawyers' observations of some Kadhis. According to these advocates, the presence of legal representatives in certain cases intimidates some Kadhis such that the Kadhis become seemingly unfair to the unrepresented litigants. In such suits, the Kadhis hardly challenge the lawyers' submissions. Instead, they agree with every point the advocates assert.[1765] In fact, a male lawyer in one of the research sites narrated that the Kadhi would often ask his opinion relating to a case in which the advocate is representing one of the parties. The judicial officer would ask: *'Hapa unaonaje bwana wakili'*[1766]*?* According to the advocate, when the Kadhi posed him such a question, he replied in favour of his client to the detriment of the unrepresented party.[1767]

This behaviour of the Kadhi, perhaps, explains why a lawyer working for a women's rights organisation in Mombasa concluded that her self-representing clients (unlike those with legal representation) had innumerable complaints against the court.[1768] It also feeds into the common perception among female respondents that the Kadhis tend to side with male litigants and are complicit in disentitling females.

Because of some Kadhi's conducting themselves unprofessionally, some respondents dismiss them as mere '*kazi*'[1769] or 'Kadhi'[1770] and not '*qadhwii*'[1771]. One male respondent explained this distinction: '[Y]ou know there is '*qaf*' (ق) and '*kaf*' (ك) (…) so you should use the latter when referring to the 'Kadhi'.'[1772] The distinction goes to the attitude of the judicial

[1764] Interview 59.

[1765] Interview 113; Interview 120.

[1766] Swahili phrase for 'what do you think about this Mr. Advocate?' Interview 134.

[1767] Interview 134.

[1768] Interview 47.

[1769] Swahili word for job.

[1770] Arabic word meaning being at work, perhaps a derivative of the word *kadda* which means to work hard.

[1771] Arabic word for a judge or magistrate. Herein it means umpires applying God's law. See eg FGD 3; Interview 101.

[1772] Interview 101. ق (pronounced like a 'q') and ك (pronounced like a 'k') are two of the 29 Arabic alphabets. Some children and adults with pronunciation difficulties, however, utter them similarly. Chesworth observes that the word 'Kadhi' is a Swahili transliteration of the Arabic word 'Qāḍī' because of the missing

officer: those who simply go through the motions of doing a job, and those who see themselves as pursuing divine justice. These respondents, therefore, conclude that the only way to have *Sharii'ah* followed is to 'take the *Qur'aan* and get a scholar and ask him to distribute the estate for you' because 'going to the Kadhi? You will never get the truth (justice).'[1773]

Next to the allegations of receiving bribes or succumbing to powerful personalities are complaints of some Kadhis seducing female litigants into marrying them so that the disputants' succession cases terminate.[1774] In a discussion with women in Amu, for instance, the participants indicated that these incidences '*hufanyika sana. Huthokea. Yani mtu we umekwenda na shida zako, nae ataka umtatulie shida yake*'[1775]. Indeed, some female religious teachers in Mombasa confirmed that some women in the locality had married former Kadhis (while in office) to avert inheritance conflicts in their families.[1776] Like the outcomes of the bribe allegations, these sexual approaches discourage some existing and potential litigants from continuing or attempting to pursue their justice at the courts.

6.2.4 Mandated Alternative Dispute Resolution Mechanisms

Women also feel short-changed when some Kadhis impose alternative dispute resolution mechanisms on them. These judicial officers send some female litigants back to intra-family forums or refer them to the council of elders or to civil society organisations such as the Council of Imams & Preachers of Kenya[1777]. The courts refer these litigants to the extra-judicial institutions for mediation, yet the parties left these very informal avenues to seek justice before the court.[1778] A participant in a discussion with female religious teachers in

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letter 'q' in the Swahili language. Chesworth (n 300) 3. Notwithstanding this fact, this study has employed the word 'Kadhi' to refer to both the judicial officer and the courts.

[1773] Interview 101.

[1774] FGD 3; FGD 13.

[1775] Bajuni phrases for 'happen a lot. They happen. You have gone with your grievances (and the Kadhi) wants you to resolve his (ie accept him as a husband)'. FGD 13.

[1776] FGD 3.

[1777] A national association of Kenyan *a'immah* and preachers. It has both national and regional offices.

[1778] Interview 120; Interview 10.

Mombasa found it improper for the Kadhi to refer her case for settlement within the family because the judicial officer had received death threats from her opponent.[1779]

Other respondents and key informants in Garissa and Nairobi also frowned upon the court-mandated alternative dispute resolution.[1780] A male lawyer in Nairobi noted that while some advocates regarded the Kadhis' courts as reconciliatory avenues, the institutions lose their respect among litigants when they compel parties 'to talk'[1781] over their issues.

Doing so also infringes on the litigants' right to be heard by the court. Article 50 of the 2010 Constitution makes it a fundamental right of every Kenyan to have his or her dispute 'resolved' before a court of law. Since this right constitutes the Bill of Rights, it can only be limited if a statute so provides and if such limitation 'is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[1782] In the absence of a written law restricting the right to be heard in court, courts cannot – even in good faith – force parties to consider alternative dispute resolution methods. While the courts may suggest this option to the parties, the decision to pursue such alternative avenues remains the litigants'.[1783] In fact, Rule 1 of Order 19 of the draft KCPPRs 2015 recognises this fact and merely recommends *sulh*[1784].

This recommendation embodies the spirit of article 159 (2) (c) and (3) of the 2010 Constitution. These dual provisions enjoin courts to promote alternative forms of resolving disputes such as 'reconciliation, mediation, arbitration' and traditional mechanisms provided that the customary methods uphold the Bill of Rights; justice and morality, and are consistent with the constitution and relevant statutes.[1785] Thus while the goals of pacification and reducing backlog of cases in courts are genuine, courts contravene the constitution when they insist on ADR processes without assessing whether such systems recognise women's decreed inheritance rights.

[1779] FGD 3.

[1780] Interview 10; Interview 125.

[1781] Interview 125.

[1782] Article 24(1) and (2) of the 2010 Constitution.

[1783] Interview 125.

[1784] Arabic word for peacemaking or conciliation.

[1785] See also The Judiciary of Kenya, 'State of the Judiciary and the Administration of Justice: Annual Report 2013 – 2014' (The Kenya Gazette 2015) 101.

6.2.5 Judicial Incompetence

Until a decade ago, the judicial incompetence of a majority of the Kadhis also made some litigants or their lawyers evade the courts.[1786] Since many Kadhis delivered abstract and unreasoned judgments and rulings, disputants preferred the High Court.[1787] In fact some judges have ordered several re-trials before a different Kadhi in cases in which the trial Kadhi failed to write reasons for his judgment.[1788]

Some Kadhis also mix the instances of issuing a ruling and judgment.[1789] A disputant could receive either regardless of the stage of her or his case. Yet ideally, the final court verdict is the judgment.[1790] Thus one scholar notes that that during the National Constitutional Conferences, Muslim women (among other Muslim delegates) campaigned for enhanced qualifications for the Kadhis because, in their view, 'better qualified Kadhis rendered better decisions for women.'[1791]

A former Chief Kadhi also estimates that some Kadhi's arbitrary and inconsistent application of the procedural laws cause grave injustices to litigants.[1792] In Nairobi, for example, a Kadhi who proceeded to enter judgment in a divorce case in the absence of the petitioner and in the absence of the court clerk; and during an un-scheduled hearing date caused the petitioner to miss out on her inheritance share when the respondent died, despite the couple having reconciled during the 'waiting period'[1793]. Briefly, the petitioner had filed for divorce. She indicated in her pleadings that she would give the grounds for dissolution of the marriage at the hearing of the case. One day, the respondent passed by the Kadhis' courtwhile drunk. He told the Kadhi that he knew there was a case against him, and that the Kadhi could go ahead and issue the orders as prayed. The Kadhi did so without setting a

[1786] Interview 126; Interview 84.

[1787] Interview 126; Interview 84; Interview 47; Interview 64.

[1788] Interview with QRS (Kenya, 2015). The identity, location and date of the interview have been obscured to protect the possible identity of the relevant judges.

[1789] Interview 125; Interview 69.

[1790] Interview 125.

[1791] D Mutua (n 37) 92.

[1792] Tayob (n 616) 61.

[1793] The researcher has put quotation marks on this phrase because it is questionable if a divorce took place given the circumstances of its issuance. Interview 125.

hearing date or receiving any evidence. When the man died a year later, his first widow objected to the petitioner's inheritance on the ground that she had been divorced. Another Kadhis' court upheld this objection.[1794]

One of the interviewed advocates further complained that the Kadhis' lack of knowledge about the Civil Procedure Act resulted in wasting of court time because most of these judicial officers write cited provisions verbatim during court arguments.[1795] Thus, several judges and lawyers who participated in this study found it important for the Kadhis to learn mainstream law[1796] at least 'a six-month certificate course'[1797] in order to enhance their judicial expertise. Incidentally, these views also surfaced among Muslim lawyers in Mombasa and Nairobi during the constitutional review process in 2000.[1798]

Indeed both the lack of knowledge in procedural laws among the Kadhis and the hitherto neglect of their courts by the Judicial Service Commission explained the courts' deficient decisions and conduct for a while. While the Kadhis applied *Sharii'ah* within mainstream procedural rules,[1799] most Kadhis only encountered the actual Civil Procedure Act for the first time during their practice.[1800] The few weeks of training on the civil procedure during their induction could not possibly match the instruction of law and moot court training that a judge underwent at Law School.[1801] Again, while judges were (are) degree holders, Kadhis were male madrassah or school teachers or former government clerks without a degree

[1794] Interview 125.

[1795] Interview 113.

[1796] See Interview 69; Interview 125; Interview 64; Interview 130; Interview 84; Interview 128; Interview 58; Interview 47.

[1797] Interview 58.

[1798] See Cussac (n 333) 296; Kimeu (n 177) 19.

[1799] See the accompanying text to note 1727.

[1800] Interview 125; Cussac (n 333) 296.

[1801] Interview 125; Interview 84; Interview 113; Interview 110. To qualify as a Judge in the repealed Constitution, one had to have seven years experience as an advocate or either be a High Court or Appellate Judge of any Commonwealth country or the Republic of Ireland. See section 61. And for one to be an advocate, s/he must have first studied a law undergraduate degree in a recognised university in Kenya or abroad. This graduate then learns procedural and further substantive law at the Kenya School of Law before doing practical legal work (pupilage) under the supervision of a competent advocate for about nine months. See section 13(1) of the Advocates Act (Chapter 9). See also generally Seidu Issa Ali NoorMohamed, 'Debunking the Misconceptions of Muslim Women's Participation in the Legal Profession' (LLB Dissertation, University of Nairobi 2015); JB Ojwang and DR Salter, 'The Legal Profession in Kenya' (1990) 34 Journal of African Law 9.

'provided they were able to read *Qur'aan*'[1802] or 'had some Islamic education'.[1803] Often, these Kadhis were also of Arab descent because the government believed that community was most knowledgeable in Islamic knowledge.[1804]

The judicial reforms under the 2010 Constitution have made the Kadhi's employment process more conscientious and inclusive.[1805] The Judicial Service Commission now recruits the judicial officers from among graduates of *Sharii'ah*, Islamic studies or law.[1806] The last recruitment exercise in 2015, for instance, saw appointments from a cross-section of Kenyan Muslims. The Judicial Training Institute now also incorporates the Kadhis in its Continuous Judicial Education sessions. Previously, only magistrates attended this continuous training.

These initiatives, coupled with the individual efforts of some Kadhis to learn mainstream law, are bearing fruit. Today, a number of Kadhis render reasoned and contextual opinions that derive support from both *Sharii'ah* and relevant mainstream law. Others also incorporate the jurisprudence of commonwealth Muslim countries in their decisions while some collate their rulings and judgments to publish digests.[1807] Moreover, most Kadhis now express themselves in English,[1808] the official language of the courts. Consequently, litigants' boycott of the courts on account of inferior service is waning.[1809]

6.2.6 Inability to Enforce Decisions

Despite their improved service delivery, the Kadhis' courts apparent weaker status compared to mainstream courts[1810] also discourages some women from seeking their services. Since the Kadhis' courts are seemingly unable to enforce their decisions or punish

[1802] Interview 108.

[1803] Interview 126. See also Abdulkadir (n 42) 113.

[1804] ibid 284–85.

[1805] Article 232(1) (h) of the 2010 Constitution mandates all public appointments to represent the country's 'diverse communities'. Article 232(1) (i), on the other hand, requires all public offices to grant 'adequate and equal opportunities for appointment, training and advancement at all levels' to, among others, both men and women; and members of all ethnic groups. A Kadhi is a public servant pursuant to article 260 of the 2010 Constitution.

[1806] Of the 56 Kadhis in office, only two are non-graduates. In fact, three Kadhis are both trained in law and *Sharii'ah*. Interview 126; Interview 68; Interview 44.

[1807] Interview 53; Interview 128.

[1808] Interview 44.

[1809] Interview 126.

[1810] Interview 2.

contemnors of their orders, unlike the ordinary courts, both respondents and key informants dismiss the institutions as either 'unhelpful'[1811] or 'useless'[1812]. A male lawyer in Lamu, for instance, described the Kadhis' courts as 'a toothless bull-dog'.[1813] Similarly in a discussion with women in Mumias, the respondents narrated that if one threatened to take an inheritance matter to the Kadhis' court, her opponent remained unperturbed. But when one mentioned '*serikali*'[1814], the opponent gets scared.[1815] Several public and private bodies, such as the military and some banks, also question Kadhis' court orders or decrees.[1816]

In the upshot, this low view of the courts' decisions contributes to the displacement of women's inheritance rights.[1817] While female litigants get their decreed rights there, they may not realize them in fact if those who are targeted by the orders continue to disregard these directives.[1818] That is why several respondents see no operative distinction between a Kadhi and a *sheikh* or an *imaam*. Yet under *Sharii'ah*, the former is more powerful than the latter because while the latter offers opinions over various Islamic issues, the former bears an additional duty of implementing (or overseeing the implementation of) his or her decrees.[1819] The Kadhi's extra mandate is what distinguishes '*fatwa*'[1820] from '*hukmu* (plural *ahkaam*)'[1821].

The failure to enforce Kadhis' court decisions stems, partly, from the uncertainty among some Kadhis on whether they have the power to punish for contempt of court (both of their

[1811] Interview 127.

[1812] Interview 10. See also FGD 13.

[1813] Interview 113. See also Interview 10 where the male respondent found the courts have no 'teeth to bite'.

[1814] Swahili word for the government or its mainstream structures (institutions and laws).

[1815] FGD 6.

[1816] Interview 129.

[1817] FGD men Lureko.

[1818] Chopra and Isser (n 1588) 28.

[1819] Interview 123; Interview 124; Interview 127; FGD 13. The use of the pronoun 'her' to describe a Kadhi is purposeful. The researcher believes a woman can practice as a Kadhi within selected divisions of the Kadhis' courts in the country – including the Succession Division. The present court structure, however, lacks such categorization.

[1820] Arabic word for a legal or advisory opinion.

[1821] Arabic word for a ruling, a holding, a decision or an award. Interview 123; Abdulkadir (n 42) 57.

orders and on the face of the court[1822]). This discussion came up among some Kadhis in Garissa.[1823] If the draft KCPPRs are enacted, however, this doubt will dissipate as the courts will have express powers to punish both forms of contempt against an individual and a body corporate.[1824]

But even with the existing laws, the Kadhis' courts – like any other judicial institution in the country – have capacity to punish contemnors.[1825] This was confirmed in *Fazleabbas.* When the petitioner moved the constitutional court alleging that the Kadhis' court acted in excess of its jurisdiction to issue warrants of attachment, the court held that the Kadhis' courts (just like magistrate ones) can enforce their orders and decrees vide Order 22 of the Civil Procedure Rules 2010.[1826]

The other reason for treating the courts' orders and or the Kadhis contemptuously results from the infrastructure of these courts. A majority of Kadhis conduct their cases in small offices which have neither the Coat of Arms nor court orderlies, necessary symbols of authority.[1827] Some of the Kadhis operate in structures bereft of a court. They are also assisted by lethargic staff. In sum, the working environment does not appear professional enough to command respect from the public.[1828]

6.3 Substitution of IIL with the LSA in Mainstream Courts

[1822] This includes assaulting or being rude to a judicial officer, a witness or any such other person during a sitting of a court or willfully interrupting the proceedings of a court. Section 6 of the now nullified Contempt of Court Act (No 46 of 2016) (Repealed) entails a broader definition. The constitutional court in *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR invalidated the legislation because the law sought to limit the courts power to punish for contempt, which step contravenes the constitution. See ibid [65], [68] and [98].

[1823] See Interview 7.

[1824] See Order 32 rules 1 and 2. The penalty for contempt of court is generally a jail term of a maximum of 6 months. It is unclear, however, if courts have authority to give the contemnor the option of a fine. But courts have exercised such prerogative. See Ochiel J Dudley, 'Revisiting the Koinange-Gachoka Case: Reflections on Contempt of Court Under the Constitution of Kenya, 2010' (2015) <http://kenyalaw.org/kenyalawblog/revisiting-the-koinange-gachoka-case/> accessed 17 January 2019.

[1825] The present general powers for punishing contempt of court lie in the Civil Procedure Act, section 63(c) and Order 40 rule 40(3)(1); Magistrates' Court Act, section 10(1); and The Judicature Act (Chapter 8) section 5(1). Some analysts also read these powers in the constitutional provisions relating to upholding of the rule of law. Thus the preamble, articles 1, 10 and 159(1) of the 2010 Constitution are instructive. Dudley (n 1825).

[1826] *Fazleabbas Mohammed Chandoo v AI Hussein & 4 others* [2015] eKLR (High Court) [63].

[1827] Interview 120.

[1828] Interview 120.

While some of the mainstream courts suffer similar problems to the Kadhis' courts, the main challenge women face there in relation to their inheritance rights is the application of the LSA in the place of IIL. Both the mainstream courts and the litigants' advocates assume that the LSA – and not *Sharii'ah* – is the norm before these courts. For example in responding to the disentitlement of Muslim women's inheritance rights in Kakamega, one of the interviewed judges blamed women for succumbing to their customs instead of invoking the constitution and the LSA for help.[1829] In *Ahmed Shariff*, the High Court also held erroneously that once a matter is transferred from the Kadhis' court to that court, 'then the law of succession'[1830] applies.[1831]

Therefore to have IIL apply in the mainstream courts, legal practitioners (both bench and bar) believe erroneously that the parties must request the court accordingly.[1832] But this is not the position of the law. Under section 2(3) of the LSA, when a Muslim case is before the High Court (or a Magistrate Court), the applicable law is IIL.[1833] Section 2(3) reads, firmly, thus:-

> 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 this [sic] 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*.[1834]

On its part, subsection (4) states that: '[N]otwithstanding 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 1st January, 1991.'

[1829] Interview with SUV (Kenya, 2015). The identity, location and date of the interview have been obscured to protect the respondent.

[1830] *Ahmed Shariff Swaleh& 3 others v Abdulgader Shariff Swaleh & 3 others* [2014] eKLR 2.

[1831] See also *Abdul Azim Kassim v Badrudin Hussein Haji Issa* [2016] eKLR [35], [37], [39] and [40]; *In Re Estate of Ismail Osman (Deceased)* [2009] eKLR 2.

[1832] Interview 64.

[1833] *Noorbanu [HC 2017]* (n 18) [19]; *Fatuma Rama Mwaurinda & another v Kusi Mukami Mwaurinda* [2017] eKLR [11]. See also Interview 128; Interview 126; Interview 64.

[1834] Emphasis added.

But in *Re Paul Ndungu Muiruri, Zubeida Mohamed Nahdey and three others vs Harriet Waithira Muiruri and another*[1835], for example, while the court acknowledged that the applicable law for distributing the estate was Islamic, it nonetheless invoked section 3(5) of the LSA to find both the Objector and the Petitioner widows and legitimate heirs of the deceased just like their offspring. The deceased, who had first married the Petitioner under civil law, became Muslim and married the Objector under Islamic law. Both marriages had adult children.

Clearly, the court contravened section 2(3) of the LSA by determining the beneficiaries through the LSA's criteria. Since the deceased was Muslim, the relevant law was IIL. If the court had followed section 2(3) and 48(2) – which it cited – then it would have found the Objector and her offspring the only legitimate heirs. It would then be upon these beneficiaries to share the property with the Petitioner and her offspring. When interviewed for this study, the Objector confirmed that she had wanted to give the first family much of the estate.[1836]

Moreover in *Saifudean*, while conceding the complexity of the issues before it because of the deficiency of a precedent,[1837] the court also overlooked section 2(3) of the LSA and upheld what would have been an invalid will under *Sharii'ah*.[1838] The court further struggled with the facts before it to justify the application of LSA – and not IIL – in the appeal. For example, it sought to apply the spirit of IIL instead of its letter to normalise the will.[1839] Thus it inquired whether the deceased 'would have happily contemplated to see his widow (…) deprived of three quarters of his estate in favour of a cousin'[1840] and responded in the negative.

Furthermore, the court considered an aspect which is alien to the application of the LSA. It upheld the High Court's conclusion that the deceased made a valid will [as per section 5(1) of the LSA] because he was least of 'a devout Muslim'. Yet the strength of a deceased's faith

[1835] *Re Paul Ndungu Muiruri, Zubeida Mohamed Nahdey and three others v Harriet Waithira Muiruri and another* [2013] HC Succession Cause No 3229 of 2007 (Nairobi).

[1836] See Interview 60.

[1837] *Saifudean* (n 17) 1.

[1838] Interview 128.

[1839] *Saifudean* (n 17) 10.

[1840] ibid at 10.

is never a determinant in choosing the applicable law to that deceased's estate.[1841] It suffices that one is a Muslim under section 2(3) of the LSA.[1842]

The application of IIL in mainstream courts continues even with the existence of the 'submission clause'[1843] in the present constitution. While article 170(5) of the 2010 Constitution recognises the Kadhis' courts' jurisdiction to determine '*questions of* Muslim law relating to personal status, marriage, divorce or *inheritance*'[1844], it requires all the parties before these proceedings to be Muslims and to 'submit to the jurisdiction' of these courts. This explicit addition to the limitations of the Kadhis' courts' authority has, however, caused uncertainty (real and perceived) in the functioning of the courts and the observation of Islamic personal law in the country. Defendants now raise preliminary objections (POs),[1845] uncontrollably, to oppose the Kadhis' courts' hearing of cases filed against these respondents.[1846] But the ensuing important question is whether the abdication of these courts includes the application of *Sharii'ah* to those suits. Put differently, what law applies when these cases move to the High Court or the Magistrate Courts.

The simple and straight answer is: the applicable law before the High Court and the Magistrate Courts. And since both the High Court and the Magistrates' Courts derive their specific probate jurisdiction from the LSA, then vide section 2(3) this law is Islamic. The Court of Appeal in *Noorbanu Abdul Razak v AbdulKader Ismail Osman*[1847] elucidated this point poignantly, viz:-

> 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

[1841] Interview 128; *Sophia Betty Chepng'etich Rono v Saleh Kiplagat Chebii* [2015] KC Divorce Cause No 138 of 2013 (Nairobi) 3–4.

[1842] Interview 128.

[1843] Article 170(5) of the 2010 Constitution contains a phrase which requires litigants to acquiesce to the jurisdiction of the Kadhis' courts. This study has termed this phrase the 'submission clause'.

[1844] Emphasis added.

[1845] These are ground(s) of opposition to the hearing of a case. They concentrate on points of law. When litigants raise the POs, courts must address these questions before proceeding with the actual (ie substantive issues of the) case.

[1846] Interview 128.

[1847] *Noorbanu Abdul Razak v AbdulKader Ismail Osman* [2013] Civil Appeal No 285 of 2009 (Mombasa). This case is actually an appeal against the decision in *Re Ismail* (n 1882). See *Noorbanu [HC 2017]* (n 17) [3].

> (…) [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*.[1848]

This is the true position of the law.[1849] IIL and not the LSA applies in the mainstream courts when the deceased is Muslim. Therefore the position of some High Court judges and recently the Court of Appeal that the applicable law then is the LSA[1850] is wrong. In fact, (former) Chief Justice Mutunga had earlier clarified this position in his memo to all judicial officers.[1851]

So far a number of High Court judges have followed the Court of Appeal's guidance in *Noorbanu Abdul Razak*[1852]. In fact, *Noorbanu Abdulrazak [HC 2017]* is a re-trial of the original *Re Ismail* which was the case under the Court of Appeal's consideration when it delivered the above opinion. Thus while invoking *Sharii'ah*, Thande J found the contested will invalid 'not just for providing for only 2 of the Deceased's children to the exclusion of all other children but for providing for legal heirs whose share is already stipulated in the Holy Qur'aan.'[1853]

In *Mwaurinda* while conceding that article 170 would have aided the objector to challenge the Kadhis' court remit successfully were the case to be tried there, Thande J observed that this provision – nonetheless – 'does not oust the application of Islamic law in respect of the estate of a Muslim.'[1854] In this case, the objector had declined the observance

[1848] See *RB & RGO v HSB & ASB* [2014] eKLR (HC) [16]; *Nazima Janmohammed Nassar v Nasreen Kauser* [2015] eKLR (HC) 5; *Noorbanu [HC 2017]* (n 17) [19] reproducing the Court of Appeal's pronouncement. Emphasis added.

[1849] Waris also alludes to this conclusion. See Waris (n 34) 53.

[1850] See notes 1830 and 1831. See also *Chuba* (n 805) 24.

[1851] See Internal Memo from Willy Mutunga, 'Practice Note No 1 Of 2012' (18 May 2012).

[1852] *Re Ismail (CA)* (n 1898). See eg *Nazima* (n 1899) 6; *Noorbanu [HC 2017]* (n 18) [19]; *Mwaurinda* (n 1884) [11].

[1853] *Noorbanu [HC 2017]* (n 17) [25].

[1854] *Mwaurinda* (n 1884) [7].

of *Sharii'ah* at the High Court because she was non-Muslim. She asserted article 170 and section 47 of the LSA; and claimed for allocation of identical shares of the estate to the deceased's widow, three sons and four daughters (of whom she was one). The court ordered the distribution of the estate according to IIL.

Regardless of these developments, a majority of legal practitioners (both bench and bar) remain uneasy with following IIL when it conflicts with the substantive provisions of the LSA because they find that the outcome erodes the conventional understanding of justice. Private lawyers and Public Trustees, for example, would advise aggrieved relatives to move to the High Court to contest a Kadhis' court order or decree which excludes a deceased's sons or daughters from the list of rightful beneficiaries because of their proved illegitimacy or non-Islamic faith.[1855] This is because, as intimated by one of the interviewed Public Trustees, the High Court would find these deceased's offspring eligible heirs since the LSA considers them as the deceased's lawful dependants.[1856]

But while that may be so under the LSA, this advice seeks to defeat section 2(3) of the LSA. Though the lawyers, public and private, may arbitrate an amicable outcome among possible heirs – which initiative may fit into the doctrine of consensual estate distribution outside *Sharii'ah* portions, they ought first to consult the IIL rules relating to exclusion from inheritance. Otherwise, the lawyers risk causing ineligible heirs to succeed while unknowingly depleting the proportions of the rightful beneficiaries.[1857]

In *re Estate of CCBH (Deceased)*,[1858] Thande J was also at pains to confirm the applicants as ineligible to inherit their deceased's father because of their illegitimacy. She opined thus: -

> Indeed referring to any child as illegitimate in this day and age appears to be outrageous. However, as long as the estate herein belongs to a deceased Muslim and as long as Article 24(4) remains in our Constitution and further as long as section 2(3) remains in the Law of Succession Act, the Court's hands are tied. In

[1855] Interview 129.

[1856] Interview 49.

[1857] Interview 93. See also Interview 49 where such an outcome almost happened.

[1858] *In re Estate of CCBH (Deceased)* [2018] eKLR.

> any other circumstances, the Court would not require elaborate persuasion to find in favour of the Applicants.

The facts of this case were that the Applicants were born out of wedlock. Until their father's death on 18 December 2012, the Applicants, their mother and father lived in one of the properties of the Applicants' grandfather. This grandfather died on 2 August 2004. He was survived by two widows and 18 sons and daughters including the Applicants' father. The Applicants' father, however, died before he could receive his share of his father's estate. The Kadhis' court had determined this share as 9.21%. It also found the Applicants as unsuitable to inherit from their father.

On appeal of this ruling, however, the Court of Appeal held that only the High Court ought to determine the heirs to the Applicants' father's estate and that the determination should be made according to the LSA.[1859] The Court based its decision on the ground that IIL could not apply to the Applicants since the four pre-conditions to its application were absent.[1860] The Court discerned these 'strict conditions'[1861] from articles 24(4) and 170(5) of the 2010 Constitution.

According to the Court, every person has the right to equality and freedom from discrimination which includes equal protection of the law and equal benefit of the law. While article 24(4) allows derogation of this right to equality at the Kadhis' court, the Court surmised, such derogation can only happen:

> First, (…) ***"only to the extent strictly necessary***". Second, (…) to matters of personal status, marriage and divorce and inheritance. Third, the persons involved must (…) profess the Muslim faith. Fourth, (…) ***all the parties*** to the dispute must profess the Muslim faith and ***submit to the jurisdiction of the Kadhis' court***.[1862]

But the Court's reading of articles 24(4), 27 and 170(5) in relation to the application of IIL (in the country) is faulty. While article 27 enshrines the principle of equality before the law, this study has shown in chapter two that the meaning of equality includes the protection

[1859] *Chuba* (n 805) 24.

[1860] ibid at 23 and 24.

[1861] ibid at 21 and 23.

[1862] ibid at 21. Emphasis court's own.

of the rights of minorities which encompass the observance of their personal law. That law includes IIL. And article 170(5) further safeguards it. As also alluded in chapter two, the qualification of the principle of equality in article 24(4) was unnecessary because that principle in itself protects the understanding of equality under *Sharii'ah*. And chapter three has shown how IIL embodies the principle of equality. That said, section 2(3) of the LSA provides that IIL applies to the estates of Muslims, not the LSA, when the succession matter is before the mainstream courts.

The Court seems to have drawn the issue before it as to whether IIL discriminates against the Applicants by denying them to inherit their father's estate because of their illegitimacy. While the Court hesitated to make this declaration,[1863] it found that IIL does not apply to the Applicants.[1864] Indeed IIL does not apply to non-Muslims. The issue before the court should have been which law applies to the Applicants' father's estate. And the response should have been derived from the existing laws. Because section 2(3) identifies such applicable law as IIL, it was unlawful for the Court to direct the High Court to use the LSA. Despite mentioning this provision at the beginning of the decision, the Court seems to have ignored it in its analysis. As Thande J observed, as long as section 2(3) remains – then IIL and not the LSA applies to Muslim estates.

The Court also erred in importing article 24(4) in its analysis. This provision is restricted to the Kadhis' court. Thus if the matter before the High Court was an appeal of the Kadhis' court's decision, a discussion of article 24(4) would stand. But that was not the case. The Applicants made a fresh application before the High Court as to the unconstitutionality of IIL. If at all, the Court of Appeal should have pronounced itself on this. This did not happen. But even if it did, the Court – most likely – would have concluded that IIL is not unconstitutional. It could not be because it is enshrined by the same constitution. It is unfathomable that constitutional provisions contradict. They do not. It is upon legal practitioners to read the constitution holistically and derive its ultimate intent amid its seemingly inconsistent provisions.

6.4 Using the Deceased's Locality as A Referent to the Applicable Law

[1863] ibid at 23 and 24.

[1864] ibid at 22.

While IIL has no geographical boundaries, the dominant view emerging from the research indicates that both mainstream courts and extra-judicial institutions use a deceased Muslim's area of residence (or that of his or her parents) to determine the applicable inheritance law. If this locality is predominantly Muslim, then these institutions will apply IIL. If, however, the location is largely non-Muslim, then these probate processes employ either the LSA or the deceased's natal family's ethnic customs. It is only at the Kadhis' courts and Islamic civil society organisations where *Sharii'ah* applies regardless of the location of the institutions in the country.[1865]

Thus despite the explicit words of section 2(3) of the LSA, a High Court which is situated in a predominantly non-Muslim areas applies the LSA or endorses the deceased's family's consensual informal divisions – including customary ones.[1866] In Kakamega, for example, families normally approach the High Court to endorse the land divisions done in accordance with customs.[1867] But while *Sharii'ah* accepts such traditional allocations if they are voluntary, it is most probable they are not, even when women endorse them as such because (as seen above) the predominant Luhya tradition there has conditioned women to believe that they have little rights to land.

In areas where the community's knowledge of Islam is high, however, a majority of women file their inheritance grievances in the Kadhis' court and return to enforce the court decisions if their opponents fail to observe them.[1868] The Kadhis' court in Mombasa, for example, is very busy because a majority of the residents appreciate their Islamic rights. Of the 535 cases filed in the fiscal year 2014/2015 there, 253 were inheritance ones.[1869] Similarly in Garissa where the knowledge of Islam is relatively high, parties that go to court prefer the Kadhis' court to the High Court.[1870] Meanwhile, five of the seven judges who

[1865] Interview 69; Interview 95; Interview 2; Interview 79; Interview 68. See also the accompanying texts to notes 1693 and 1694.

[1866] Interview 130; Interview 64; Kameri-Mbote (n 267) 373 and 380.

[1867] FGD 7; interview with Mwijaka Salim (Malindi, Kenya, 2 December 2015); FGD 10; Interview 110.

[1868] Interview 113; Interview 46.

[1869] Interview 53.

[1870] Interview with Billow Gudo (Garissa Town, Garissa, Kenya, 2 October 2015). In the state of the Judiciary and administration of justice report for the fiscal year 2013/2014, the Chief Justice observed that succession matters formed 57% of the pending 2,376 cases in Kadhis' courts across the country. This was a 23.72% increase from the previous year. The Judiciary of Kenya, 'SOJAR 3' (n 1786) 39. Section 5(2) (b) of

participated in this research indicated that they had only encountered an appeal from the Kadhis' court (whether probate or otherwise) for the first time while serving in predominantly Muslim areas.[1871]

The Public Trustees in largely Muslim areas, on the other hand, employ *Sharii'ah* while those in non-Muslim areas use the LSA. The Public Trustees in Muslim localities either apply to the Kadhis' court for an order confirming the rightful heirs and their respective shares or write to it for similar guidance.[1872] They then follow the court order or response strictly.[1873] The Public Trustees in non-Muslim localities, however, hardly confer with the area or nearby Kadhi.[1874] And since they are ignorant of IIL, they allocate the estate according to the LSA[1875] – which distribution primes the widow over other female heirs. During the research, for instance, it became evident that while the Public Trustees in Garissa, Mombasa and Malindi applied *Sharii'ah*, the Public Trustee in Kakamega employed the LSA.

At some quasi-judicial processes such as the village elders', the chief's office, and the Deputy County Commissioner's office,[1876] divergent inheritance laws also apply. In places where Islam is practised strongly, for example, most village elders hesitate to tackle succession issues.[1877] Instead, they transmit the matters to local Muslim scholars. These could be an '*ulamaa'a* in Garissa, a Naibul Kadhi in Pate or *sheikh wa mji*[1878] in Shella.[1879] One of the village elders in Pate, for instance, was categorical that succession issues and a

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the Judicial Service Act (No 1 of 2011) (Kenya) requires the Chief Justice to submit a yearly report on the situation of the Judiciary and the administration of justice in the country. The Kenya Gazette publishes this report and both houses of Parliament, the Senate and the National Assembly, discuss it.

[1871] These judges share a collective previous practice of the following stations: Eldoret, Nairobi, Machakos, Meru, Kakamega and Kisumu. These courts are found in counties bearing the same names save for Eldoret which is in Uasin Gishu County.

[1872] These divergent methods of approaching the court stem from individual Public Trustee's interpretation of the probate laws. Sub-section 6.5 highlights how the latter form impinges on women's succession rights.

[1873] Interview 49; Interview 111.

[1874] Interview 87.

[1875] FGD 10; Interview 87.

[1876] See note 38.

[1877] Interview 96; Interview 94; Interview 24; Interview 114; Interview 97.

[1878] Swahili phrase for the Island's *sheikh*.

[1879] Interview 96; Interview 94.

headman's mandate differed.[1880] According to this elder, only those educated in IIL 'can explain intricate inheritance matters.'[1881] Another one in Shella supported these views and indicated that if inheritance issues overwhelm a family, the heirs in his area either go to the Kadhis' court or consult a scholar.[1882] These village elders, however, may appear as witnesses to an inheritance dispute because of their familiarity with the attending family.[1883]

But some village elders in some predominantly Muslim localities agree to distribute an estate physically if a family's consensual divisions conform to IIL. A headman in Pate admitted demarcating plots and farms to several sons as per their father's arrangement when the daughters accepted the houses allocated to them.[1884] This headman also indicated that he was allocating undivided estates according to *Sharii'ah* such that a daughter received half as much as the son. After the distribution, the village elder requires the parties to sign an agreement which witnesses the resolution of an impasse.

In cosmopolitan areas such as Mombasa, however, and in localities where Islam is practised marginally like Kakamega, village elders resolve inheritance grievances customarily or in accordance with mainstream laws.[1885] Thus in Likoni a village elder explained how he resolved a dispute using the 'constitution'[1886]:

> In my area, a brother-in-law wanted to evict a widow. The case came to me as an elder. Because the brother-in-law did not consult the widow to get the property amicably, I told them the property was not for the brother-in-law. I said it was for the wife and children. We went further to the Divisional Officer (DO) and the DO agreed with my position. He said the constitution says so.[1887]

[1880] Interview 96. Often, a village elder is the foremost arbiter of his or her areas disputes in both rural and peri-urban localities after the family.

[1881] Interview 96.

[1882] Interview 114.

[1883] Interview 96; Interview 94.

[1884] Interview 94.

[1885] FGD 5.

[1886] The researcher has put this word into quotation marks because the constitution is not explicit on mainstream inheritance laws.

[1887] FGD 5.

While what this village elder applied is the LSA, his application matches IIL in some respect because, as seen in chapter three, the deceased husband's brothers have no right to an estate in the presence of a son.

A similar pattern of handling inheritance issues happens at the chiefs'.[1888] While all chiefs write the 'estate letter',[1889] chiefs in predominant Muslim areas often hesitate to adjudicate inheritance issues relating to Muslims.[1890] Instead, they investigate the matters[1891] and then avail the information to the Kadhis' court through the Deputy County Commissioner by the 'estate letter'.[1892] A chief in Garissa narrated that: 'If a person comes to me with an inheritance issue, I go to the person's home to confirm if what the person is saying is true.'[1893]

An FGD with men in Pate revealed that the chief's mandate was limited to handling criminal and development issues while the Naibul Kadhi attended to succession matters in the presence of a headman. The chief could, nonetheless, attend a dispute resolution session as a witness because he knows the history of the relevant family.[1894]

When interviewed, however, the chief indicated that he also resolved inheritance feuds using *Sharii'ah* between his people who are '100% Muslim'.[1895] Thus if a matter is simple, the chief conducts the hearing in the company of the Naibul Kadhi. When the tussle is complicated, the chief invites his committee of village elders alongside the Naibul Kadhi to hear the matter. In either session, however, the chief asks the parties' relatives to attend the meeting so that they could verify that he has applied *Sharii'ah*. The disputants' relations may

[1888] Chiefs ordinarily resolve locals' grievances when the elders have been defeated. Interview 82. They receive and adjudicate complaints of inheritance disentitlement including distributing the estates. They also oversee proper appropriation and management of the deceased's children's shares by the widow or such other administrator. Interview 2; Interview 118; Interview 37; Interview 92; Interview 81.

[1889] See note 1242.

[1890] Interview 92; Interview 118; Interview 37.

[1891] Interview 37; Interview 118.

[1892] Interview 118; Interview 37.

[1893] Interview 37.

[1894] FGD 12.

[1895] Interview 92.

also prevail over the disputants to embrace an amicable solution over 'insignificant'[1896] differences. For example, if after the estate distribution, there is a remainder of one coconut tree, the relatives persuade the disputants to give up fighting over the tree since it 'cannot be divided'.[1897]

When the parties concede to the chief's verdict, the chief procures their written consent and writes to the local Lands Office to effect changes of ownership of some plots or lands as necessary.[1898] But if a party disagrees with the chief's decision, the chief refers them to the Kadhis' court in Lamu directly as he fears that if his area Deputy County Commissioner is a non-Muslim, s/he will be ignorant of IIL.[1899]

Thus in a case where a grandmother sought to dispossess her granddaughter and grandson of their deceased father's incomplete house, both the chief and the Naibul Kadhi resolved to retain the house for the widow and her two children. The deceased's mother thus received a sixth of the house value plus the cost of the plot. The deceased's father relinquished his inheritance portion to his grandson's and granddaughter's proportions. In this case, a man left an unfinished semi-permanent house of approximate value of Ksh.s 600,000/= on his mother's plot. Since the incomplete dwelling belonged to her son, the deceased's mother claimed it wholly to the exclusion of the widow and the deceased's minor son and daughter.[1900]

In predominantly non-Muslim localities such as Mumias, however, the chief distributes both the estates through the LSA.[1901] When the chief mediates a land dispute, for example, he identifies a widow as a unit in the property division. But unlike the *wichisala*, the chief allocates equal portions of the land to the widows (not on the basis of number of sons). It becomes the individual widows' responsibility to distribute the acquired land to their

[1896] The researcher has put this word into quotation marks because under *Sharii'ah* every interest to an inheritance property (or such other property) however nominal matters. Only voluntary abandonment of such interest by its owner relieves the other side of its obligation to observe it.

[1897] Interview 92.

[1898] Interview 92. This happens mostly when most properties are registered in the name of the elder son to the exclusion of his siblings. Ibid.

[1899] Interview 92.

[1900] Interview 92.

[1901] Interview 81.

children. The chief also leaves it for the widow and her progeny (adult or minors) to decide whether to give the widow a separate share or not.[1902]

But while the employment of the LSA to divide the Muslim estates is wrong in itself, the mixing of the widows' shares with those of their offspring further condones the actual or potential disentitlement of women's land rights. It is unlikely that the Luhya customary position would shift merely because a matter emanates from the chief's office. That is why in *Ndeta*,[1903] the Kadhis' court faulted both the chief and the Assistant Deputy County Commissioner for following traditions to subdivide the deceased's 18 acres farm among his three sons and step-grandson to the exclusion of the widow.

In fact because of the chief and Assistant Deputy County Commissioner's decision, one of the three sons and the step-grandson leased the entire farm without leaving some land for the widow to grow food. The widow sued them and prayed for the subdivision of the land under *Sharii'ah*. The court awarded her 2.25 acres which were equivalent to her one-eighth entitlement under IIL.

When the deceased husband's estate is money whether in a bank or such other financial institution, on the other hand, the chief only summons the widows and their children and excludes the deceased's parents. Thus the deceased's mother, unlike under *Sharii'ah*, misses out on the list of heirs, because banks and financial institutions recognize only the nuclear family, unless there are written instructions to the contrary. When the amount is more than Ksh.s 100,000/=, the chief advises the parties go to the High Court to get a grant to facilitate its division. If the amount is less then Ksh.s 100,000/=, however, the chief writes to the relevant financial institution through the Assistant Deputy County Commissioner and the Deputy County Commissioner for any of the two offices to distribute it.

The locality of the Deputy County Commissioner, just like that of the chief, influences the applicable law.[1904] In largely Muslim areas such as Amu, therefore, this law is *Sharii'ah.* Thus when the gross value of the estate is Ksh.s 100,000/= and below, the Deputy County

[1902] Interview 81.

[1903] *Ndeta* (n 1257).

[1904] The Deputy County Commissioner or his or her assistant exercises probate mandate in areas distanced from a Public Trustee Office. As at the time of the study, the Deputy County Commissioner's monetary jurisdiction was Ksh.s 100,000/=.

Commissioner allocates the property summarily to the beneficiaries identified in the chief's 'estate letter'.[1905] And when the property value exceeds Ksh.s 100,000/=, the Deputy County Commissioner transmits the matter to the Kadhis' court together with the chief's 'estate letter'.

In non-Muslim areas such as Mumias, on the other hand, the Deputy County Commissioner follows the LSA. Thus the Deputy County Commissioner distributes an estate within his or her monetary jurisdiction to the deceased's widows and offspring only.[1906] The offspring's divisions, however, follow their ages such that minors get higher shares than the older ones on the logic that they have more maintenance needs.[1907] If the heirs dispute the distribution, however, the Deputy County Commissioner refers the matter to the Public Trustee.

This Deputy County Commissioner's distribution, nonetheless, defies *Sharii'ah*. First, it excludes the deceased's mother (and possibly his father). Second, it creates disparities between old and young offspring yet IIL law treats sons identically, on one hand; and daughters identically, on the other – regardless of their ages and (financial) needs.

6.5 Public Trustees' Misconstruction of the Kadhis' Courts' Probate Jurisdiction

As public officers charged with administering the estates of deceased Kenyans, Public Trustees also have jurisdiction over Muslim estates.[1908] Thus, about 65% of the properties in Malindi Public Trustee Office, for example, belong to Muslims.[1909] The Mombasa and Garissa offices, on the other hand, each receive about 50 Muslim briefs annually.[1910] And 3% of the 4,000 yearly briefs in Kakamega office concern estates of Muslims.[1911]

[1905] Interview 118.

[1906] Interview 81.

[1907] Interview 11.

[1908] Sections 6, 7 and 10 of the Public Trustee Act and sections 46 and 66 of the LSA indicate the circumstances when a Public Trustee administers an estate.

[1909] This office serves from Mtwapa (Kilifi County) all through to Lamu County including the southern parts of Tana River County. Interview 111.

[1910] Interview 49; Interview with Peter Oloo (Garissa, Kenya, 30 September 2015). But the Garissa office covers Mandera County, Wajir County, Garissa County and the northern parts of Tana River County. Interview with Peter Oloo (Garissa, Kenya, 30 September 2015).

[1911] Interview 87.

As an administrator, a Public Trustee can distribute the estate of a Muslim either summarily or upon receipt of a court grant or order authorizing him or her to do so. Summary distribution entails dividing an estate with a gross value of Ksh.s 500,000/= and below without a grant up to 7 June 2018.[1912] This amount was, however, enhanced to 3,000,000/= from 8 June 2018 when the Public Trustee Act was amended.[1913] The grant or order, on the other hand, empowers a Public Trustee to operationalise an existing will or to manage an intestate property above that value. In both cases, however, the Public Trustee liaises with the Kadhis' court to identify the deceased's rightful beneficiaries and their respective shares.[1914]

But a majority of the Public Trustees' engagement with the Kadhis' court, however, is unprocedural, unconstitutional and hinders expeditious justice. When approaching the courts, the Public Trustees either apply for an order which determines the deceased's heirs and their corresponding fractions or write a letter seeking similar guidance. While the first method is procedural, writing to the Kadhi for advice on the eligible beneficiaries and their respective shares instead of opening a court file is not. First, it disrespects the judicial officer.[1915] Second, it is extreme informality unheard of in the ordinary courts. A Public Trustee or such other party interested in the development of a case would, at the very least, write to the judicial secretaries of the mainstream courts.[1916] They may also make a formal request to peruse the court file. Alternatively, s/he could cause the case to be mentioned in open court. But it is inconceivable that s/he would write to the Magistrates or Judges directly.[1917]

Some Public Trustees, however, write to the Kadhis because they refuse to appear before the Kadhis' court since their interpretation of the word 'court' in the LSA and the Public

[1912] See section 8(1) of the Public Trustee Act.

[1913] See section 8(1) of present Public Trustee Act. See also section 8 of the Public Trustee (Amendment) Act (No 6 of 2018).

[1914] See the text accompanying note 1872.

[1915] Appendix 6 is an example of the correspondence between the Public Trustee Office and the Kadhis' court. Appendix 6A is a response from the Kadhi. Crucial details which could reveal the identity of both the relevant Public Trustee and Kadhi have been blocked to protect them. This study also established that Deputy County Commissioners also pursue the progress of a matter before the Kadhis' courts through a letter.

[1916] These are the Executive Officers of the Magistrates' Courts; the Deputy Registrars of the High Court and Court of Appeal; and the Registrar of the Supreme Court.

[1917] Interview 130.

Trustee Act is only the 'High Court'.[1918] And until five to 10 years ago, most Kadhis' courts indulged this Public Trustees' erroneous construction of the probate laws and gave the requested directions via a letter. A Public Trustee in one of the research sites confirmed this anomalous practice: '[A]fter we receive the estate, we then involve the Kadhi's through a *letter* to issue us with the mode of distribution according to Islamic law.'[1919] Similarly, a Public Trustee in another station observed that after receiving a brief, 'I attach the list of the heirs and then ask for his *advisory opinion* and I copy the *letter* to all the heirs.'[1920]

The present insistence by some Kadhis' courts for all parties seeking such information, including the Public Trustees, to institute a proper case (albeit a miscellaneous one)[1921], has made the Public Trustees resort to directing heirs to institute the court cases themselves. In cases in which the beneficiaries are illiterate or simply unfamiliar with court procedures, this results in delays or ultimately, abandonment of the matter. During her legal practice, the researcher has witnessed two matters in which distribution of estates was delayed because the heirs lacked the necessary knowledge to file a case before the Kadhis' courts. Yet as administrators, the Public Trustees have a duty to appear before the Kadhis' court to represent the relevant Muslim estates just like they do in the High Court.[1922]

But even then, since both the LSA[1923] and the Public Trustee Act[1924] define a 'court' as one with jurisdiction to hear a particular succession matter pursuant to the LSA, then the Kadhis' court fits the description of a 'court' under both statutes because section 48(2) of the LSA identifies the Kadhis' court as the court that hears matters relating to Muslim estates.[1925] Section 48(2) reads that: -

[1918] Conversation between a Public Trustee (whose identity is obscured to protect him) outside the field research period relating to a certain Muslim estate.

[1919] Interview with XYZ (Kenya, 2015) [hereinafter Interview 132] (Emphasis added). The identity, location and date of the interview have been obscured to protect the respondent.

[1920] Interview with ABC (Kenya, 2015) (Emphasis added). The identity, location and date of the interview have also been obscured to protect the respondent.

[1921] That is a case which involves nominal determination of issues.

[1922] Interview 128; Interview 130.

[1923] See section 3(1).

[1924] See section 2.

[1925] See *RB & RGO* (n 1849) [16].

> *For the avoidance of doubt* it is hereby declared that the Kadhis' courts shall continue to have and exercise jurisdiction in relation to the estate of a deceased Muslim for the determination of questions relating to inheritance in accordance with Muslim law *and of any other question arising under this Act in relation to such estates*.[1926]

Indeed in *Re Ismail*, the Court of Appeal affirmed that the High Court was not the exclusive probate court in the country. The other one was the Kadhis' court.[1927]

When the gross value of the estate is above Ksh.s 500,000/=, however, the Public Trustees shuffle between both the High Court and the Kadhis' court to administer the estate. The Public Trustees will either first obtain letters of administration from the High Court before invoking the Kadhis' court for the order or 'guidance' on the rightful heirs and their corresponding shares.[1928] Alternatively, if the Public Trustees first obtained the Kadhis' court order or 'guidance', they will further petition the High Court for letters of administration and for adoption of the Kadhis' court decision.[1929]

The Public Trustees move to the High Court because they believe that the Kadhis' courts lack jurisdiction to both issue the letters or the grant and to adjudicate on an estate of above Ksh.s 500,000/=. Thus even after obtaining the Kadhis' court order or directions, some Public Trustees find it illegal to distribute an estate of that value using the Kadhis' court order or directions alone.[1930] That is why in addition to applying for the letters or the grant, the Public Trustees seek a further High Court's order to confirm or adopt the Kadhis' court's vesting order. This subsequent order is meant to legalise, literally, the Kadhis' court order.

In one research site, for example, a Public Trustee described a Kadhis' court order of immediate distribution of the estate as contravening both the Public Trustee Act and the LSA.[1931] To him, Public Trustees can only distribute an estate after being confirmed as an

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[1926] Emphasis added.

[1927] This position has since changed with the enactment of the Magistrates' Court Act. See note 1625.

[1928] See Interview 49.

[1929] Interview 11.

[1930] Often, the Kadhis' courts accompany their orders determining lawful heirs of an estate and their respective shares with a directive on distribution of the estate.

[1931] Interview 11.

administrator (by the letters or grant). Otherwise, they risk attracting personal responsibility for the disappearance of assets that they had distributed without the probate instruments from the High Court.

In another study site, a Public Trustee found the conflict between complying with the Kadhis' court order and obtaining letters or grant a 'big'[1932] practice issue since it pushed him to defy either a court order or an enabling probate statute. Thus the Public Trustee met with his resident judge and Kadhi to agree on their collective practice. The meeting resolved that until the Chief Justice and the Chief Kadhi gave directions on the matter, the Public Trustee would attach the Kadhis' court's order in his application for the letters of administration to the High Court.

This workman's agreement is, however, unconstitutional because the insistence on a further order from the High Court to confirm a Kadhis' court's vesting order because of the absence of a grant or letters of administration from that latter court is unconstitutional.[1933] This is so because such a demand offends article 170(5) of the 2010 Constitution[1934] – which provision identifies the Kadhis' court as competent in dealing in 'all questions' relating to Muslim estates. Thus vide article 170(5), a Kadhis' court's decision, order or decree is conclusive.[1935] It can only be questioned at the High Court – vide section 50(2) of the LSA – by the normal process of appeal.[1936] Nothing short of this. So the High Court's practice of confirming a Kadhis' court's vesting order outside an appeal is unlawful because it is not sanctioned by any law. As the Supreme Court rightly observed, a court only exercises jurisdiction 'as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.'[1937]

[1932] Interview 132.

[1933] *Re Abdalla* (n 1633) [11].

[1934] ibid.

[1935] *Re Estate of Khatijabai D/O Gulam Hussein Esmailjee Karachiwalla* [2010] HC Succession Cause No 72 of 2010 (Mombasa) 2.

[1936] ibid. A second appeal, however, can lie to the Court of Appeal on points of IIL. See section 50(2) of the LSA; *Mohamed Madhubuti v Jelani Mohamed Habib* [2018] eKLR [20] and [23].

[1937] *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited and 2 others* [2012] eKLR (Supreme Court) [68].

Again, since the constitution bestows on the Kadhis' courts the jurisdiction to hear matters relating to Muslim estates, it has obviated the necessity of the probate instruments because neither an executor nor an administrator is a requisite in IIL.[1938] Instead, distribution is either done by the heirs themselves or the State (through the court).[1939] In essence, therefore, a Kadhis' court order or decree is sufficient to satisfy the 'requirement of grants of Probate and Letters of Administration'.[1940]

But the Public Trustees' shuffling between two competent courts over the same matter also defeats section 48(2) of the LSA. As earlier noted, section 48(2) identifies the Kadhis' court as competent in dealing in 'all questions' relating to Muslim estates including those arising under the LSA.[1941] Thus reading this provision together with section 2(4) of the LSA, Kadhis' courts can exercise all powers relating to probate procedures which any ordinary court would exercise under the LSA if that procedure is not inconsistent with *Sharii'ah*. Hence if a matter before the Kadhis' court requires letters of administration or a grant (even as a necessity because of the realities of contemporary wealth[1942]), then the presiding Kadhi can issue such letters or grant.[1943]

In fact the present requirement of instituting inheritance matters at the Kadhis' courts using probate forms similar to those in the LSA[1944] heeds this statutory call.[1945] Thus both the Public Trustees and the Kadhis' court (including other stakeholders)[1946] must henceforth apply for and issue these letters and grant respectively (where necessary) without fear of contravening the probate laws. It is incorrect, notably, to assume that using these forms

[1938] Ali Khan (n 8) 22; *Zahran* (n 49) 11.

[1939] *Zahran* (n 49) 11.

[1940] *Re Abdalla* (n 1633) [10].

[1941] See the accompanying text to notes 52 and 1925.

[1942] See eg note 719.

[1943] Interview 128.

[1944] See The Judiciary of Kenya, 'Manual' (n 1739) 34–36.

[1945] Previously, while section 53 of the main LSA recognises the Kadhis' court's jurisdiction to issue grant (both letters of administration and grant of probate), the P&A Rules confine the forms to the High Court and the Resident Magistrate's court. See Rule 2. See also Interview 130.

[1946] See Interview 64 and Interview 130 narrating that ordinary litigants also move between the two courts either by themselves or through their advocates.

amounts to submitting to the LSA.[1947] Presently, while some Kadhis believe they bear the powers to issue such probate instruments,[1948] others feel that mandate is beyond them.[1949] Similar conflicting views also hold among judges and advocates.[1950] Some attribute this confusion to the absence of the Kadhis' court probate practice rules envisioned in section 50A of the LSA.[1951] As section 50A aptly states, such rules would make practice before the Kadhis' court unequivocal.[1952]

But until then, both sections 48(2) and 2(4) of the LSA continue to enable the Kadhis' courts' to handle the administration of all Muslim estates where necessary. These dual provisions hardly conflict. While Part VII of the LSA mentions 'the court' generally, section 48(2) imputes the Kadhis' courts in these provisions to the extent that these provisions are 'not inconsistent with those of Muslim law' as per section 2(4).[1953] Again, since the Kadhis' courts have no pecuniary limitations,[1954] they can hear matters relating to Muslim estates of all sizes including those above the value of Ksh.s 500,000/= which the Public Trustees seek the letters of administration and grant for.[1955]

The Public Trustees' practice of litigating 'the same matter before two different courts of competent jurisdiction' is also unconstitutional because it delays justice and abuses the court process.[1956] Both article 159(2) (b) of the 2010 Constitution and section 83(g) of the LSA instruct expeditious justice, namely: the speedy conclusion of the administration process. Section 83(g), for example, requires the Public Trustee to finalise the administration of an estate within six months from the date of confirmation of the grant or letters. But this seems impossible if the Public Trustees commence their litigation in the High Court and end up in the Kadhis' courts. As noted above, some Public Trustees will require the individual

[1947] The High Court in *Abdul Azim* was thus wrong to hold that filing a petition at the court using the LSA P&A Form 78 amounted to submitting to the LSA. See *Abdul Azim* (n 1832) [22].

[1948] Interview 8; Interview 129; Interview 79.

[1949] About two Kadhis in different stations, however, confirmed issuing both the grant and the letters.

[1950] See eg Interview 125; Interview 69; Interview 58; Interview 130.

[1951] Interview 130; *Re Abdalla* (n 1633) [12].

[1952] Interview 130.

[1953] Interview 130.

[1954] Interview 130.

[1955] See section 8(1) of the Public Trustee Act.

[1956] Interview 8; Interview 64.

beneficiaries to approach the latter court by themselves and the heirs can take long before they move the court.

On the other hand, a Public Trustee who first went to the Kadhis' court may delay in approaching the High Court for 'adoption' of the Kadhis' court order as it was reported by some litigants during a Court Users Committee (CUC) meeting in one of the research sites.[1957] In *Re Bagoshi Mohammed Shafi's Estate*,[1958] for example, the Petitioner (through her advocate) filed a complaint in court, alleging that the Public Trustee had delayed distribution of the deceased's estate despite the court's identification of the heirs and their corresponding portions.

The shifts between the Kadhis' court and the High Court are also costly and waste court time. It is expensive to draw repetitive court documents which often require a legal mind.[1959] Even the Public Trustees themselves charge professional fees, albeit nominal.[1960] More importantly, however, the Public Trustees' movement offends article 159(2) (d) of the 2010 Constitution which mandates delivery of justice 'without undue regard to procedural technicalities' since it pits a substantive order of a Kadhis' court against a procedural requirement of a '"Grant"'.[1961]

6.6 Investing Children's Inheritance in *Sharii'ah* Non-compliant Ventures

Ordinarily after distribution, Public Trustees retain children's inheritance portions as trusts[1962] and forward the same to the Public Trustee Office in Nairobi for investment.[1963]

[1957] Interview 8. A CUC is a forum institutionalized in every court station in the country to converge stakeholders in the administration of justice (agencies and consumers) to brainstorm over issues impacting on the locals' access to justice. The CUC thus fulfils the constitutional call for public participation in running government institutions. The preamble, article 10(2) (a) and 159(1) of the 2010 Constitution recognise public contribution in the operations of the Judiciary. Isaac Lenaola, 'Public Participation in Judicial Processes: Mainstreaming Court Users Committees (CUCs)' (Kenya Judiciary Annual Judges' Colloquium, Mombasa, August 2011) <http://kenyalaw.org/kl/index.php?id=1934> accessed 22 January 2019; The Judiciary of Kenya, 'SOJAR 3' (n 1786) 70–72; Commission for the Implementation of the Constitution, 'Developing Guidelines For Court Users Committees In the Spirit of Fostering Public Participation' (October 2012).

[1958] *Re Bagoshi Mohammed Shafi's Estate* [2015] KC Succession Cause No 153 of 2014 (Mombasa).

[1959] Interview 64; Interview 46; Interview 44.

[1960] According to one of the Public Trustees that participated in this research, Public Trustee fees are one-off deduction as per the schedule of Public Trustee fees in the Public Trustee Act. But under section 13 of the Public Trustee Act, these fees come immediately after the deceased's funeral expenses and 'death-bed charges'.

[1961] *Re Abdalla* (n 1633) [11].

[1962] See section 83(f) of the LSA. If the deceased was polygynous, however, his widows may also hold the subsisting trusts for the benefit of their respective children. See section 84 of the LSA.

While establishing trusts for the benefit of the orphans is *Sharii'ah* compliant, the ensuing ventures are plausibly not. Like other non-religious affiliated agencies, the Public Trustee Office does not distinguish between investment opportunities which are *Sharii'ah* compliant and those which are not.[1964] This may be so because the enabling laws do not draw this distinction. Section 11(2) and rules 8(1) (b), 8(2) and 9 of the Public Trustee Act, for example, confer discretion on the Public Trustees to invest estates in several opportunities – a majority of which engage in interest. In fact the Trustee Act[1965] requires Public Trustees (alongside other trustees) to invest trust funds in fixed-interest initiatives, or both fixed-interest and wider-range ventures but in equal measure.[1966]

One of the Public Trustees who participated in this research confirmed that: 'any amount that stays with the Public Trustee after 3 months accrues interest. We invest the money in a Public Trustee Investment Pool (similar to unit trusts) and the interest thereof is reverted to the monies put in the pool.'[1967]

Because *Sharii'ah* forbids interest,[1968] these accruing 'profits'[1969] are *haraam*[1970] and the beneficiaries may decline to collect them when they become of age. Such a consequence defeats both *Qur'aan* 6:152 and 17:34 because in the eyes of these heirs (and the larger Muslim society), there is no actual improvement in the property. As earlier noted, these verses dissuade a manager of orphans' property from engaging in it unless s/he intends to

[1963] See section 11(2) and rules 8(1) (b), 8(2) and 9 of the Public Trustee Act; Interview 11. But where the orphans' mothers contest this initiative because they are burdened with the children's care, the Public Trustee instructs them to obtain an order from the Kadhis' court for the release of the orphans' shares. Interview 11.

[1964] In 2013, for example, a section of Kenyan Muslims condemned the National Social Security Fund for investing part of the members' contributions in Kenya Breweries and British American Tobacco companies. Yet these dual entities manufacture alcohol beverages and cigarettes respectively – which products Islam prohibits. See Patrick Beja, 'Muslims Tell off NSSF for Investing in Beer, Tobacco', *The Standard* (Nairobi, 31 May 2013) <https://www.standardmedia.co.ke/article/2000084847/n-a> accessed 12 March 2019. See also *Qur'aan* 2:219; 4:43 and 5:91.

[1965] Trustee Act (Chapter 167).

[1966] See section 4(2) read together with the Schedule to the Act.

[1967] Interview 111.

[1968] See *Qur'aan* 2:276 – 279.

[1969] The researcher has put this word into quotation marks because a majority Muslims consider these ensuing monies an unnecessary burden. They have to dispose of the money as charity without expecting God's recompense.

[1970] Arabic word for 'ill-gotten'.

improve it.[1971] In fact *Qur'aan* 17:34, reads partly that: 'and fulfill (every) engagement for (every) engagement will be enquired into (on the Day of Reckoning)'[1972]. As Ali notes, the engagements mentioned in this precept, relate (contextually) 'to the beneficial contracts connected with the orphan's property'[1973].

6.7 Other Challenges in the Extra-judicial Processes

Women still encounter a myriad of problems in the informal institutions. Some of these challenges include: weak religiosity of their families; division of unvalued estates; partial distribution of estates; non-verification of transfer documents; and delayed inheritance distribution.

6.7.1 Weak Religiosity of Families

Different families employ different succession rules depending on their ethnic identity and religiosity.[1974] In Kakamega, as noted earlier, this law is customary because of the presence of strong traditions in that county. Thus the *wichisala* chairs an extendedfamily meeting and distributes an intestate estate according to Luhya customs.[1975]

Where a family has both Muslim and non-Muslim members, on the other hand, the family goes to the High Court so that every such family member inherits vide the LSA despite the deceased's faith. This trend is also common in Kakamega because a majority of the families there are a mix of Muslims and Christians.[1976] While this arrangement can be valid under the doctrine of consensual estate distribution outside *Sharii'ah* portions, it is very unlikely that the families understand it. Instead, they act out of convenience – which approach risks denying eligible heirs (including females) of their actual rightful portions.

6.7.2 Division of Unvalued Estates

[1971] See note 1993.

[1972] Ali (n 7) 683.

[1973] ibid.

[1974] See Celestine Nyamu Nyamu-Musembi, 'Are Local Norms and Practices Fences of Pathways? The Example of Women's Property Rights' in Abdullahi An-Na'im (ed), *Cultural Transformation and Human Rights in Africa* (Zed Books 2002) observing that despite the presence of formal institutions, 'family-based' avenues including the clan remain significant in adjudicating inheritance matters.

[1975] FGD 7; FGD 6.

[1976] Interview 112.

When inheritance is distributed at family level, there is a likelihood of dividing an unvalued estate.[1977] This is because the relatives ignore the market value of the property or they are in a hurry to distribute it. These tendencies, however, may result in diminished actual shares.[1978] In Mombasa, for example, when some heirs accept to be bought out of an estate by fellow heirs, they sell the estate at throw-away prices. This also happens when the beneficiaries get an immediate deal from a stranger. Yet ascertaining the true worth of the various parts of an inheritance property before dividing it physically constitutes a key segment of estate distribution.[1979]

Thus while comparing property distribution at the Kadhis' court and within families, a Muslim scholar in Mombasa adjudged the former institution positively. To him, while 'women get their actual inheritance shares' at the court, problems emerge when the divisions happen in intra-family fora 'because of the absence of valuation of the different properties constituting the estate.'[1980]

6.7.3 Partial Distribution of Estates

Most informal probate officers do not amass the entire estate before distributing. They only divide visible properties or whatever the beneficiaries identify as the estate.While this approach is in good faith (ie it averts possible family squabbles over speculated property), it risks denying those beneficiaries (including females) the opportunity to verify non-disclosure of assets.

In Pate, for example, the chief adjudicates inheritance disputes relating to immovable properties because these properties are '*mali ya udhahiri*'[1981]. These include: coconut trees, houses, plots and farms. Thus this chief does not handle grievances relating to gold and cash because he cannot verify whether the deceasedindeed had these valuables in his '*sanduku*'[1982]

[1977] Interview 68; Interview 110.

[1978] FGD 3; Interview 68.

[1979] Interview 96. Basically before IIL applies, three conditions must exist: the death of the deceased (actual or presumed); surviving heirs; and the deceased's property. Hussain (n 5) 43. See also note 5.

[1980] Interview 68.

[1981] Bajuni phrase for 'exposed wealth'. Interview 92.

[1982] Swahili word for a storage box mainly made of wood. This was and is still a common storage facility for valuables among the WaSwahili.

and bank accounts respectively.[1983] According to the chief, the certainty of the existence of gold is faint as a parent may have divulged information on its availability to one offspring and not to another. Similarly the deceased may have had a bank account not disclosed to his wife. Alternatively if the widow knew about the account, the deceased husband may have given her half-truths about its contents.[1984]

This occurrence is unlikely to happen in courts. When the details of a bank account are unknown, for example, the court will order the mentioned bank to disclose that information. In fact at the Kadhis' court, the court will further order the bank to remit the money to a specified Judiciary bank account so that the court can distribute the same to its rightful heirs.

6.7.4 Non-verification of Transfer Documents

Complaints abound about some officers' lack of thoroughness and integrity. In one research site, for example, respondents complained of the Naibul Kadhi's cursory preparation of 'transfer of ownership' documents.[1985] Because he applies God's law, the Naibul Kadhi status in the community is high and people approach him to attest to transfer documents. But the Naibul Kadhi does so without ascertaining the veracity of any purported transaction.[1986]

In Pate, for example, several cases of rogue relatives approaching the Naibul Kadhi to attest documents indicating that their parents had either sold to or gifted them a particular property were rampant.[1987] These fraudsters, who had access to their parents' identity documents, took close friends along to witness the papers. Others tricked their unsuspecting parents into thumb-printing the testimonials.[1988] That is why during the research, an aged female respondent refused to thumb-print the interview consent form because her son had warned her against thumb-printing any form (other than what the son had given her). Despite assurance of the safety of the documents by the researcher, her research guide, her grandson and granddaughter, the woman vehemently declined to attest these documents.

[1983] Interview 92.

[1984] See also Interview 69.

[1985] Commonly known as *hati* (Swahili word for an attesting document) in Pate, these papers least conform to the contents of a formal transfer record, hence the quotation marks.

[1986] Interview 107.

[1987] Interview 107.

[1988] See Interview 107.

6.7.5 Delayed Inheritance Distribution

Many families do not divide the deceased's property immediately after his or her demise. They wait for some time (short or long) as they continue to mourn the deceased. But some families delay the estate distribution inordinately. Various reasons explain this position: some heirs are using the estate (wholly or partially) to the exclusion of others; some beneficiaries want to retain the estate intact; and some families could be waiting for those heirs who are below 18 years to become of age.[1989]

For example, while *Qur'aan* 4:6 (for example) enjoins that orphans should only be given their property when they mature[1990] and know how to manage it,[1991] some families and communities misconstrue the verse as suspending the allocation of the portions until such a time. Yet inheritance is automatic such that the intestate proportions unfold themselves to their guaranteed beneficiaries.[1992] The role of the person officiating the distribution of the estate is simply to declare the portions and their respective heirs especially to those people who are ignorant of IIL.

What *Qur'aan* 4:6 instructs is the timing to delivering physically the orphans' shares (whether enhanced, diminished or unchanged from the original ones).[1993] The phrase 'release their property to them'[1994] illustrates this point. Again, *Qur'aan* 18:82 which relates the story of the two orphans' inheritance that was buried under a ruined wall reiterates this position. Since the wall was almost collapsing and it could have exposed the treasure if it fell, Khidri (Prophet Moses' company) straightened it despite the locals' unkindness. When Khidri later narrated to Moses the wisdom behind his unselfish act, he noted that the father of the boys

[1989] See eg note 1177 and the accompanying text to note 1205.

[1990] See note 1014.

[1991] See Appendix 1.

[1992] Interview 36; *Mohamed Juma* (n 899) 5.

[1993] *Qur'aan* 4:6 envisages that the children's shares could reduce if the same is employed to raise them. But the care-giver should be cautious and use such orphan's wealth in exceptional circumstances such as when the original property is the orphans' only available wealth because it generates no income. Interview 119. See also *Qur'aan* 6:152 and 17:34 which instruct Muslims (particularly those in charge of orphan's property) to refrain from consuming an orphan's property until the orphan 'attains the age of full strength' unless they intend to improve it. Ali (n 12) 339 – 340; and 682 – 683.

[1994] Ali (n 12) 185.

was 'a righteous man: So thy Lord desired that they should attain the age of *full strength*'[1995] before they get it.

But extended delays in specifying which heir takes what part of the estate fuels disputes,[1996] continued unlawful appropriation of the property,[1997] dissipation of some heirs' rights because of the death of the original beneficiary and could contravene *Sharii'ah*.[1998] According to one of the interviewed chiefs, time aggravates inheritance disputes.[1999] When heirs delay to apportion the net estate long after the deceased's burial and payment of debts and legacies, family misunderstandings escalate. Similarly, when younger siblings (for example) refuse to acknowledge their older siblings' improvement of their deceased father's estate, conflicts arise.[2000]

On the other hand, if a beneficiary of below 18 years dies before inheriting, her or his heirs are likely to be deprived of his or her inheritance share.[2001] In Garissa, for example, a man died and left a widow, two sons and a daughter. While the sons were six and three years respectively, the daughter was three months. The daughter later died before she had entirely succeeded her father's estate of two houses and pension funds.[2002] Such an occurrence denied the widow (the daughter's mother) and the sons (the daughter's brothers) shares in the daughter's succession portion.[2003]

Delayed estate distribution also complicates the divisions.[2004] When an original heir dies, before receiving his inheritance, for example, his or her portion would disintegrate into finer fractions when calculating his or her beneficiaries' rights. These divisions may be exacting.

[1995] Ibid 730 – 731. Emphasis added.

[1996] FGD 12; Interview 116; FGD 13.

[1997] Interview 116.

[1998] Interview 36.

[1999] Interview 92.

[2000] Interview 92.

[2001] Interview 36.

[2002] Interview 26.

[2003] The widow would have taken a sixth of the daughter's original portion while the sons share equally the remainder of this property. See *Qur'aan* 4:11 and Diagram 1 above.

[2004] Interview 116; FGD 13.

Again if the estate is perishable, eg livestock, some heirs may demand to inherit the deceased's original number of livestock instead of the available animals.[2005]

Thus whether the heirs include persons below 18 years or not, *Sharii'ah* mandates the immediate demarcation of their proportions even if the family chooses to retain the estate in unison (until the children mature) so that when the undivided estate expands or diminishes so do the respective shares of the heirs.[2006] Hence if a family business continues as it were, for example, every individual (including an underage through his or her next friend) must know his or her attending profits or losses.[2007] And if some beneficiaries work directly in the business, their efforts (time and expertise) must also be compensated.[2008]

6.8 Conclusion

Several probate processes, formal and informal, exist in the country whereat women can go to claim or resolve any question relating to their inheritance rights. But while sometimes women get these claims or questions adjudicated in their favour, the journey to these institutions is never smooth. A number of barriers portend which hampers women's eventual actual enjoyment of their rights.

The Kadhis' courts, for example, remain inaccessible to many women because they are geographically distanced; the litigation costs are relatively high; and there is inadequate information on both the presence and functions of these institutions especially to the rural women. Litigation at these courts never ends even after judgment has been delivered. Sometimes the Kadhis behave unprofessionally and seduce female litigants into marrying them in order for their cases to finalise. Since a majority of the Kadhis' knowledge on the civil procedure is faint, they tend to waste court time as they write cited provisions verbatim. They also deliver unreasoned judgments which pose difficulties when one wants to appeal against them. Some Kadhis remain unsure of their ability to enforce their decisions.

[2005] Interview 92.

[2006] Interview 53; Interview 110; Interview 119; Interview 116.

[2007] Interview 116; Interview 110.

[2008] Interview 116; FGD 12. In fact, the heirs must document this arrangement to protect the rights of those developing the estate as per the *Qur'aanic* instruction to recording all business transactions. See *Qur'aan* 2:282.

On the other hand, while the probate laws permit Muslims to adjudicate their inheritance questions in the mainstream courts, these courts employ the LSA and not IIL as required by the laws. Some Public Trustees' continued disregard of the Kadhis' courts as competent probate institutions also delay estate distribution when the Public Trustees approach the High Court to issue an order to adopt the Kadhis' court's order. This chapter has, however, shown that the Kadhis' courts – just like the mainstream ones – are fully fledged probate courts. They are competent to issue an order to distribute an estate of any value. This means the Public Trustees – if administering such an estate –they should distribute it without seeking a further vesting order from the High Court. The Kadhis' courts can also enforce their decisions. They must, therefore, hear and give adequate remedies to those heiresses that return to the courts to enforce the earlier decisions.

7 CHAPTER 7: CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

This study sought to address two issues. First, the fact that despite successive constitutional and legislative provisions guaranteeing the application of IIL in the country, several Muslim women lose out on their stipulated inheritance rights. Second, the continued divergence in the understanding of the principle of equality between conventional human rights practitioners and Islamic law practitioners. Thus guided by its main objective of establishing whether Muslim women in Kenya actually enjoy their inheritance rights as decreed in the *Qur'aan* and protected by both the 2010 Constitution and the Law of Succession Act, the thesis set out six specific objectives to aid it in tackling these dual problems.

While chapters two and three focussed on the second issue, chapters four, five and six looked into the first by highlighting Kenyan Muslim women's varied inheritance experiences. It has emerged that these women's rights are, after all, rhetoric. This is because a significant proportion of women do not enjoy either their explicit stipulated shares or the implicit family maintenance which is embedded in the double shares of some male relatives. Several reasons explain this situation. But the broad ones include: syncretic practice which interweaves custom with Islam, ignorance of IIL, and malfunctioning probate institutions.

Therefore, as it concludes, this study summarises its key findings. It gives a synopsis of each preceding chapter. The thesis similarly interrogates whether the research objectives were met; whether the research questions were answered; and whether the assumptions were confirmed. It further demonstrates how both the conceptual and theoretical frameworks of the study were applied. Finally, the study suggests its recommendations towards effective implementation of Muslim women's inheritance rights in the country.

7.2 A Summary of the Study

7.2.1 Chapter Summaries

Chapters two, three, four, five, six and seven sought to answer the Research Questions and prove the assumptions. While chapter two, three and seven responded to an individual Research Question only, chapters four, five and six fused an interrogation of both a Research Question and an assumption.

Chapter two answered the first Research Question, viz: 'how does Muslim sexual equality theory explain the disparate shares between males and females in certain categories of divisions?' Thus the chapter interrogated the meaning of equality generally and as it relates to Muslim men and women. Aided by the three theories of the study: Multiculturalism, Global Critical Race Feminism (or Intersectionality) and Modified Muslim Feminism, this chapter established that the principle of equality does not portend identical treatment between its subjects. Instead it calls for concurrent respect for the similarities and differences among those subjects, what is known as substantive equality.

Thus as it relates to sexual equality in the Islamic sense – which the study argued through Modified Muslim Feminism – equality means observing both the sameness and specificity of men and women. Unlike some Western feminist perspectives, *Qur'aanic* discourses are not predicated on either sameness or difference theory of the sexes. Rather, they recount the ontological identity of men and women without using man as the referent. They also treat men and women differently on some aspects because of *Sharii'ah* grounds; and not because of the concept of binary opposition of 'self' (meaning men) and the 'other' (signifying women). Thus the double inheritance shares of some men compared to some women in the same degree of familial relationship is because of these males' Islamic duty to fend for their families including these corresponding females. While both sexes have identical right to any of their deceased relative's estate, only these particular males take the larger inheritance portion. Other males without such a family maintenance obligation receive identical shares with the corresponding females in the same familial category.

Chapter three continued the discussion in chapter two. It illustrated the Islamic inheritance provisions as the best example of Islamic conception of sexual equality. After narrating the specific precepts and inheritance shares for a variety of males and females, the chapter explained the divergent shares between certain males and females. It demonstrated that because Islam is patrilineal, paternal relations are stronger than maternal. Thus sons, full or consanguine brothers bear familial obligations to their natal families including their sisters. They actually assume their fathers' roles in the latter's absence. Hence during inheritance they take double shares compared to their sisters who have no such familial obligation. The uterine brothers, on the other hand, bear no financial responsibility over their sisters. Uterine brothers and sisters, therefore, inherit identical shares. Similarly because of

the maintenance of their children and potential wife (or wives) as well as payment of another dowry (upon remarriage), widowers take a double share compared to widows. The latter have no maintenance responsibility. Instead they receive another dowry (upon remarriage) and financial care from their sons and potential husbands.

Thus the chapter showed that Islam treats those who are similarly situated (ie the uterine brother and sister) similarly. It also treats those who are differently situated (ie sons and daughters on one hand; and full and consanguine sisters and brothers on the other) differently. If the males with familial responsibility were to inherit a similar fraction like their corresponding females, then this would amount to indirect discrimination against them on the basis of their economic means. While these male and female heirs may have a similar familial relationship to the deceased (as the case may be), their financial circumstances (obligations) are different.

Chapter four responded partly to Research Question two and the entire Research Question three and Assumption two. It interrogated whether a deceased Kenyan Muslim's ethnicity, locality or livelihood determined his or her female relatives' receipt of the stipulated inheritance shares. It also sought to establish how Muslim women inherit and whether the observance of ethnic traditions which are unfavourable to women deny these women their inheritance rights. The chapter established that indeed a deceased's ethnicity, locality or livelihood determined his or her female relatives' inheritance rights. Communities with entrenched customary practices and beliefs, whether in rural or urban Kenya, such as the Luhya in Kakamega, the Somali in Garissa and the Memon in Mombasa disregarded women's individual inheritance rights. They primed custom to IIL and employed practices such as forceful wife inheritance, women's transient kinship ties, and women's contingent property rights to exclude women from the significant properties in the community's economy. In the upshot, women receive that part of the estate which is linked to their feminine identity and roles such as their deceased mother's dresses and utensils.

The chapter also indicated that while women in pre-dominantly Muslim areas inherited according to IIL, those in non-Muslim areas did not. Probate officers, both judicial and non-judicial distributed the estates according to the family's customary law or the LSA. Only the Kadhis' courts in those non-Muslim localities followed *Sharii'ah*.

This chapter further established that in the past 30 to 40 years, there have been increasing demands to revert to IIL. And communities with hitherto strong traditions such as the Pate in Lamu have begun distributing their entire deceased's estates to eligible heiresses. There is also anecdotal evidence which suggests that a gradual increase in knowledge of IIL and constitutional equality provisions in areas which are pre-dominantly non-Muslim such as Kakamega is already having the desired impact of reducing the likelihood of disentitling women.

Chapter five answered the fourth Research Question, viz: 'to what extent does ignorance of IIL in Muslim families and among probate officers (judicial and extra-judicial) impact on women's inheritance rights? The chapter revealed that a majority of Muslim women, men and religious leaders as well as legal practitioners (both bench and bar) are uneducated on IIL. They are ignorant of the specific shares for the deceased's varied male and female heirs. There is also a wrong general assumption that males always inherit twice as much as females. Some women do not know that they have inheritance rights in the first place. This unfamiliarity of IIL has resulted in women receiving less or nothing of their prescribed portions because of several reasons. First, the introduction of unrelated factors during estate distribution. Second, women's quick abandonment of their rights because of avoiding family feuds which often accompanies property division. Third, wrongful application of the law.

Chapter six responded to Research Question two. It, therefore, looked into the application of IIL in both formal and informal probate institutions. The chapter showed that while both the constitution and the LSA recognise IIL, several barriers both in the judicial and extra-judicial processes hindered Muslim women's actual benefit of this law. These challenges range from inaccessibility, unprofessionalism, incompetence, unenforced decisions, legal practitioners' misunderstanding of the Kadhis' courts' authority, to substitution of IIL with the LSA or customary law in the judicial systems. Others include: delayed estate distribution, partial distribution or division of unvalued estates, determining the applicable law on the basis of the deceased's natal locality in the extra-judicial systems. In the end, heiress end up with mixed results. Some inherit according to *Sharii'ah*. Others do not.

Chapter seven answered Research Question six. It suggests multidimensional strategies that could be employed by various stakeholders, either independently or collectively, to enhance Muslim women's inheritance experiences. The chapter suggests constitutional,

statutory, community and religious measures that could help address the factors that prevent a significant proportion of Muslim women from enjoying both their explicit stipulated shares or the implicit family maintenance which is embedded in the double shares of some male relatives.

7.2.2 Objectives Met

Because the individual Research Questions emanated from the specific objectives of the study, the study confirms that it has met these objectives. Moreover, the study has also fulfilled its general objective which was to establish whether Muslim women in Kenya actually enjoy their inheritance rights as decreed in the *Qur'aan* and protected by the 2010 Constitution and the Law of Succession Act. It has emerged that a significant proportion of Muslim women in Kenya do not enjoy either their explicit stipulated shares or the implicit family maintenance which is embedded in the double shares of some male relatives. Only those females whose families are committed to Islam, receive their full Islamic rights. The rest, if they are familiar with these rights, may have to demand them. But some claimants abandon such rights along the way because of both family tensions and challenges in the probate systems.

7.2.3 Assumptions Partly Confirmed

The study was premised on three assumptions. First, that ignorance of IIL across the Kenyan ethnic and socio-legal communities contributes significantly to the disentitlement of Muslim women's stipulated inheritance shares. Second, that observance of ethnic traditions which are unfavourable to women denies Muslim women their inheritance rights. Third, that structural barriers in the probate institutions negatively impact on women's actual enjoyment of their inheritance rights.

As discussed above, assumption two is partly confirmed. The study established that strong ethnic customs which disfavour women have prevented women from inheriting land and animal estates among the Luhya in Kakamega, the Pate in Lamu and the Somali in Garissa. Women's individual rights among the Memon in Mombasa are also grouped into community rights akin to the Hindu customs. However, anecdotal evidence suggests that a gradual increase in knowledge of IIL is already having the desired impact of reducing the likelihood of disentitlement among women such that a few women in Kakamega have begun

inheriting land estates. Similarly while opposition to IIL still exists, the Somali and Pate have in the past 30 to 40 years resorted to inheriting according to IIL.

Assumption one has fully been confirmed. Chapter five indicates that the widespread unfamiliarity of IIL among key stakeholders who exercise or apply the law continues to deny women of their stipulated inheritance rights. Assumption three has also been confirmed. Chapter six has indicated how the challenges in both judicial and extra-judicial probate processes contribute to defeating women's enjoyment of their inheritance rights.

7.2.4 Application of Concepts

The study laid out a conceptual framework which defined several words and phrases that were going to feature in it repeatedly. These were Muslim women's rights, gender justice, equity and non-discrimination. The delineation of these meanings was useful. The researcher employed the concept of substantive equality throughout the subsequent chapters and specifically chapters two and three. She was able to show how IIL illustrates substantive equality. Because the word 'equality' offers itself to its substantive meaning, the researcher found the qualification of the word in article 24(4) of the 2010 Constitution unnecessary. She argued that the mere mention of the word requires the user to also interrogate its substantive meaning.

The researcher also imported a discussion of gender justice within *Qur'aanic* discourses and indicated that this concept was not alien in Islam in chapter two. While she acknowledged that gender justice informed both the drafting of the LSA and its present proposed amendment, the researcher has shown that the drafters' employment of this concept defeated the rights of other women in the process such as Muslim and those living in the counties where the LSA intestate provisions do not apply.

Finally while the study has accepted that the concept 'equity' has the same meaning as substantive equality, it chose to work with the latter phrase. The study therefore found the debacle of whether to employ the word 'equality' or 'equity' in human rights instruments unnecessary lexical contest in chapter two.

7.2.5 Application of Theories

The concurrent usage of the three theories have been instrumental in addressing the research problem. The question of whether Muslim women in Kenya inherit their stipulated

inheritance rights could adequately be addressed by fusing these theories. That is why the study later coined them into one, viz: Multicultural, Intersectional and Modified Muslim Feminist Approaches to Equality (MIMoMFAE). Modified Muslim Feminism (MoMF) alone explained both the similar and dissimilar inheritance shares between the sexes in different degrees of familial relationship. This was captured in chapters two and three.

Intersectionality or critical race feminism further guided the study in interrogating the inheritance experiences of women in different localities, communities and livelihoods. That is why the study collected its data in different research sites. It was important to capture the varied experiences of these women, even when all of them were Muslim, because women bear intra-group differences. The study revealed that while the women in Pate, Kakamega and Garissa, for example, were exposed to different properties, they all suffered exclusion through different customary practices. The study also showed that the inclusion of article 24(4) in the 2010 Constitution resulted from incorporating the intersectionality theory by a coalition of women's rights activists during the first constitutional review process. Such an understanding of equality by a group of non-Muslim women helps to allay fears (now and in future) that allowing Muslim women to apply IIL disadvantages them compared to other women.

Multiculturalism helped to explain the observance of IIL in Kenya. While chapter six has documented uneasiness among probate officers (judicial and extra-judicial) to determine inheritance matters according to *Sharii'ah*, it has argued that observing that law does not contravene both the constitution and the LSA. The study has also shown that observing IIL does not violate justice because it is within both the group rights of Kenyan Muslims and their right to equality. Thus the study has called for the full embrace of IIL by legal practitioners (both bench and bar) especially those practisingin the mainstream courts and other extra-judicial probate officers such as the chiefs, the Assistant Deputy County Commissioners and the Deputy County Commissioners.

7.3 Concluding Remarks

Muslim women's inheritance rights are definite. These rights transcend the general belief that a Muslim woman always inherits half as much as her corresponding male. Muslim women also receive identical shares to their male counterparts, and sometimes, the heiresses

take more. It is, therefore, inaccurate to dismiss *Sharii'ah* as discriminating against women because of some females' lesser inheritance portions than some males, without considering their specific and relative positions as estate beneficiaries.

That said, it is impossible to amend IIL in order to give identical portions to all categories of male and female heirs because *Sharii'ah* has assigned the sexes specific family roles in accordance with their social-communal obligations. To do so, would be blasphemous for the Muslims. It will also cause them unnecessary substantial burden in observing their religion. Yet there is no compelling government interest in any country to do so because the application of IIL to Muslims does not defeat a country's obligation to treat its citizens equally. This is so because Muslims' understanding of equality – just like other minorities' conceptions – marries with the principle of equality in many municipal and global human rights documents.

Thus, going forward, Muslims and non-Muslims alike should not be astonished to see Muslims (and particularly females) clamouring for a law which appears largely to grant women smaller inheritance shares. These women are within the conception of the equality principle – but in its substantive strand. Similarly, advocates of equality and women's rights should take time to study this formulation of the principle of equality because the key treaty bodies and renown international human rights lawyers acknowledge that it is a better means of achieving justice than the popular one framed around formal equality. Again, it is important to respect other peoples' truths even when they seem strange or discriminating. That is the essence of diversity among humans.

The observance of IIL in Kenya, therefore, is within Muslims' right to equality. It is not a political favour. Muslims should demand consistently the application of this law throughout the country's existence. Any attempts to scuttle the observance of IIL, by Parliament, the courts or the executive, can and must be challenged in court as an infringement of both the Bill of Rights and Kenya's international human rights obligations.

In fact, the constitution, the LSA, the Kadhis' Court Act and the Public Trustee Act safeguards specifically the application of IIL to Muslim estates. Therefore the mainstream courts must apply the law to these estates – even when the law offends their sensibilities. For that is upholding the laws of the country. It is important to note that while the 'submission

clause' in the constitution ousts the Kadhis' court as an adjudicating forum when a litigant asserts it, it does not oust *Sharii'ah*. Hence there should be no confusion as to what law applies when a Muslim's estate is before the ordinary courts. In the past, the High Court jurisprudence on this clause has largely been wrong. But the Court of Appeal set the record straight about seven years ago in the case of *Noorbanu Abdul Razak*. It would also be important in future to examine how the Magistrate Courts are handling Muslims' estates since the Magistrates' Court Act has now enabled them to adjudicate Muslim inheritance matters.

This study has shown that the LSA empowers the Kadhis' courts to issue orders for the administration of Muslims' estates. These courts can therefore legitimately order individual litigants, lawyers and the Public Trustees to administer an estate regardless of its value. And as the High Court in *Re Abdalla* observed, the practice of obtaining a further vesting order from the High Court after or before receiving an order to distribute the estate from the Kadhis' court is unconstitutional. It is thus expected that there would be speedy administration of estates when the Public Trustees are particularly involved.

The Kadhis' courts can also enforce their decisions, including IIL-related ones. Thus female beneficiaries who are not cared for by their male counterparts may move the courts to compel the latter to maintain them. And the courts should not shy away from embracing this not so novel approach in Islamic jurisprudence. It would also be pivotal for both male and female Muslim scholars to conduct research to establish the reasons for and the extent to which Kenyan Muslim men abdicate the responsibility of providing for their female relatives. These proposals and some of the multidimensional strategies suggested in sub-section 7.4 will help to enhance women's enjoyment of the IIL provisions. At the moment, very few women benefit from this law– which fact reduces their rights into a mere rhetoric.

There is, therefore, need for Kenyan society (particularly Muslim leaders) to drum up support for the full observance of IIL instead of merely declaring its existence. And because this law extends to all properties regardless of their nature and sizes, no Muslim woman should be denied the right to inherit any of her deceased relative's estate. While the woman can certainly choose to forfeit such a right, it must be established that her action is both informed and voluntary.

7.4 Recommendations

Several actors must work independently and collectively to enable Muslim women in Kenya to enjoy their inheritance rights fully. These stakeholders range from both Muslim men and women, male and female Muslim scholars, teachers, parents, immediate and extended relatives, the national government (through its decentralized officers such as the Assistant Deputy County Commissioners and the Deputy County Commissioners), lawyers, civil society organisations, the Parliament, the Judiciary, the Attorney-General Office, to the Law Society of Kenya.

While the approaches taken by these multiple actors differ and include constitutional and statutory ones; judicial; community including religious, to family interventions, the strategies they employ seek mainly to educate or improve the knowledge of IIL and women's rights among Muslim men and women, children, legal practitioners (both bench and bar) and extra-judicial probate officers. These measures further intend to call for full observance of the relevant inheritance laws in the country by all probate officers; to enhance the judicial competencies of the Kadhis; and to streamline legal practice and judicial conduct at the Kadhis' courts. This section now suggests multidimensional approaches which can help to address the three broad factors which impede women's full enjoyment of the IIL provisions.

7.4.1 Recommendations to Address Syncretic Practice that Interweaves Islamic Inheritance Law with Local Ethnic Customs

This study has shown that many Kenyan Muslims hold onto their ethnic customs when addressing the subject of inheritance. They either apply pure customary law or mix the customs with IIL – regardless of their incompatibilities – and still feel that they are acting within Islam. Sometimes, these people interpret IIL through their long-held customary beliefs. The following proposals address this syncretic practice and will also assist in reducing its negative outcomes on women's inheritance.

First, both male and female religious leaders should encourage Muslim men and women to embrace fully the dual roles of a Muslim which are fulfilling the rights of God (the moral-religious) and the rights of God's creations (the social-communal, wherein inheritance falls). It is important for these religious leaders to remind their constituents that one is never a true believer if s/he commits to one category of these obligations and neglects the other even

when the performance of these duties is proportional to the Muslim's ability (health and economic wise). In that regard, the leaders should call upon their constituents to abandon ethnic traditions which conflict with *Sharii'ah*, including IIL.

Second, both male and female religious leaders and teachers, parents and the community at large should educate children on religious laws, including men's and women's rights, to enable them grow into adults who uphold Islamic tenets and renounce cultural inheritance norms which disfavour women.

Third, the national government should continue to sensitize communities through its decentralized offices and the National Gender and Equality Commission (NGEC) on the constitutional equality provisions. So far, the participation of the offices of the Deputy County Commissioner, the Assistant Deputy County Commissioner and the chief in educating their constituents on constitutional women's rights has yielded some positive results. Some daughters from communities that have hitherto upheld customary practices that disfavour women have began receiving small portions of land as inheritance. NGEC, which bears specific responsibility to promote gender equality in the country; and to coordinate and advise on public education programmes in order to create a culture which respects this principle, should reinforce the efforts of these grassroots leaders through continuous training. It could further engage reputable local civil society organisations to supplement the ongoing community sensitization programmes.

Fourth with the decreasing prevalence of unfavourable ethnic customs, it will become pivotal for the community including parents, other family members, civil society organisations and women's rights advocates to educate women on property management. As more women take charge of both personal and family wealth, this knowledge will be essential in assisting them to enhance their economic lives and that of their families and communities.

Fifth, the community including parents, other family members, civil society organisations and women's rights advocates should instill sense of agency among girls by giving them equal opportunities with boys, constantly re-affirming them and reiterating the girls' equality with the boys. This upbringing would enable many girls to shun fatalistic attitudes and

instead grow into strong and assertive women who can both demand their rights and defend them.

Sixth, civil society organisations and women's rights advocates should educate married couples to share information about their individual, family and matrimonial wealth whether orally or in writing. This knowledge will help eliminate the inevitable but unnecessary family feuds as to what constituted the deceased husband's or wife's estate. It will also avert chances of partial distribution of the deceased's properties on the basis that his or her family members did not know about some of the properties. In particular, the educators should inform married women to document all improvements they make on their husbands' properties (actual or apparent) to prevent incidences of the widows' contribution being computed as part of their deceased husbands' estates or the actual owners of the deceased husband's apparent properties.

Seventh, polygynous men should declare their covert wives to their confidants (whether family members of friends) in order to safeguard the inheritance rights of these further spouses and their children.

Eighth, both male and female religious leaders should encourage Muslim men and women to abide by relevant governmental regulations – even if non-essential in Islam – which facilitate estate distribution eg timely procuring of marriage certificates. Such a move will also help to protect the rights of widows and their children who are unknown to other family members. The leaders should further encourage their constituents to write wills for the purposes of identifying their entire wealth and beneficiaries.

7.4.2 Recommendations to Address Ignorance of Islamic Inheritance Law

The second major factor which causes Kenyan Muslim women to miss out from their religiously guaranteed inheritance is ignorance of IIL. Many stakeholders in the realm of Islamic inheritance (women, men, legal practitioners and religious leaders) are unaware of the explicit details of this law. Consequently, they misapply it or disregard the women's entitlements. These suggestions now tackle this unfamiliarity of IIL and its consequences.

First, it is vital that both male and female Muslim religious leaders take the issue of women's disentitlement seriously. It is a far-reaching one given the explicit *Qur'aanic* injunctions against failing to abide by the IIL provisions. Thus male Muslim religious leaders

must talk against dispossession of women's inheritance portions on their innumerable platforms, whether in or outside the mosques. Both male and female religious leaders should also create awareness on the IIL *Qur'aanic* provisions to the general Muslim community. They should counsel perpetrators of women's disentitlement to fear God and inform them that they are committing an injustice against the dispossessed females. The leaders should also remind Muslim men to fulfill the important duty of providing for their female relatives.

Second, both male and female Muslim religious leaders' discourses on Muslim women should transcend women's obligations and incorporate women's actual enjoyment of their economic rights. Female religious leaders, in particular, should organise Islamic propagation excursions and camping to areas with nominal Islamic knowledge in order to educate the local women on their general Islamic rights. Islamic civil society organisations should, on their part, organise a national or regional conferences of both male and female religious leaders to educate the leaders on women's indelible rights as heiresses. The conferences should also highlight widows' and orphans' separate inheritance rights and discourage the practice of mixing the two.

Third, women must themselves seek to learn *Sharii'ah* generally and IIL in particular instead of leaving this knowledge to men. Uneducated women should thus enroll in the mushrooming adult female-only Islamic institutes in major Kenyan towns. Unlike the original tertiary facilities, these contemporary institutes offer Islamic education from pre-unit to degree level in order to largely give a second chance to drop-out females to continue or improve their Islamic knowledge. The Muslim community should also set up similar institutions in other areas (rural or urban) which have relatively high Muslim population such as Mumias in Kakamega.

Fourth, women should tune in to the ever-increasing local and foreign Islamic television and radio channels on cable transmissions; online videos, audios and literature which provide massive, accurate and easily accessible information by even the most indigent woman. Presently, Kenya runs three radio stations on frequency modulation (FM) and two television stations whose content is largely Islamic. Regular following of these Islamic content will increase the women's knowledge and minimise incidences of deprivation of their rights.

Fifth, the Muslim community should establish more integrated schools in order to equip both Muslim boys and girls with holistic knowledge at an early age. These schools, which offer a fused syllabus of mainstream and spiritual education so that their pupils need not attend specialised religious institutions to learn the latter knowledge, are on the increase. And a curriculum to formalize this wholesome learning has also been piloted and is presently seeking the Ministry of Education's approval.

Sixth, civil society organisationsand women's rights lawyers should educate women and girls on both their legal and Islamic rights. These educators should, for example, inform women to approach courts whenever there is a threat to or actual dispossession of their inheritance. The instructors should also train women on how to enforce the resulting court orders.

Seventh, civil society organisations should also train both male and female Muslims on basic *Sharii'ah* and constitutional law and encourage the participants to implement and share the knowledge.

Eighth, civil society organisations should organise Legal Aid Days and invite persons with inheritance grievances to attend and raise their questions to religious leaders including the *a'immah*.

Ninth, the Attorney General should form a task force to develop an IIL Code in order to enable legal practitioners and other stakeholders easily access the intricate IIL provisions. The Code will fill both current and future knowledge gaps relating to IIL. It will reduce the incidences of applying offending LSA provisions subtly to Muslim estates and therefore Muslim women's right of access to justice. While there may be concerns as to the success of codifying any aspect of *Sharii'ah* because of the different opinions among Islamic juristic schools and sects, the task force may work on a code within the *Sunni* system which is what the Kenyan courts have employed over the years. But since article 170(2) (b) of the 2010 Constitution accommodates all Islamic juristic schools, it may be necessary to develop a code which embodies the various versions of IIL so that the courts can apply them to their different adherents.

Tenth and in the alternative, Parliament should amend the Kadhis' Court Act or the LSA to incorporate IIL provisions.

Eleventh and in the meantime, both male and female Muslim scholars should publish local books or pamphlets on IIL in the English language which will educate these legal practitioners and other stakeholders on the law.

Twelfth, the Judicial Training Institute should introduce some aspects of IIL or general Islamic family law in its annual Continuous Judicial Education training sessions for magistrates and Kadhis; and the colloquia for judges to enhance the judicial officers' knowledge on *Sharii'ah*.

7.4.3 Recommendations to Address Malfunctioning of Probate Institutions

The last broad aspect which contributes to defeating Muslim women's guaranteed inheritance is malfunctioning probate fora, judicial and extra-judicial. While women from strong religious families and those before the Kadhis' courts and Islamic civil society organisations receive their stipulated entitlements, very few enjoy the same opportunity at the mainstream courts and other informal probate systems. But even at the Kadhis' courts and other Islamic processes, women experience some practice challenges which hinder their actual enjoyment of these rights. The following suggestions, therefore, seek to address some of these obstacles to women's receipt of their inheritance in the probate processes.

First, it is about time that the Kadhis' courts apply the pauper briefing mechanism under Order 33 of the 2010 Civil Procedure Rules (within the Civil Procedure Act) to enable very indigent women access the courts. Despite the low filing fees at the Kadhis' courts, this research has established that very poor women are still unable to afford the fees and they opt to forgo their rights. Therefore, since these courts still follow the Civil Procedure Rules, then they must implement Order 33.

Second, it is also important for civil society organisations to educate women against the misinformed generalization that the litigation process is expensive. While litigants still pay court fees at the Kadhis' court and may engage an advocate just like in mainstream courts, the courts fees at the Kadhis' court remain very low. And since the Kadhis' courts have no pecuniary jurisdiction, their fees are standard. This fact is beneficial to women, especially those involved in massive estates. They can have their questions adjudicated at very nominal fees.

Third, Muslim lawyers should organise themselves and provide free legal services to women who cannot afford lawyers yet their cases are complicated and require a lawyer's expertise. This move will enable poor women approach the lawyers' organisation for assistance instead of abandoning their rights for fear of high litigation costs or court's technicalities. Unlike their Christian counterparts, Muslim advocates have ceased providing collective legal assistance to indigent Muslims. While some volunteer their expertise on a personal basis or as friends of the court, both the position of some poor litigants as well as the jurisprudential growth under the 2010 Constitution in the country beg for organised Islamic legal effort.

Fourth, the Judicial Service Commission should appoint special staff at the Kadhis' courts who are knowledgeable in both Islamic and mainstream Kenyan law to assist unrepresented litigants discern whether their stories are justiciable in *Sharii'ah* and to reduce these stories into pleadings. This step will not be a first for the Kadhis' courts. Presently, rule 10 (4) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 permits the conversion of any oral application which alleges denial, contravention or threat to a right or fundamental freedom into writing.

Because women are the main users of these courts, the Commission should consider appointing more females in these positions to respond to the sensibilities of Muslim women. And the Judicial Training Institute should provide continuous training for these special executive officers to enable them offer quality assistance to unrepresented litigants.

Fifth, the Chief Registrar of the Judiciary should organise biannual Open Days for the Kadhis' courts to familiarize the courts with their local communities. It emerged during the research that several respondents, especially those in the rural parts of the country, were ignorant of both the presence of the courts in their localities and the role of these institutions. The Kadhis can also use these days to sensitize the Muslim community on safeguarding women's inheritance rights. Because several respondents complained of protracted litigation at the courts, the judicial officers should further employ this platform to update litigants on the progress of their cases. Such an initiative will make the Kadhis so accountable and responsible that they would speed up conclusion of cases before them and adjudicate fairly.

Sixth, the Chief Justice in consultation with the Chief Kadhi should publish practice rules to govern the Kadhis and enable these judicial officers to conduct themselves and their courts professionally just like the mainstream courts. The research learnt about some Kadhis who receive bribes; undermine the rights of poor, unrepresented or less influential litigants; or seduce female litigants into marrying them. The litigants who cannot take this pressure discontinue prosecuting their cases and therefore forgo their rightful inheritance.

Seventh, it is important to enhance the judicial competencies of a majority of the Kadhis in order to improve their delivery of justice. Thus the Judicial Service Commission, which is charged with the appointment of the Kadhis, should prefer lawyers who are also knowledgeable in *Sharii'ah* in these offices. This is because much of the law applied at the courts is procedural and lawyers are already trained in procedures. The Chief Justice should also appoint a Muslim High Court Judge as a Deputy Registrar of the Kadhis' courts to supervise the courts and to oversee the growth of Islamic law jurisprudence in the country.

The Judicial Training Institute, on its part, should train the Kadhis in recording detailed proceedings, and quality and timely judgments and rulings. The Institute should further organise remedial classes on relevant mainstream laws (such as the constitution, the LSA and the Public Trustees Act) for the Kadhis. And to ensure that these trainings are effective, the Institute should incorporate a Kadhi in its Continuous Judicial Education Committee in order to address the actual needs of these judicial officers. The Institute should further stardardisethe competencies of the Kadhis by offering them a six-month job induction which includes training on the existing jurisprudence of the Kadhis' courts.

Meanwhile, the National Council for Law Reporting should publish the decisions of the Kadhis' courts periodically to document the emerging jurisprudence developed by the present highly-trained Kadhis. Like the IIL Code, the easy accessibility of these well-thought out decisions would also enhance the practice of IIL in the country.

Eighth, Parliament should enact the draft Kadhis' Court Procedural & Practice Rules 2015 to streamline practice at the Kadhis' courts. Section 8(1) of the Kadhis' Court Act recommends to the Chief Justice to draft these Rules. The Chief Justice has since formed a committee consisting of Muslim Judges, Magistrates and Kadhis to draft these rules. And the committee has come up with a draft which is presently undergoing public scrutiny. Since the

Kadhis have participated in drafting these Rules, they would find it easy to follow them unlike following the Civil Procedure Rules. In the absence of these Rules, the courts apply the Civil Procedure Act – yet they get little training on it during their induction.

Ninth, Muslim lawyers should learn *Sharii'ah* and practice it including assuming offices as Kadhis just as they become magistrates. The terms of service for the judicial staff in the Kadhi's and Magistrates'courts are identical.

Tenth, legal practitioners (both bench and bar) should learn critically about the Kadhis' courts' authority as outlined in the constitution, the Kadhis' Court Act and the LSA to allay the unnecessary obfuscation on the courts' powers. The Judicial Training Institute, the Public Trustees Office and the Law Society of Kenya can aid their constituents to achieve this. Thus the Institute can train both Magistrates and Judges on this. The Public Trustees Office can arrange a similar training for its officers across the country. And the Law Society of Kenya can organise several of its regular Continuous Legal Education sessions on this subject for the benefit of its nationwide membership.

Eleventh, it may also be opportune for the Chief Justice (in consultation with the Chief Kadhi) to develop the Kadhis' Court Probate & Administration Rules which are recommended in section 50A of the LSA. As this provision expresses and some judges intimate, the ongoing confusion on the Kadhis' courts' probate jurisdiction stems heavily from the absence of these rules.

Twelfth, the Kadhis must remain vigilant to protect their honour. They must assume their inherent judicial mandate to enforce their orders and punish those who disobey their courts. On its part, the Judicial Training Institute should increasingly remind these judicial officers of their powers in their annual Continuous Judicial Education sessions.

Thirteenth, the Kadhis' courts should confiscate the male heirs' properties if the latter fail to care for their corresponding relatives. This move is critical in ensuring that women actually enjoy their implicit inheritance rights.

Fourteenth, other stakeholders must also put efforts to restore the honour of the Kadhis' courts in the country. Thus the Chief Justice should establish well-equipped court buildings and attending human resources for these courts especially in the small and remote areas to enable the institutions command respect from the public. The Judicial Service Commission,

on its part, should, hire competent interpreters to work in the courts in order to represent the proceedings accurately. In the meantime, both male and female religious leaders should encourage Muslims to resolve their inheritance questions at the courts to continue bolstering the relevance of these institutions.

Fifteenth, there is need to vary the present Public Trustees' investment choices in respect of Muslim orphans' continuing trusts. Thus the Public Trustees could exercise their discretion and invest these orphans' properties in *Sharii'ah* compliant ventures. Rule 9 of the Public Trustee Act affords them this opportunity. And there are several such *Sharii'ah* compliant facilities in the Kenyan market including banks which Rule 9 permits.

Parliament should also establish a *Sharii'ah* Compliant Fund under the Public Trustees Act for investment of these Muslims orphans' continuing trusts (and of such other children if their guardians are willing) into profitable *Sharii'ah* compliant ventures. Alternatively, Parliament should alter the Wakf Commissioners Act (Chapter 109) such that these trusts are remitted to the Commissioners for management under a new special fund, the Special Orphans' Fund. Because there is already an existing relationship between the Wakf Commissioners Act and the LSA, this second proposal would be an easier option. Presently, if no beneficiaries claim a Muslim estate under the Public Trustee's administration within one year of such management, the Public Trustee is required by section 18(1) of the Wakf Commissioners Act to submit the property to the Commissioners through the Surplus Fund.

Appendix 1: *Qur'aanic* Provisions Relating to Islamic Inheritance Law

Provision	**What It Says**	**Its Context**
2:177	It is not righteousness that ye turn your faces towards East or West; but it is righteousness to believe in Allah and the Last Day, and the Angels and the Book, and the Messengers; to spend of your substance out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask and for the ransom of slaves; to be steadfast in prayers and practice regular charity, to fulfill the contracts which ye have made; and to be firm and patient in pain (or suffering) and adversity and throughout all periods of panic. Such are the people of truth, the God fearing.	The dual roles of humans on earth.
2:180	It is prescribed, when death approaches any of you, if he leave [sic] any goods, that *he make [sic] a bequest to parents and next of kin, according to reasonable usage*; this is due from the God-fearing.	This original 'ayah of bequests' was abrogated by the intestate provisions (*Qur'aan* 4:11, 12 and 176). These later precepts established specific fractions for a deceased's parents and closed relations as well as acknowledged his or her testamentary power.
2:181	If anyone changes the bequest after hearing it, the guilt shall be on those who make the change. For Allah hears and knows (All things).	Proscription against changing someone's will
2:182	But if anyone fears partiality or wrongdoing on the part of the testator, and makes peace between (the parties concerned), there is no wrong in him. For Allah is Oft-Forgiving, Most Merciful.	A will can be altered only if the testator has done some injustice in his estate distribution.
2:233	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 ….	Husbands to maintain (food and clothing) of their immediate wives and their children. [See also *Qur'aan* 65:1]. If the man bears these responsibilities during divorce, then he possesses them during marriage.

2:234	If any of you die and leave widows behind, they shall wait concerning themselves *four months and ten days*. When they have fulfilled their term, there is no blame on you if they dispose of themselves in a just and reasonable manner. And Allah is well acquainted with what ye do.	Period of death '*iddah*.
2:236	There is no blame on you if ye divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift), the wealthy according to his means, and the poor according to his means – a gift of *reasonable* amount is due from those who wish to do the right thing.	Dower is a woman's right. Even a poor man must give it to his bride.
2:240	Those of you who die and leave widows should *bequeath for their widows a year's maintenance and residence*; but if they leave (the residence), there is no blame on you for what they do with themselves, provided it is reasonable. And Allah is Exalted in Power, Wise.	Another earlier verse on bequest assigning property rights to widows. Like *Qur'aan* 2:180, this precept was abrogated by the intestate provisions which acknowledged a widow's a quarter or an eighth right (as the case may be) to the deceased's entire estate.
4:1	O mankind! Reverence your guardian-Lord, who created you from a single Person, created, of like nature, his mate, and from them twain scattered (like seeds) countless men and women – *fear Allah, through whom ye demand your mutual (rights),* and (reverence) the wombs (that bore you): for Allah ever watches over you.	Rights and obligations emanate from serving God
4:2	To orphans restore their property (when they reach their age), nor substitute (your) worthless things for (their) good ones; and devour not their substance (by mixing it up) with your own. For this is indeed a great sin.	How to manage an orphan's property.
4:3	If ye fear that ye shall not be able to deal justly with the orphans, *marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then only one*, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice.	Conditions for polygyny.
4:4	And *give the women (on marriage) their dower*	Dower is mandatory for

	as a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer.	brides.
4:5	To those weak of understanding make not over your property which Allah *has made a means of support for you*, but feed and clothe them therewith, and speak to them words of kindness and justice.	Purpose of property.
4:6	Make trial of orphans until they reach *the age of marriage*; if then ye find sound judgment in them, *release their property to them*; but consume it not wastefully, nor in haste against their growing up. *If the guardian is well-off, let him claim no remuneration, but if he is poor, let him have for himself what is just and reasonable.* When ye release their property to them, take witnesses in their presence: but all-sufficient is Allah in taking account.	Management of an orphan's property and when to release it to him or her.
4:7	From what is left by *parents and those nearest related* there is a share for men and a share for women, whether the property be small or large – *a determinate share.*	Both males and females have a right on a deceased's relative estate.
4:8	But if at the time of division other relatives, or orphans or poor are present, *feed them out of the (property),* and speak to them words of kindness and justice.	Provision for ineligible relatives, orphans and the poor.
4:10	Those who unjustly eat up the property of orphans, eat up a fire into their own bodies: they will soon be enduring a blazing fire.	Punishment for wrongful appropriation of orphan's property.
4:11	Allah (thus) directs you as regards your children's (inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half. For parents, a sixth share of the inheritance to each , if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers (or sisters) the mother has a sixth. (The distribution in all cases is) after the payment of legacies and debts. *Ye know not whether your parents or your children are nearest to you in benefit*. These are settled portions ordained by Allah: and Allah is All-Knowing, All-Wise.	Inheritance fractions of deceased's daughters, sons and parents.

4:12	In what your wives leave, your share is a half, if they leave no child; but if they leave a child, ye get a fourth; after payment of legacies and debts. In what ye leave, their share is a fourth, if ye leave no child; but if ye leave a child, they get an eighth; after payment of legacies and debts. if the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a bother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies and debts; so that no loss is caused (to anyone). Thus is it ordained by Allah; and Allah is All-Knowing, Most Forbearing.	Succession shares of widows, widowers and uterine siblings.
4:13 – 14	Those *are limits* (*hudud*) *set by Allah*; those who obey Allah and his Messenger will be admitted to gardens with rivers flowing beneath, to abide therein (forever) and that will be the supreme achievement. But those who disobey Allah and his Messenger and transgress His limits will be admitted to a Fire, to abide therein: and they shall have a humiliating punishment.	A continuation and conclusion to verses 11 and 12 above. These dual precepts explain why Muslims are firm in observing the *Qur'aanic* inheritance provisions
4:19	O ye who believe! *Ye are forbidden to inherit women against their will*. Nor should ye treat them with harshness, that ye may take away part of the dower ye have given them-except where they have been guilty of open lewdness; on the contrary live with them on a footing of kindness and equity. If ye take a dislike to them it may be that ye dislike a thing, and Allah brings about through it a great deal of good.	Outlaw of women's inheritance without their consent. Men enjoined to be gentle to women.
4:20 – 21	But if ye decide to take one wife in place of another, *even if ye had given the latter a whole treasure for dower, take not the least bit of it back*; would ye take it by slander and a manifest wrong? And how could ye take it when ye have gone in unto each other, and they have taken from you a solemn covenant?	Males prohibited from re-possessing dower (or its equivalent) from their divorced wives (especially those with whom they had have sexual relations).
4:23	Prohibited to you (for marriage) are – your mothers, daughters, sisters, father's sisters, mother's sisters, brother's daughters, sister's daughters; foster-mothers (who gave you suck),	Adopted children do not assume the lineage of their adopted parents. Hence only marriage to former wives of

	foster sisters; your wives' mothers, your step-daughters under your guardianship, born of your wives to whom you have gone in – no prohibition if ye have not gone in - (*those who have been) wives of your sons proceeding from your loins*; and two sisters in wedlock at one and the same time, except for what is past; for Allah is Oft-Forgiving, Most Merciful -.	blood sons is prohibited. (Marriage to former wives of adopted sons is thus permissible).
4:24	Also (prohibited are) women already married, except those whom your right hands possess: thus hath Allah ordained (prohibitions) against you: except for these, all others are lawful *provided ye seek (them in marriage) with gifts from your property* – desiring chastity, not lust. *Seeing that ye derive benefit from them, give them their dowers* (at least) as prescribed; but if, after a dower is prescribed, ye *agree mutually (to vary it)*, there is no blame on you. And Allah is All-Knowing, All-Wise.	An extension of *ayah* 4:23 which proclaims the prohibited degrees of marriage. Emphasises payment of dowry to intended brides.
4:32	And in nowise covet those things in which Allah hath bestowed His gifts more freely on some of you than on others: to men is allotted what they earn, and to women what they earn. But ask Allah of His bounty *for Allah has full knowledge of all things*.	Rights and Obligations are in accordance to God's Plan.
4:33	To *(benefit) every one* We have appointed sharers and heirs to property left by parents and relatives. To *those, also, to whom your right hand was pledged, give their due portion*. For truly Allah is witness to all things.	IIL incorporates both testacy and intestacy. The remaining inheritance rights between the *al-Muhaajiruun* and *al-Answaar* estate was through a will or previous pledges.
4:34	(Husbands) are the protectors and maintainers of their (wives) because Allah has given the *one more (strength) than the other*, and because *they support them from their means* ….	Some men bear maintenance duties over some women.
4:176	They ask thee for a legal decision. Say: Allah directs (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance: if (such a deceased was) a woman, who left no child, her brother takes her inheritance: if there are two sisters, they shall have two-thirds of the inheritance (between them): if they are brothers and sisters, (they share) the male having twice the share of	Inheritance portions of full and consanguine siblings.

	the female. Thus doth Allah make clear to you (His law), lest ye err. And Allah hath knowledge of all things.	
5:5	This day are (all) things good and pure made lawful unto you. The food of the People of the Book is lawful unto you and yours is lawful unto them. (Lawful unto you in marriage) are (not only) chaste women who are believers, but chaste women among the People of the Book, revealed before your time – *when ye give them their due dowers, and desire chastity, not lewdness, nor secret intrigues*….	Emphasis of dowry to brides.
5:106 – 107	O ye who believe! When death approaches any of you, (take) witnesses among yourselves when making bequests – two just men of your own (brotherhood) or others from outside if ye are journeying through the earth and the chance of death befall you (thus) if ye doubt (their truth), detain them both after prayer, and let them both swear by Allah "We wish not in this for worldly gain, even though the (beneficiary) be our near relation: we shall hide not the evidence before Allah! If we do, then behold the sin be upon us!" But if it gets known that these two are guilty of the sin (of perjury), let two others stand forth in their places – nearest in kin from among those who claim a lawful right: let them swear by Allah: "We affirm that our witness is truer than that of those two, and that we have not trespassed (beyond the truth): if we did, Behold! The wrong be upon us!"	Formalities of a will.
6:152	And come not nigh to the orphan's property, except to improve it, *until he attains the age of full strength* (…).	When to release an orphan's property to him or her.
8:75	And those who accept Faith subsequently and adopt exile, and fight for the Faith in your company – they are of you, *but kindred by blood have prior rights against each other in the Book of Allah*. Verily Allah is well-acquainted with all things.	Enunciation of the primacy of blood relatives' inheritance rights before God.
17:34	Come not nigh to the orphan's property *except to improve it, until he attains the age of full strength*:	Management of an orphan's property and when to release it to him or her.

18:82	As for the wall, it belonged to two youths, orphans, in the town; there was, beneath it, a buried treasure, to which they were entitled to; their father was a righteous man: So thy Lord desired that they should attain the age of *full strength* and get out their treasure – a mercy (and favour) from thy Lord.	When to release an orphan's property to him or her.
33:4	Allah has not made for any man two hearts in his (one) body (…): *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.	Adopted sons bear no similar (lineage) rights to blood sons.
33:5	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 *Mawlās*. But there is no blame on ye if ye make a mistake therein: (what counts is) the intention of your hearts: and Allah is Oft-Forgiving, Most Merciful. (Emphasis author's own).	How to name children.
33:6	The Prophet is closer to the Believers than their own selves, and his wives are their mothers. *Blood-relations among each other have closer personal ties, in the decree of Allah*, than (the brotherhood of) Believers and Muhajirs: nevertheless do ye what is just to your closest friends: *such is the writing of the Decree (of Allah).*	The primacy of blood relatives to their deceased relatives' estates is emphasised (twice) over other (previous) inheritance arrangements.
33:37	Then when Zayd had dissolved (his marriage) with her, with the necessary (formality), We joined her in marriage to thee: *in order that (in future) there may be no difficulty to the Believers in (the matter of) marriage with the wives of their adopted sons*, when the latter have dissolved with the necessary (formality) (their marriage) with them. And Allah's command must be fulfilled.	Permits marriage to former wives of adopted sons is permissible. This means adopted children do not assume the lineage of their adopted parents.
33:50	O Prophet! We have made lawful to thee thy wives to whom thou hast paid their *dowers*;	Dowry payment.
60:10 – 11	O ye who believe! When there come to you believing women refugees, examine (and test) them: Allah knows best as to their faith: if ye ascertain that they are believers, then send them	Emphasis of dowry payment to brides. [These precepts respond to the pagan Arabs' breach of the Treaty of

	not back to the unbelievers. They are not lawful (wives) for the unbelievers, nor are the (unbelievers) lawful (husbands) for them. *But pay the unbelievers what they have spent (on their dower). And there will be no blame on you if ye marry them on payment of their dower to them.* But hold not to the guardianship of unbelieving women: *ask for what ye have spent on their dowers, and let the (unbelievers) ask for what they have spent (on the dowers of women who come over to you).* Such is the command of Allah: he judges (with justice) between you. And Allah is Full of Knowledge and Wisdom. And if any of your wives deserts you to the unbelievers, and ye have an accession (by the coming over of a woman from the other side), *then pay to those whose wives have deserted the equivalent of what they had spent (on their dower).* And fear Allah, in Whom ye believe.	Hudaybīyah. One of the terms of this pact between the pagan Arabs of *Makkah* and the Muslims of *Madinah* required the return to his or her guardian of any person that fled *Makkah* to join the Muslim camp; and the unreciprocated retention of any individual who departed *Madinah* for *Makkah*].
65:1	O Prophet! When ye do divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods: and fear Allah your Lord: *and turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness,* those are limits set by Allah: and any who transgresses the limits of Allah, does verily wrong his (own) soul: thou knowest not if perchance Allah will bring about thereafter some new situation.	Husbands must shelter their immediate former wives until these women complete their *'iddah*. [See also *Qur'aan* 2: 228; 65:4].
65:6	Let the women live (in '*iddah*) in the *same style as ye live, according to your means*: annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden: and if they suckle your (offspring), give them their recompense:	Divorced woman's living standards should correspond to the immediate husband's. Husbands to maintain divorced pregnant wives and if the latter suckles the baby.
65:7	Let the man of means spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has give him. Allah puts no burden on any person beyond what He has given him.	

Appendix 2: Inconsistencies between the Draft 'The Law of Succession (Amendment) Bill 2015' and Islamic Inheritance Law

Draft Bill Provisions: Section	**Principal Act affected provision**	**IIL Position**
5(2)	Deletes s, 3(2) and replaces it with s, (1A) which defines a child to include illegitimate and adopted children.	Both illegitimate and adopted children are not beneficiaries. They may, however, receive allocations from the bequeathable 1/3 of the estate. (See *Qur'aan* 33: 4 – 5; *Qur'aan* 33:37 read together with *Qur'aan* 4:23; and *Qur'aan* 33:6 read together with 4:33. See also note 951).
6(b)	It adds the word 'beneficiary' before the word 'dependant' in section 26. Thus a court can obviate an allocation for a dependant or beneficiary if it deems it insufficient.	*Sharii'ah* proportions are absolute and the court cannot alter them.
9	Deletes s, 29 and replaces it with a new one which distinguishes between a beneficiary and a dependant. Only a surviving spouse and the deceased's children are beneficiaries. His or her other relatives are dependants if they were under his or her maintenance.	The surviving spouse and deceased's blood relatives [ie children, parents, siblings (full, uterine, paternal), grandparents etc] are beneficiaries. But some heirs are principal and other only inherit in the absence of other heirs. (see sub-section 3.3)
13(a)	Amends s,35(1) (a) by adding matrimonial property[2009] among properties that a surviving spouse is entitled to.	No specific property is preferred for the surviving spouse. All heirs have identical right to any available property in their respective portions.[2010] The heirs may, however, agree among themselves to give a particular property to a certain beneficiary.
13(b)	Introduces a fresh para (c) to s,35(1) which entitles the surviving spouse to the residue of the net estate absolutely if its values is below Ksh.s	The surviving spouse has a specific absolute fraction of the net estate regardless of its value, whether below or above Ksh.s 200,000/=.

[2009] While Kahn-Freund noted in his 1969 commentary that this category of wealth missed out glaringly from the distribution of the intestate estate, this position remained unaltered. See Kahn-Freund 85.

[2010] See the accompanying text to note 823. See also *Chelanga v Juma* [2002] 1 KLR 339, 360.

	200,000/=.	
13(e)	Deletes s,35(5) and substitutes it with a fresh s,(5A) which divides the net reside residue to the surviving children (including a grandchild of the deceased if his or her parent predeceased the deceased).	When the surviving spouse dies, his or her male and female children inherit the estate in the ratio of 2:1. His or her grandchild does not inherit him even if the parent of the grandchild predeceased the surviving spouse. [*Qur'aan* 4:11]
14	Deletes s,36 and replaces it with a novel s,36A which devolves the entire net estate to the surviving spouse if the deceased left no child.	The surviving spouse only takes ¼ or ½ of the net estate if a widow or widower respectively. If more than a widow, they share the ¼. The remaining property goes to the deceased's other heirs, namely the parents. The deceased's father also inherits as a residuary and determines the estate. If only a deceased's mother, she takes 1/3 of the net estate and the remainder goes to the Muslim Public Treasury. In the absence of the Treasury, the property reverts to the spouse and the deceased's mother. [*Qur'aan* 4:11 – 12]
15	Deletes s,37 and replaces it with s,37A (1) – (3). Thus, a surviving spouse can sell any part of the estate with or without the consent of all co-trustees, of the adult children or of the court or adult children in order to maintain himself or herself or the said children. The surviving spouse must, however, obtain the consent of the court to sell an immovable property. Any person contravening these provisions commits an offence which is punishable by a fine of not more than Ksh.s 500,000/= or imprisonment of not more than three years or both.	Surviving spouse may use the income emanating from the children's shares reasonably for his or her maintenance and that of the children. S/he may only sell the property (whether movable or immovable) at the market price for the benefit of the respective child or children. [*Qur'aan* 4:16]. *Sharii'ah* makes no distinction between movable and immovable property.[2011]
16	Deletes s,39 and replaces it with a novel s,39A. Under s,39(A) (1), the	Both the deceased's parents are beneficiaries whether or not the

[2011] See the accompanying text to note 823.

	deceased's kindred inherit in the following priority: both parents in identical shares; if dead, full brothers and sisters (including any child or children of the deceased's such sibling who had predeceased the deceased) in identical shares; if dead, half-brothers and half-sisters in the same order; if none, relatives in near consanguinity up to the 6th degree.	deceased has left a surviving spouse or child. If, however, the deceased has left neither spouse nor children, the mother takes 1/3 of the property. The father takes his 1/3 too. But because he is a closer residuary heir to the deceased, the father assumes the remaining 1/3. In the absence of the parents, the deceased's uterine brother and sister inherit 1/6 each; or share a 1/3 identically if they are more than two. The remainder goes to the full brothers and sisters who inherit in the ratio of 2:1. If the deceased uterine siblings are non-existent, the full brothers and sisters inherit in the ratio of 2:1. When the deceased full siblings are absent, and paternal ones exist, the uterine siblings assume their identical shares before the paternal brothers and sisters take the remaining estate in the ratio of 2:1. When the deceased's siblings inherit, a child of the deceased's sibling who predeceased the deceased does not inherit. [*Qur'aan* 4:11, 12 and 176]
17	Deletes s,40 and replaces it with a fresh s,40.	
	s,40(1)(b): the personal and household effects shall be divided among the spouses according to their contribution absolutely	A spouse's contribution to the acquisition of personal and household effects is separated from the deceased's estate.[2012] The deceased's entire estate is then divided among all heirs, including the spouses, in their respective portions.
	S,40(1)(c): spouses bear life interest in the remaining net estate according to their contribution.	Spouses (like other heirs) have absolute interest in the remaining estate according to their respective inheritance portions.

[2012] See note 822.

	S,40(2) – each widow shall take the matrimonial home she occupied and its personal and household effects absolutely.	The widows' individual matrimonial homes if entirely belonging to the deceased constitutes his estate and are shared among all heirs including the widows. The heirs may, however, agree to give the widows priority to charge their respective portions to the matrimonial homes first.
	S,40(3) – each widow sharing a matrimonial home with another widow will inherit the home and its personal and household effects according to her contribution.	The widow's individual contribution is separated from the deceased's estate. The estate then divides among the widows and other heirs according to their respective portions.
	S,40(4)(a) – a widower who has other subsisting wives shares the matrimonial home and its personal and household effects with the deceased's children identically and absolutely. The widower will, however, hold the children's portions in trust until they attain maturity.	A widower's contribution to the matrimonial property and its personal and household effect is separated from the deceased's estate. The widower and the deceased's children then share the deceased's entire estate in their respective portions absolutely. The widower may hold immature children's portions in trust. [See *Qur'aan* 6:152; 17:34; and 18:82]
	S,40(4)(b) – a widower has life interest in the deceased's residue estate.	Deceased's entire estate divides among all her heirs, including the widower, absolutely according to their respective shares.
	S,40(5) – children of a deceased wife who shared a matrimonial home with her co-wives to receive her identical share absolutely.	After deducting the individual wives' contribution to their shared matrimonial homes, its personal and household effects, and their husband's contribution; the widower and the deceased wife children share the wife's contribution alongside her other properties according to their respective portions.
18	Deletes s,41 and replaces it with a novel s,41A(1) which provides that where the deceased's net estate divides among his or her children equally, the same shall be held in trust in equal shares. The children of the deceased's child who predeceased him or her shall take in equal shares	Respective shares of immature children (whether below or above 18) are held in trust. A predeceasing child has no right to inheritance. His children cannot therefore inherit the deceased in the presence of the deceased's other children. [See

	their parent's share.	*Qur'aan* 6:152; 17:34; and 18:82]
19	Amends s,42 to indicate beneficiaries and dependants in the place of 'child, grandchild or house'.	If the gift was given in no contemplation of death, it does not factor in the distribution of the estate to the deceased's children. Grandchildren have no inheritance rights in the presence of the deceased's children. A bequest in their favour survives if within the permissible 1/3 of the deceased's estate.
20	Insert s,42A immediately after s,42, thus:	
	S,42A(1) – where a widow lives in a matrimonial home whose land is registered in the name of the deceased, she becomes an automatic owner of the home.	The widows' contribution to the matrimonial home is separated from the deceased's estate. Then the widow and other beneficiaries share the home according to their respective fractions.
	S,42A(2) – where two or more widows live in separate matrimonial homes on a single piece of land which is registered in the deceased's name, they each become automatic owners of their respective homes.	Each individual widow's contribution in the matrimonial homes is separated from the deceased husband's estate. Then the residue is divided among all the deceased's beneficiaries. The heirs may, however, grant the individual widows priority in inheriting the widows' individual homes according to their shares or the collective shares with those of their respective children.
	S,42A(3) – the widow who succeeds her matrimonial home need not prove registration to be recognised as the legal owner of the house. She may, however, apply to be registered as such.	This provision obviates other subsisting beneficiaries' rights. It, therefore, fails,
22(6)	Amends s,45 by inserting ss,(2A) and (2B) immediately after s,(2). S,(2B)(b) restricts a person from imposing any pre-conditions to obtaining or continue occupation or succession of matrimonial home by a	Like other beneficiaries, a surviving spouse or such other beneficiary, has identical right to the deceased's estate including his matrimonial home. The court or any other beneficiary may impose a condition

	spouse or such other property by some other dependant.	prior to some heirs benefitting exclusively to the deceased's partial estate.
29	Amends s,51 by adding fresh subsections (4A), (4B), (4C) and (4D) immediately after subsection 4.	
	S,51(4A) – there is no need for any court proceedings to transfer ownership of a matrimonial home to a surviving spouse.	The matrimonial home (absent the surviving spouse's contribution) forms part of the deceased's estate and must be considered by a court when computing and distributing the estate. The court may, nonetheless, subject to the approval of other heirs, give the spouse priority to inherit the house.
	S,51(4D) – a surviving spouse who swears an affidavit and gets it approved by the court can present it together with its accompanying court order to the person or institution effecting transfer of the matrimonial home to do so in his or her home.	The automatic transfer of a matrimonial home to a surviving spouse offends *Sharii'ah* (as detailed above) and courts will decline to approve it through an affidavit of the surviving spouse. The rest of the heirs must consent to the surviving spouse inheriting the matrimonial house.
31	Amends s,55 by adding subsections (2A) and (2B) after subsection 2.	
	S,55(2A) allows the court to distribute the matrimonial home to the surviving spouse or permit his or her using it before confirmation of a grant.	A spouse has no automatic ownership or possession of the matrimonial home. The widow(s) may, however, live automatically in the matrimonial home(s) until expiry of their '*iddah*. Then the home alongside other properties of the deceased husband divides among all his heirs, including the widow(s). (*Qur'aan* 2:234)
	S,55(2B) – shares in a land estate to conform to the minimum and maximum acreages contemplated in art 68(c)(i) of the 2010 Constitution.	Shares in a land estate reflect the beneficiaries' respective portions. But some inheritance portions could be consolidated (through buying out or compensating other heirs willingly) to meet the minimum acreage contemplated in the constitution.

Appendix 3: Inconsistencies between the Law of Succession Act and Islamic Inheritance Law

LSA Provisions: Section	What it Says	IIL Position
5(3)	A will is valid (regardless of how it is made) if the testator is a person of sound mind.	A will is valid if the testator is a person of sound mind and if the bequest(s) cover not more than a third of the deceased net estate (ie after debts) and the legatees are not eligible intestate beneficiaries.[2013]
9(1)(b)	Oral will only valid if the testator dies more than 3 months after making it.	An oral will (just like a written one or an intelligible gesture) is valid regardless of the time it was made, even if it is made during death sickness provided that the testator is of sound mind and conscious; and two witnesses are present.[2014]
13(2)	A bequest to an attesting witness or her spouse is invalid.	A bequest to an attesting witness or her spouse (or such other relative) is valid.[2015]
19	A will shall be revoked by the marriage of the maker.	The testator's subsequent marriage has no effect on the will since neither (his) existing spouse nor children are beneficiaries in a will.
20	Construction of wills as elaborated by the First Schedule, thus:	
	Para 4 – persons entitled on intestacy cannot be absented from a will.	No bequests to intestate beneficiaries.
	Para 17 – a testator shall be presumed to negate intestacy	While a will is recognised up to a third of the deceased's estate, it never obviates the compulsory intestacy.

[2013] See sub-section 3.2.2.

[2014] Hussain (n 5) 393 and 401; Khan (n 5) 226–67; *Ismail* (n 951) 6. See also *Qur'aan* 5:106 – 107.

[2015] This is an inference from *Qur'aan* 5:106. There the non-Muslim witness testifies the truthfulness of the contents of the will even if the legatee is his or her 'near relation'. Ali (n 7) 282.

	Para 68 – debts accruing on a bequest will be paid proportionately from the said property by the beneficiaries, not any other property.	Another property from the deceased's estate, if available, can offset the debt. Otherwise legacies only payable after payment of debts.
28	Enumerates points which the court considers before allocating a portion of the deceased's estate to a dependant. These are: the nature and amount of the estate; the dependant's past, present or future income; present and future means and needs of the dependant; whether the dependant received any gift or advancement from the deceased; the dependant's behaviour towards the deceased; the welfare of the deceased's other dependants or beneficiaries of his or her will; all other important factors including the reasons for the deceased omitting the dependant in his or her will.	The intestate provisions are absolute and merit to the beneficiaries regardless (among other things) of the size of the estate or the relationship (amiable or acrimonious) between the deceased and his or her beneficiaries.[2016] If the beneficiary caused the deceased's death or has changed religion, however, s/he cannot inherit. An illegitimate child cannot inherit his father too.[2017]
29	Definition of a dependant which includes former wives, step-parents, grandchildren, step-children and adopted children.	Only blood relatives and subsisting spouse inherit the deceased. While the spouse's right is automatic, the blood relations are divided into principal heirs and such other beneficiaries whose right depends on the absence of other nearer relatives.
35(1)(a)	A single surviving spouse acquires absolute interest in the deceased's personal and household effects if the deceased left a child or children.	No specific property is preferred for the surviving spouse. All heirs have identical right to any available property in their respective portions. The heirs may, however, agree among themselves to give a particular property to a certain beneficiary.
35(1)(b)	Surviving spouse takes life interest on the net estate which interest extinguishes upon remarriage if that spouse is a widow.	Both a widow and a widower have specific absolute fraction to the deceased spouse's estate which interest does not extinguish when they remarry (or die). (*Qur'aan* 4:12 read

[2016] See accompanying text to note 15.

[2017] See notes 926 to 929 and 1493.

		together with 2:234).
35(2), (3) and (4)	The surviving spouse has power to gift the capital of the residue of the net estate among the deceased's children. But if a child feels that this power has been unduly exercise or withheld, s/he may apply to court to give him or her share of the estate.	Each child has an independent and automatic inheritance share to the capital and income of the entire deceased's net estate.[2018] The surviving spouse has no power to divide either of this property. Again, no factor other than the child's illegitimacy, changed religion, or participation in the death of his or her parent can bar him or her from his or her absolute share.
35(5)	Where the surviving spouse dies or if a widow remarries, the net residue estate devolves to the surviving children identically (including the children of the deceased's child who had predeceased his or her parent).	When the surviving spouse dies, his or her inheritance share devolves to the male and female children in the ratio of 2:1. The widow's share remains hers even when she remarries.
36	If a spouse dies without a child, the surviving one receives absolute interest in the deceased spouse's personal and household effects; and in the first 10,000/= or 20% of the real estate – whichever is greater. S/he gets life interest in the remaining real property, which interest extinguishes when s/he dies or if a widow, when she remarries.	A widow and a widower receive a ¼ or a ½ of the entire deceased's property including his or her personal and household effects. If more than one widow, they share the ¼. These interests do not extinguish when either the widow or widower dies or remarries. Their heirs succeed the interests.
37	A surviving spouse may sell the property which s/he holds life interest with the approval of all co-trustees of the children's said property, the adult children (and the court's consent if the property is immovable) to maintain himself or herself.	Since the property is already the children's (in their respective portions), the children may donate it to the surviving spouse for his or her maintenance if they are mature. If not, the spouse can only use the income of the property reasonably. But s/he cannot sell the capital. [*Qur'aan* 4:6 and 17:34].
38	If the deceased has left a child but not a spouse, the child takes all the property. If the children are two or more, they share the estate	The deceased's child or children do not exhaust the estate in the presence of the deceased's parent(s). But if no surviving deceased's parent, the

[2018] See note 850.

	identically.	deceased's sons and daughters share the entire estate in the ratio of 2:1. If only son, he takes it all. If only a daughter, she takes ½ of it and the remainder goes to the deceased siblings (uterine and full) in their respective portions. If full siblings are inexistent, the remainder goes to both uterine and consanguine siblings in their respective portions. If all deceased siblings are inexistent (including the deceased full or consanguine siblings' descendants howlowsoever), the remainder goes to the Public Treasury. In the absence of the Treasury, the deceased's distant kindred comes in. In their absence, the remaining ½ reverts to the daughter.[2019]
39	Where an intestate dies with neither a spouse nor a child surviving him or her, his or her other kindred inherit the estate in priority. First, the father takes it all. If he is dead, the mother inherits it all. If she is dead, the deceased's full brothers and sisters (including a child of a full sibling if that sibling is dead) share the property identically. Where the full siblings are inexistent, the deceased's half-brothers and half-sisters (including a child of a half-sibling if that sibling is dead) assume the estate in identical portions. If no such half-siblings exist, then such other deceased's near consanguine relatives up to the 6th degree would inherit him. But where none of the aforementioned deceased's relations survives him or her, then his or her estate devolves to the Consolidated Fund.	Both the deceased's parents are beneficiaries whether or not the deceased has left a surviving spouse or child. If, however, the deceased has left neither spouse nor children, the mother takes 1/3 of the property. The father takes his 1/3 too. But because he is a closer residuary heir to the deceased, the father assumes the remaining 1/3 too. In the absence of the parents, the deceased's full brothers and sisters inherit in the ratio of 2:1. If they are dead or inexistent, the deceased's paternal brothers and sisters inherit in the ratio of 2:1. If they are inexistent, the deceased's uterine brothers and sisters share the estate identically. When the deceased's siblings inherit, a child of the deceased's sibling who predeceased the deceased does not inherit.

[2019] See sub-section 3.3.1.

40	Where a deceased husband was polygynous, the estate (personal and real) accrues to all his houses according to the number of children per house. The widow also computes as a child. Once each household has its share, the widow – like in the previous provisions – assumes absolute ownership in both the deceased husband's personal and household effects. She acquires a life interest in the real property which extinguishes when she remarries. The children, on the other hand, share identical shares in the real property when they mature.	Widows have distinct share from those of their individual children. If there are two or more widows, they share 1/8 of the entire deceased's net estate (real and personal). All the children then share the remaining 7/8 with a son taking twice as much as a daughter. It is inconsequential that the children belong to different mothers.
41	Where the deceased's net estate devolves equally among his or her children, then the same shall be held in trust in identical shares for all children who are under 18 years or his or her daughters who marry under that age. If a deceased's child predeceases him or her, that child's child or children shall inherit what the original child would have received from the deceased.	Both respective shares of immature sons and daughters (whether married or single) are held in trust. A predeceasing child has no right to inherit. Thus his or her children (ie the deceased's grandchildren) have no right to inheritance.
42	Where an intestate gifted some property to his or her child or grandchild during his lifetime, this gift will be factored when distributing the deceased's estate.	If the gift was given in no contemplation of death, it does not factor in the distribution of the estate to the deceased's children. If, however, it was given during death sickness – it does. Grandchildren have no inheritance rights in the presence of the deceased's children. A gift in their favour during the deceased's lifetime is valid. A gift in their favour in contemplation of the deceased's death computes in the permissible bequeathable 1/3 of the deceased's estate.[2020]

[2020] Hussain (n 5) 410; Khan (n 5) 236.

43	Where two or more persons die in circumstances such that it is uncertain which of them survived the others or others, their deaths will be presumed to have occurred in seniority such that the younger person survives the older. Spouses who die in similar circumstances, however, will be presumed as having died simultaneously.	It will be presumed that they died simultaneously and would not inherit each other. Their heirs will receive the deceased persons' respective properties. But if it can be established that some predeceased others but the identity of these persons is unknown, then distribution awaits the ascertainment of this fact or the consent of the heirs on this matter.[2021]
51	Application for grant for both testate and intestate estates.	There is no requirement for either letters of administration or grant of probate since Islam only recognises distribution of the estate. This is either done by the heirs themselves or the State (through the court).[2022] But because of the realities of contemporary economies, obtaining grants for purposes of collecting the estate and paying off debts coincides with *Sharii'ah*.
90	Read together with paras 5, 7, 8 and 9 to the Seventh Schedule to the LSA permits investing an estate in an interest-earning venture to facilitate payments of legacies.	*Sharii'ah* prohibits interaction with interest.[2023]

[2021] Anderson, 'Comments' (n 709) 18; Khan (n 5) 64; Hussain (n 5) 345–47.

[2022] See the accompanying text to notes 1938 and 1939.

[2023] See note 1968.

Appendix 4: Religious Distribution of the Counties Specified in Section 32 of the Law of Succession Act

County	% Muslims	% Christians	% Hindu	% Traditionalists
Garissa	97.5	2.4	0.0	0.0
Isiolo	62.5	30.1	0.2	6.7
Kajiado	2.7	91.2	0.0	2.2
Lamu	52.0	44.9	0.0	0.3
Mandera	99.7	0.3	0.0	0.0
Marsabit	45.9	29.5	0.1	23.6
Narok	0.5	78.5	0.0	11.0
Samburu	1.0	80.5	0.0	14.2
Tana River	82.5	13.4	0.0	0.1
Turkana	3.0	72.3	0.0	13.8
Wajir	99.5	0.5	0.0	0.0
West Pokot	0.5	82.9	0.0	9.6

Source: Kenya National Bureau of Statistics 2009 Census

Appendix 5: Perceptions on the Application of Islamic Inheritance Law in Kenya: Proper or Divides Kenyans?

- We are Muslims and we want to follow Muslim law. I recommend that Muslims have their own courts eg Kadhis be in Kenyan laws.[2024]
- It is a very good arrangement. Muslims are Kenyans but they have their own religious persuasions. The other courts do not know Muslim law. Christians and Muslims come from the two big religions in the world, so they must learn to co-exist.[2025]
- It is very okay that Muslims apply different law from non-Muslims. Our traditions are different. Everybody has a different perspective. We are very happy with what the *Qur'aan* says and that the government of Kenya respects our observance of *Sharii'ah*.[2026]
- Every person has his or her own religion. Constitutionally, we are all Kenyans. But as it relates to our personal laws, each follows his or her own ways. If they (non-Muslims) want to come over, that's fine. But we will not follow them.[2027]
- '*Lakum dinukum waliya deen*'[2028]. They (non-Muslims) can follow what they want and we will follow what we want: our religion.[2029]
- As long as everyone follow his religion and there's no interference, that's okay.[2030]
- It is okay for Muslims to have their separate law.[2031]
- It is good that Muslims are allowed to use their law.[2032]

[2024] Interview 5.

[2025] Interview 9.

[2026] FGD 1.

[2027] FGD 2.

[2028] Arabic phrase for 'to you be your way, and to me mine'. Ali (n 7) 1708 translating Qur'an 109:6. The entire *Qur'aan* 106, which is made up of six verses, was an address to the Prophet (PBUH) – and by extension the whole Muslim community – on how to respond to non-Muslim's invitation to their ways of life. When the pagan Arabs of *Makkah* failed to persuade the Prophet to abandon his monotheist belief, they proposed to join him in the worship of One God for a year; and for the Prophet to join them in the worship of their idols in the subsequent year. This brief chapter was thus revealed to answer this offer. Abdullah Saleh al-Al-Farsy (tr), *Qurani Takatifu* (2nd edn, The Islamic Foundation 1974) 800; Kathir, *Kathir 10/10* (n 384) 614.

[2029] FGD 2.

[2030] FGD 2.

[2031] Interview 73.

[2032] Interview 72.

- I do not think it divides Kenya. The truth of the matter is that we are not one. There's unity in diversity. We are diverse in ethnicity, religion etc. Diversity in ethnicity does not mean we are disunited. The application of Muslim law in the country recognizes that we are different.[2033]
- Its existence gives meaning to the right on freedom of religion.[2034]
- Following Muslim law does not separate us from other Kenyans.[2035]

[2033] Interview 64.

[2034] Interview 43.

[2035] Interview 95; Interview 92.

Appendix 6: Letter from the Public Trustee to the Kadhi

OFFICE OF THE ATTORNEY - GENERAL

DEPARTMENT OF
THE ADMINISTRATOR-GENERAL to the

23rd April, 2013

The Kadhi,
P. O. Box 2,
LAMU

RE: MUHSIN SAID SALIM BAKELI – DECEASED
ADMINSTRATION CAUSE NO: 74 OF 2012

The estate of the above named deceased who died on 21st February, 2009 has been reported to me for administration.

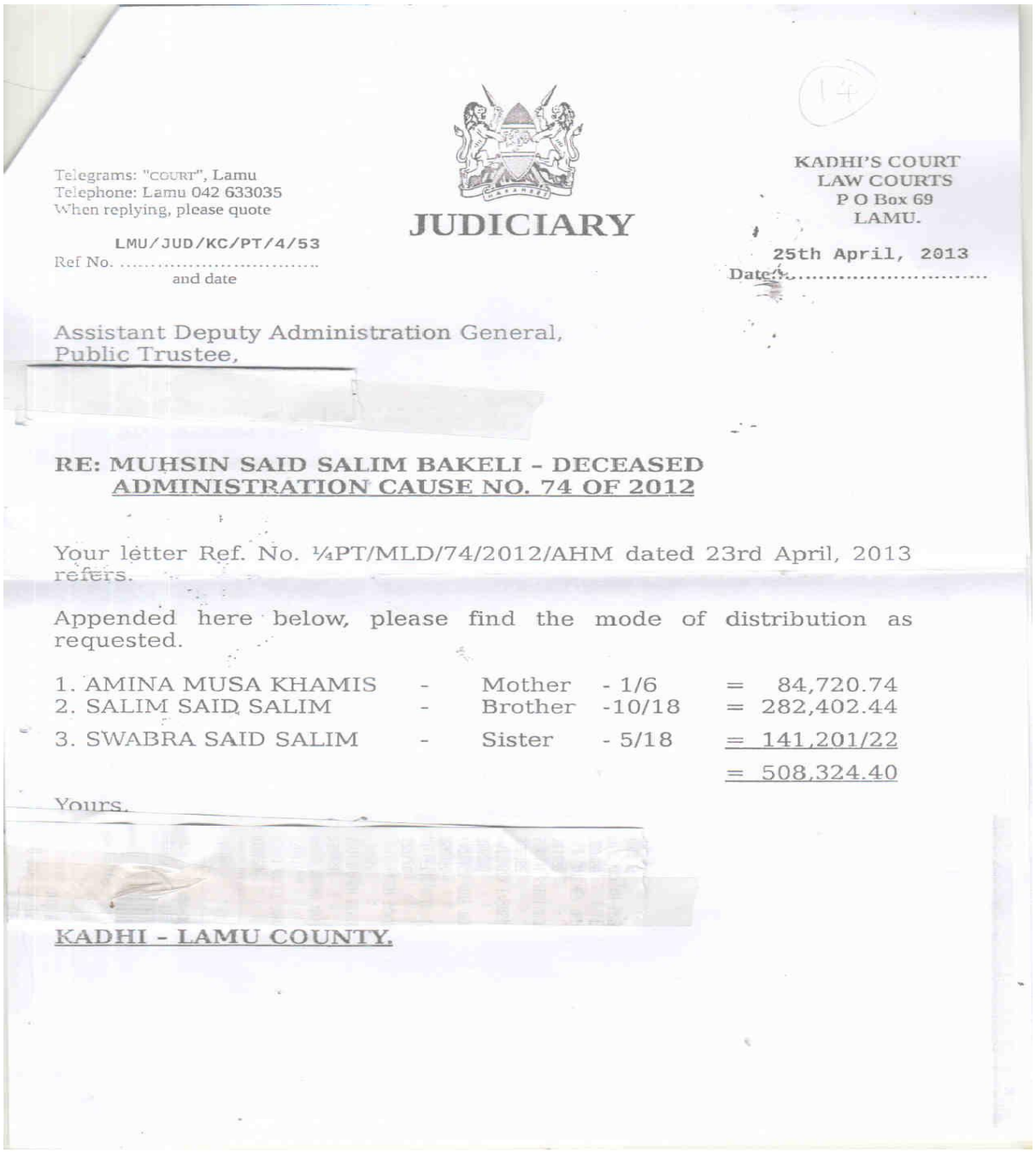
The estate comprises of Death Gratuity from Ministry of finance amounting to Ksh 530,574.20 Public Trustee fees and administration charges amounts to Kshs.22, 249.80 .The net balance available for distribution is Ksh.508,324.40

Kindly provide me with the mode of distributing (**FRACTIONS**) the net balances to the heirs in the attached list according to the Islamic Law.

FOR: ASSISTANT DEPUTY ADMINISTRATION GENERAL

Cc
Amina Musa – Please liase with the Kadhi to speed up the matter
P.O Box 80500
LAMU.

Appendix 6A: Response from the Kadhi to the Public Trustee



Telegrams: "COURT", Lamu
Telephone: Lamu 042 633035
When replying, please quote

LMU/JUD/KC/PT/4/53
Ref No. .....
and date

JUDICIARY

KADHI'S COURT
LAW COURTS
P O Box 69
LAMU.

Date 25th April, 2013

Assistant Deputy Administration General,
Public Trustee,

[redacted]

RE: MUHSIN SAID SALIM BAKELI - DECEASED
ADMINISTRATION CAUSE NO. 74 OF 2012

Your letter Ref. No. ¼PT/MLD/74/2012/AHM dated 23rd April, 2013 refers.

Appended here below, please find the mode of distribution as requested.

1. AMINA MUSA KHAMIS	-	Mother	- 1/6	= 84,720.74
2. SALIM SAID SALIM	-	Brother	-10/18	= 282,402.44
3. SWABRA SAID SALIM	-	Sister	- 5/18	= 141,201/22
				= 508,324.40

Yours.

[redacted]

KADHI - LAMU COUNTY.

Appendix 7: Interview Guides

PROJECT: THE INHERITANCE RIGHTS OF MUSLIM WOMEN IN KENYA: REALITY OR RHETORIC?

Interview Guides

My name is Moza Jadeed and I am the researcher in this study. **The research is about** Muslim Women's Inheritance Rights in Kenya. **The reason why I am conducting this research** is to *understand whether Muslim women succeed their Qur'anic shares in fact.* In particular, I want to understand whether there exist any specific factor(s) that deny these women access to their actual (testate or intestate) *Shari'ah* inheritance shares.

I assure you that everything you tell me is in confidence. I also assure you that the information will be anonymized: I will not attribute statements to you. Rather, I will speak only about averages (*ujumla*, eg 'among 20 people that we spoke to, 5 thought xxx). If at any point you do not wish to continue with the interview please let me know. I appreciate your time and willingness to speak with me.

A. Muslim Female Heirs (Successful or Unsuccessful)

1. Get Respondent full names and what she does for a living.
2. Comment on her immediate family members and (family) livelihood:
    a. Categorise family's livelihood (economic pre-occupation: ranching, agricultural, manufacturing, fishing etc)
    b. (Number, sex, and those dead).
3. Establish her story (what happened) ie (elicit the factors for disinheritance, if any).
4. Investigate her views in resolving women's disinheritance (would the suggested solutions apply to her case, if at all)?
5. Explore her knowledge and perception of Muslim law generally (favourable/unfavorable to women).
    a. Ask respondent to share her knowledge on Muslim law on inheritance.
        i. Is she happy/ comfortable with this law?
    b. Do you know/ understand the succession law (the Succession Act Cap 160) applied in ordinary courts?
        i. Does this law offer better inheritance opportunities?
6. Are Kenyan Muslim women entitled to insist on the application of Muslim law on inheritance in the country?

a. Get suggestions for strengthening the application of Muslim succession law in Kenya.

B. Friends/Relatives/Neighbours/Aggressors of Female Heirs

Repeat introduction as in opening of part A above. Give Respondent Consent Form to Sign.

1. Get Respondent full names and what s/he does for a living
2. Verify respondent's relationship to female heir.
3. Elicit his/her version of the story (what happened) ie (eliciting factors of disinheritance).
4. Assess his/her reasons that led to the disinheritance of the female heir/ or affirmation (observance) of her entitlement ie (eliciting factors of disinheritance).
5. Ask if respondent knows of past disinheritance incidences in his family or neighbourhood or tribe (community)?
6. Explore his or her considered solution(s) to cases of disinheritance.
7. Investigate whether s/he prefers the Kadhi's court or other forum (judicial or quasi-judicial) to resolve women's succession disputes. Why?

C. Guide for Muslim scholars (key informants)

Repeat introduction as in opening of part A above. Give Respondent Consent Form to Sign.

1. Get Respondent full names and area of work/ expertise.
2. Inquire on his/her general knowledge of Muslim inheritance law vis-à-vis women.
    a. What led to the revelation of the fused (testate and intestate) inheritance law in Q4:11, 12 and 176? Did they all come at the same time?
    b. Which year?
    c. Did other Muslim law (relating to inheritance) exist before that?
3. Explore his/her take on the following aspects of Muslim inheritance law:
    a. Why does a son become an agnate, yet he is a Qur'anic sharer? Does it mean he inherits twice than his sister (ie twice as much the sister + residuary share)?
    b. Does a descendant in *Qur'an* 4:11 (who excludes decedent's siblings and reduces decedent's parents' share) include a child of the son?
    c. Do residuary rights really (ever) ensue?
    d. How do you explain a sharer becoming a residuary? Who are such sharers?
    e. When do you know to apply the doctrine of increase (*awl*) instead of subjecting other shares to the residue of the estate after other Qur'anic heirs have taken theirs?
    f. Why is true grandmother and grandfather Qur'anic heir when not mentioned in the Qur'an?
    g. Where a person dies without surviving children but with surviving siblings (full, consanguine or uterine), the mother takes a sixth. Because of the tenet on propinquity, the father excludes the full and consanguine siblings and takes the remaining five-sixths. Why doesn't the uterine sibling inherit, if s/he exists?
    h. Is the doctrine of *naf'a* (benefit) applicable in inheritance matters such that the person who expends more inherits more (if a daughter supports the mother more can she inherit more than the son)?
    i. Are uterine brothers not required to support their uterine sisters and mothers? Why do they inherit equally to their sisters? Why so too for the decedent's mother and father when the decedent left children?

j. What is the *'illah* for a widower to inherit twice as much as a widow?
    i. Full/consanguine sister takes half the estate if no descendants or ascendants. But brother takes entire estate.
    ii. Does this have to do with other male duties (payment of dowry)?
k. What is the *'illah* for a father to inherit twice as much as the mother when the decedent has no children?
l. Does Muslim inheritance system espouse equality of the sexes? Query the basis of his/her response.
    i. What is your conception of equality? Does this understanding matter when arriving at your decisions?

4. Comment on the trends of women's inheritance in his/her locality and Kenya generally.
    a. Probe the reasons behind his/her answer.
    b. Establish if s/he has heard of female disinheritance. Query his/ her assessment of the situation (ie reasons for this position).
    c. Elicit the possible solutions to remedy the situation.
5. Assess his/her opinions on the application of inheritance law in Kenya.
    a. Investigate if the instruments safeguarding the application of Muslim succession law in Kenya were/are adequately protecting Muslims as a minority group in the country. As a Muslim, does s/he feel short-changed as a citizen?
    b. Inquire on his/her perception on the performance of the *Kadhi*'s courts in upholding women's inheritance rights.
6. Would s/he favour the Succession Act (and hence the High Court) where women fail to inherit their duly *Qur'anic* portions? Why?

D. Chiefs and Chairpersons of Village Councils (Key Informants)

Repeat introduction as in opening of part A above. Give Respondent Consent Form to Sign.

1. Description of his/her role in society.
    a. Get Respondent full names and area of jurisdiction.
    b. Years of experience.
    c. Main livelihood of his/her people in his/her division.
    d. Probe if his/her port-folio includes handling inheritance matters albeit informally.
2. Explore the number of inheritance disputes involving Muslims that s/he handles in a week/month [if agreeable, ask him/her to allow you to peruse the Occurrence Book to elicit this information].
    a. How does s/he resolve the dispute?
    b. If s/he personally handles the matter, which law does s/he use?
        i. What procedure does s/he follow? Why?
    c. Are the disputants satisfied with his/her decision?
    d. Does s/he know of females that were disinherited by their family members?
        i. Did the case come to him/her? If yes, what did s/he do about it?
3. What is his or her perception of Muslim inheritance? Why?
4. Does s/he find it okay for Muslims to have separate inheritance law from the rest of Kenyans?

E. Community-based organizations (CBOs) dealing with women's inheritance issues (Key Informants)

Repeat introduction as in opening of part A above. Give Respondent Consent Form to Sign.

1. Get Respondent's full names and position in the organisation.
2. Description of the organisation mandate
    a. Name of the CBO and years in existence.
    b. Main livelihood of the clients it serves.
    c. Inquire what other work (other than inheritance) the CBO deals with.
3. Explore the number of inheritance disputes involving Muslims that it handles in a week/month.
    a. How does it resolve the dispute?
        i. If it personally handles the matter, which law does it use?
        ii. Are the disputants satisfied with its decision?
    b. Why do clients choose the Respondent to handle their inheritance issues?
    c. Does s/he know of females that were disinherited by their family members?
4. Query its assessment of the likely causes of Muslim females' disinheritance.
    a. Does the type of the estate determine whether females inherit or not?
5. Estimate the possible solutions to reducing instances of Muslim females' disinheritance.
    a. Do they do advocacy on the issue? What methods do they use?

F. Guide for Advocates and Legal Aid Institutions (Key Informants)

Repeat introduction as in opening of part A above. Give Respondent Consent Form to Sign.

1. Get Respondent's full names and position in the organisation (if relevant).
2. Establish respondent's experience in handling Muslim inheritance issues.
    a. Years in experience/ existence.
    b. Number of cases on Muslim inheritance she/he/it receives in a month.
    c. Why do clients choose the Respondent to handle their inheritance issues?
3. Explore the venue(s) where respondent adjudicate these issues.
    a. Which venue does the respondent like most? Why?
    b. Which venue do majority of Muslim clients prefer? Why.
        i. Query if the Respondent is able to give sex-disaggregated data/ statistics on clients' choice of adjudication venue.
4. Query her assessment of the likely causes of Muslim females' disinheritance.
    a. What stands out most?
5. Find out his/her/its' considered solution(s) to cases of female disinheritance.
6. Assess his/her/its opinions on the application of Muslim inheritance law in Kenya.
    a. Investigate if the instruments safeguarding the application of Muslim succession law in Kenya were/are adequately protecting Muslims as a minority group in the country. Are Muslims short-changed as citizens?
    b. Inquire on his/her perception on the performance of the *Kadhi*'s courts in upholding women's inheritance rights.
    a. Would s/he/it favour the Succession Act (and hence the High Court) where women fail to inherit their duly *Qur'anic* portions? Why?

G. Guide on Public Trustees (Key Informants)

Repeat introduction as in opening of part A above. Give Respondent Consent Form to Sign.

1. Get Respondent's full names and position in the organisation (if relevant).
2. Establish respondent's experience in handling Muslim inheritance issues.
    a. Years of experience (generally or specifically handling Muslim inheritance issues).
    b. Number of cases on Muslim inheritance s/he receives in a month.
3. Establish instances in which they come to administer estates of Muslim.
4. Investigate if PTs have come across disinheritance claims by women when administering a Muslim estate.
    a. How often is this (in every 5 cases, how many are affected)?
    b. Which avenues do you take to resolving such a case, the Kadhis or High Court or ….?
5. Query when they do apply Islamic law, which sources or expertise do they draw on?
    a. Would they prefer using LSA?
    b. Do they feel Muslim law discriminates against women?
    c. What is his or her general perception about Muslim law on inheritance?
6. Probe for the solutions to bar female disinheritance.

H. Guide for High Court and Court of Appeal Judges (Key Informants)

Repeat introduction as in opening of part A above. Give Respondent Consent Form to Sign.

1. Investigate the frequency of disinheritance cases among Muslim females.
    a. What factors cause this disinheritance?
    b. What are the possible judicial interventions to address this situation?
    c. What other remedies (socio-economic, legal etc) can resolve this issue?
2. Query whether the law anchoring the application of Muslim law in Kenya adequately protects Muslims as a minority in the country.
    a. Is it proper (or it divides Kenyans)?
    b. Is the 'opting-out from the *Kadhis*' courts' clause proper? Is it a win for Muslim women or a loss?
    c. Does the outlaw against indirect discrimination on the basis of religion, race, ethnic or social origin an additional protection to the application of Muslim law in the country?
    d. What further safeguards (constitutional or statutory) would s/he recommend for the protection of Muslim law in the country?

Appendix 8: Focus Group Discussion Guide

PROJECT: THE INHERITANCE RIGHTS OF MUSLIM WOMEN IN KENYA: REALITY OR RHETORIC?

Focus Group Discussion Guide for Muslim males and females within the female heirs' localities

My name is Moza Jadeed and I am the researcher in this study. **The research is about** Muslim Women's Inheritance Rights in Kenya. **The reason why I am conducting this research** is to *understand whether Muslim women succeed their Qur'anic shares in fact.* In particular, I want to understand whether there exist any specific factor(s) that deny these women access to their actual (testate or intestate) *Shari'ah* inheritance shares.

I assure you that everything you tell me is in confidence. I also assure you that the information will be anonymized: I will not attribute statements to you. Rather, I will speak only about averages (*ujumla*, eg 'among 20 people that we spoke to, 5 thought xxx). If at any point you do not wish to continue with the interview please let me know. I appreciate your time and willingness to speak with me.

1. Establish the main livelihood of communities within this locality?
    a. What are the main forms of property/wealth in this locality? Why?
2. Investigate the applicable law in inheritance matters.
    a. How long has this law been in use?
    b. Is it Islamic, customary, common law or a mixture?
    c. When there are disputes, where are such matters taken to?
3. Query their perception(s) on the application of Muslim law on inheritance in Kenya.
    a. Is it proper (or divides Kenyans)?
    b. Is it discriminating against women?
    c. Do you know the LSA?
        i. Is it more favourable to women or?
4. Find out if they have heard of cases of female disinheritance among Muslims?
    a. What are the likely causes of this disinheritance?
    b. Who brings about these incidences of disinheritance (males, females, birth relatives or in-laws or both)?
5. Explore the likely interventions to reduce disinheritance of females in their locality and entire Kenya.

JadeedPhD_FGDGuide

Appendix 9: Data Capture Form

PROJECT: THE INHERITANCE RIGHTS OF MUSLIM WOMEN IN KENYA: REALITY OR RHETORIC?

Data Capture Form

Research Site: ..... (County) Research Date: .....

Name of Research Assistant: .....

Name of the Case (eg A vs B)	
Date Case was filed. Which Court (Kadhis' court, Chief Kadhis' or other Court)?	
Date judgment was delivered	
Was the Petitioner represented?	
Was the Respondent represented?	
Briefly give the facts of the Case	

JadeedPhD_DataCaptureForm

Briefly state the holding (conclusion) of the Case. Include the basis of the holding (ie the law and previous case referred to).

.....

Research Assistant's Signature

Appendix 10: Interview Consent Form

PROJECT: THE INHERITANCE RIGHTS OF MUSLIM WOMEN IN KENYA: REALITY OR RHETORIC?

Ms. Moza Jadeed, a PhD student at the University of Nairobi – School of Law, is conducting a research on Kenyan Muslim Women's Inheritance Rights. The study seeks to establish whether Muslim women in Kenya enjoy their actual inheritance portions as stipulated under Muslim law and safeguarded by the Constitution.

Ms. Jadeed will carry out her research in four selected counties: Mombasa, Lamu, Garissa and Kakamega. In these research sites, Ms. Jadeed will interact with Muslim females who have suffered disinheritance (as well as those who have succeeded to inherit) together with their families, friends and neighbours. She will also interview several stakeholders in the application of Muslim law in the country such as Muslim scholars, Kadhis, Judges, lawyers, legal aid institutions, chiefs, Public Trustees and relevant community-based organisations both within and without these sites. Her questions will cover the conception of sexual equality in Islam, the contextual application of Muslim law on inheritance in the country and whether a deceased person's ethnicity, geographical habitation or livelihood (among other identities) influence her or his female relatives' disinheritance.

The resulting analysis will form part of Ms. Jadeed's PhD Thesis and will be presented to the University of Nairobi – School of Law for grading. Since this research is authorised by the National Commission for Science, Technology and Innovation (NACOSTI), a statutory body mandated to facilitate research in the country, copies of that Thesis would also be shared with NACOSTI.

We request to interview you for the study. Ms. Jadeed confirms the following:

i) All data collected for this research which is not from an official source will be made anonymous.
ii) All locations used for this research that might mean that private citizens contributing to the research could be identified will be made anonymous.
iii) All data collected in this research will be protected.
iv) All requests for confidentiality of specific and non-official information will be respected.

v) The researcher will avoid harm to respondents and will respect their dignity and autonomy at all times.

Respondent's consent:

I agree to grant an interview

NAME: .....

SIGNATURE: .....

DATE: .....

Appendix 10A: Focus Group Consent Form

PROJECT: THE INHERITANCE RIGHTS OF MUSLIM WOMEN IN KENYA: REALITY OR RHETORIC?

Ms. Moza Jadeed, a PhD student at the University of Nairobi – School of Law, is conducting a research on Kenyan Muslim Women's Inheritance Rights. The study seeks to establish whether Muslim women in Kenya enjoy their actual inheritance portions as stipulated under Muslim law and safeguarded by the Constitution.

Ms. Jadeed will carry out her research in four selected counties: Mombasa, Lamu, Garissa and Kakamega. In these research sites, Ms. Jadeed will interact with Muslim females who have suffered disinheritance (as well as those who have succeeded to inherit) together with their families, friends and neighbours. She will also interview several stakeholders in the application of Muslim law in the country such as Muslim scholars, Kadhis, Judges, lawyers, legal aid institutions, chiefs, Public Trustees and relevant community-based organisations both within and without these sites. Her questions will cover the conception of sexual equality in Islam, the contextual application of Muslim law on inheritance in the country and whether a deceased person's ethnicity, geographical habitation or livelihood (among other identities) influence her or his female relatives' disinheritance.

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ii) All locations used for this research that might mean that private citizens contributing to the research could be identified will be made anonymous.
iii) All data collected in this research will be protected.
iv) All requests for confidentiality of specific and non-official information will be respected.

v) The researcher will avoid harm to respondents and will respect their dignity and autonomy at all times.

Participants' consent:

I agree to take part in a Focus Group Discussion:

NAME	Sex (M/F)	County	Period of living/staying in the county	SIGNATURE

Appendix 11: NACOSTI Research Authorisation Letter

NACOSTI

NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY AND INNOVATION

Telephone: +254-20-2213471, 2241349, 310571, 2219420
Fax: +254-20-318245, 318249
Email: secretary@nacosti.go.ke
Website: www.nacosti.go.ke
When replying please quote

9th Floor, Utalii House
Uhuru Highway
P.O. Box 30623-00100
NAIROBI-KENYA

Ref: No.

Date:

27th May, 2015

NACOSTI/P/15/0514/6284

Moza Ally Jadeed
University of Nairobi
P.O Box 30197-00100
NAIROBI.

RE: RESEARCH AUTHORIZATION

Following your application for authority to carry out research on ***"The inheritance rights of muslim women in Kenya: Reality or rhetoric?,"*** I am pleased to inform you that you have been authorized to undertake research in **Mombasa County** for a period ending **31st December, 2016.**

You are advised to report to **the Court Registrars of selected Courts, the County Commissioners and the County Directors of Education, Mombasa, Garissa, Lamu and Kakamega Counties** before embarking on the research project.

On completion of the research, you are expected to submit **two hard copies and one soft copy in pdf** of the research report/thesis to our office.

DR. S. K. LANGAT, OGW
FOR: DIRECTOR GENERAL/CEO

Copy to:

The Court Registrars
Selected Courts.

The County Commissioner
Mombasa County.

National Commission for Science, Technology and Innovation is ISO 9001: 2008 Certified

The County Director of Education
Mombasa County.

The County Commissioner
Garissa County.

The County Director of Education
Garissa County.

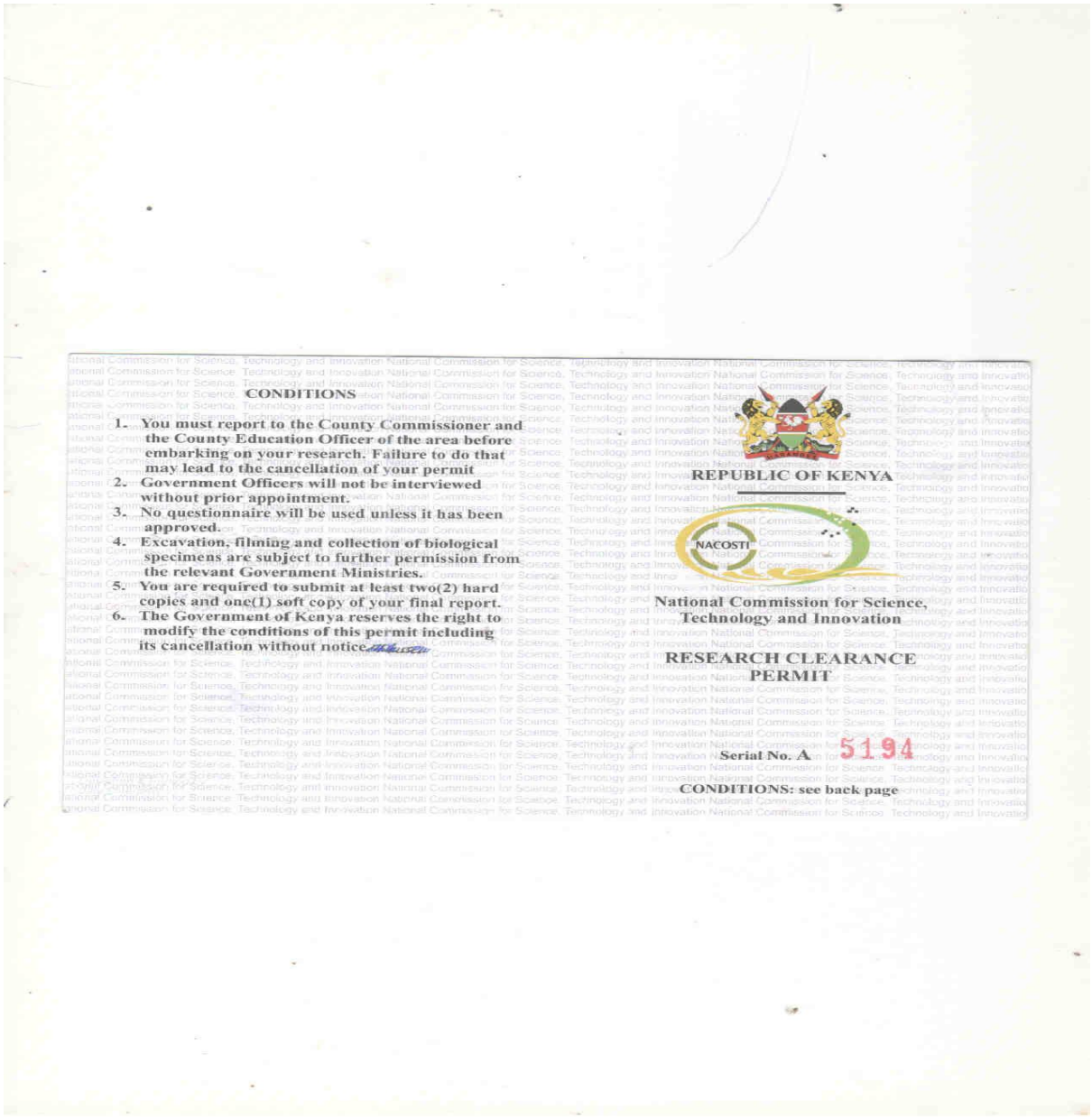
The County Commissioner
Lamu County.

The County Director of Education
Lamu County.

The County Commissioner
Kakamega County.

The County Director of Education
Kakamega County.

Appendix 11A: NACOSTI Research Permit



CONDITIONS

1. You must report to the County Commissioner and the County Education Officer of the area before embarking on your research. Failure to do that may lead to the cancellation of your permit
2. Government Officers will not be interviewed without prior appointment.
3. No questionnaire will be used unless it has been approved.
4. Excavation, filming and collection of biological specimens are subject to further permission from the relevant Government Ministries.
5. You are required to submit at least two(2) hard copies and one(1) soft copy of your final report.
6. The Government of Kenya reserves the right to modify the conditions of this permit including its cancellation without notice.

REPUBLIC OF KENYA

NACOSTI

National Commission for Science, Technology and Innovation

RESEARCH CLEARANCE PERMIT

Serial No. A 5194

CONDITIONS: see back page

THIS IS TO CERTIFY THAT:
MS. MOZA ALLY JADEED
of UNIVERSITY OF NAIROBI,
82474-80100 Mombasa,has been
permitted to conduct research in
Mombasa County including Gamba
Lamu and Kakamega

on the topic: *THE INHERITANCE RIGHTS OF MUSLIM WOMEN IN KENYA: REALITY OR RHETORIC?*

for the period ending:
31st December,2016

Permit No : NACOSTI/P/15/0514/6284
Date Of Issue : 27th May,2015
Fee Recieved :Ksh 2,000

.....
Applicant's Signature

.....
Director General
National Commission for Science, Technology & Innovation

Appendix 12: Research Authorisation from Garissa County Commissioner

THE PRESIDENCY

MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT

Telegrams: "COUNTY" GARISSA.
Telephone: Garissa
ccgsacounty@gmail.com

OFFICE OF THE
COUNTY COMMISSIONER
P.O BOX 1-70100
GARISSA COUNTY

When replying please quote

REF.NO: CC/EDU/7/3/(16)

17 September, 2015

Moza Ally Jadeed
University of Nairobi
P. O. BOX 30197-00100
NAIROBI

RE: RESEARCH AUTHORIZATION

Refer to your letter Ref No. NACOSTI/P/15/0514/6284dated 27th May, 2015 from the Director General/CEO National Commission for Science Technology and Innovation application for authority to carry out research on "***The inheritance rights of Muslim women in Kenya: Reality or rhetoric?.***"

I am pleased to inform you that you have been authorized to undertake your research in Garissa County.

COUNTY COMMISSIONER GARISSA
P.O. Box 1 - 70100,
Email:ccgsacounty@gmail.com

A. S. AHMED
FOR: COUNTY COMMISSIONER
GARISSA COUNTY.

Appendix 12A: Research Authorisation from Mombasa County Commissioner

OFFICE OF THE PRESIDENT
MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT

Telegrams: "PROVINCER", COAST
Telephone: Mombasa 2311201
Fax No.041-2013846
Email: msacountycommissioner@yahoo.com
when Replying please quote

COUNTY COMMISSIONER'S OFFICE
P.O. BOX 90424-80100
MOMBASA
Tel.0722371400

REF. NO. MCC/ADM.25/123 **6th October, 2015**

TO WHOM IT MAY CONCERN

RE: RESEARCH AUTHORIZATION – Ms. MOZA ALLY JADEED - ID/NO. 22394738

This is to confirm that Ms Moza Ally Jadeed, holder of ID No. 22394738 has been authorized by the National Commission for Science Technology and Innovation to carry out Research on "**The Inheritance rights of Muslim women in Kenya: Reality or rhetoric? In Mombasa County** for a period ending 31st December, 2016.

Any assistance given to her will be highly appreciated.

Thank you.

(APP) **NELSON MARWA SOSPETER**
COUNTY COMMISSIONER
MOMBASA COUNTY

c.c: All Deputy County Commissioners
MOMBASA

Appendix 12B: Research Authorisation from Lamu County Commissioner

OFFICE OF THE PRESIDENT

MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT

Telegrams: "DISTRICTER', Lamu West
Telephone: Lamu 633511
Fax: 042-4633511
Email: lamudistrict@yahoo.com
When replying please quote:

COUNTY COMMISSIONER,
LAMU COUNTY,
P.O. BOX 41 – 80500,
LAMU.

Ref. No.**ADM.15/3 VOL.IV/166**

Date: **19th November, 2015**

ACC AMU
ACC FAZA
ACC KIZINGITINI

RE: RESEARCH AUTHORIZATION – MOZA ALLY JADEED.

The above named has been authorized by the National Commission for Science Technology and Innovation to carry out research on "The Inheritance Rights of Muslim Women in Kenya Reality or rhetoric" The research will be done between now & end of 31st December 2016.

The purpose of this letter is to inform you of the authority and ask you to pass the same message to officers under your supervision.

(PAUL ROTICH)
FOR: COUNTY COMMISSIONER
LAMU COUNTY

Cc:
- Moza Ally Jadeed

Appendix 12C: Research Authorisation from Kakamega County Commissioner

REPUBLIC OF KENYA

THE PRESIDENCY

MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT

Telegrams
Telephone: 056-31131
Fax-056-31133
Email-cckakamega12@yahoo.com

When replying please quote

COUNTY COMMISSIONER
KAKAMEGA COUNTY
P.O BOX 43-50100
KAKAMEGA

DATE: 5TH NOVEMBER, 2015

REF: ED.12/1/VOL.II/31

MOZA ALLY JADEED
UNIVERSITY NAIROBI
P.O. BOX 30197 - 00100
NAIROBI

RE: RESEARCH AUTHORIZATION

Following your authorization vide letter Ref: NACOSTI/P15/0514/6284 dated 27th May, 2015 by National Commission of Science, Technology and Innovation to undertake research on "***the inheritance rights of Muslim women in Kenya: Reality or rhetoric?,***" for a period ending 31st December September, 2016.

Iam pleased to inform you that you have been authorized to carry out the research on the same.

WILSON MWANGI
FOR: COUNTY COMMISSIONER
KAKAMEGA COUNTY

COUNTY COMMISSIONER - KAKAMEGA

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Appendix 12D: Research Authorisation from Kakamega County Director of Education

MINISTRY OF EDUCATION SCIENCE & TECHNOLOGY

Telephone: 056 - 30411
FAX : 056 – 31307
E-mail : wespropde@yahoo.com
When replying please quote.

COUNTY DIRECTOR OF EDUCATION
KAKAMEGA COUNTY
P. O. BOX 137 - 50100
KAKAMEGA

STATE DEPARTMENT OF EDUCATION

REF:WP/GA/29/17/VOL.III/ **5th November, 2015**

Moza Ally Jaded
University of Nairobi
P. O. Box 30197-00100
NAIROBI

RE: RESEARCH AUTHORIZATION

The above has been granted permission by National Council for Science & Technology vide letter Ref. NACOSTI/P/15/0514/6284 to carry out research on **"The inheritance rights of muslim women in Kakamega County, Kenya: Reality or rehetoric?"** for a period ending, 31st December, 2016.

Please accord her any necessary assistance she may require.

pp **MURERWA S. K. (MRS)**
COUNTY DIRECTOR OF EDUCATION
KAKAMEGA COUNTY

Appendix 13: List of Key Informants

No	**Name***	**Sex**	**Designation**
1	Yasin Aboud	M	Executive Director, Ukweli na Haki
2	Abud Bashamaa	M	Deputy Principal, Deputy Principal, Madrasatul Ayesha
3	Golicha Ismail	M	Official, Council for Imams & Preachers of Kenya – Garissa Branch
4	Hashim Abdillah	M	Treasurer, Supreme Council of Kenya Muslims – Garissa Branch
5	Faiza Khan	F	Executive Director, Pastoralist Women Initiative
6	Alawi Dawood	M	Founding Member, Garissa Civil Society Network
7	Ahmed Ismail	M	Executive Director, Femalekind
8	Musa Shaaban	M	Kadhi
9	Ahmed Guyo	M	Kadhi
10	Ahmed Mohdhar	M	Chief Kadhi
11	Hammad Kassim	M	Retired Chief Kadhi
12	Abdulswamad Khamis	M	Principal Kadhi
13	Joshua Keynan	M	High Court Judge
14	Umi Abdallah	F	Sub-chief
15	Bare Dabor	M	Paralegal Coordinator
16	Peter Oloo	M	Public Trustee
17	Angus Mulili	M	Public Trustee
18	Kulthum Abdulwahab	F	Project Officer, Femalekind
19	Abdillah Gedi	M	Naibul Boqor
20	Deghwo Stambuli	M	Boqor
21	Dekor Ahmed	M	Chief
22	Shufaa Ahmed	F	Religious teacher
23	Asmaa Umar	F	Religious teacher, Madrasatul Inaba
24	Nabila Moosa	F	Religious teacher
25	Abubakar Abdi	M	*Sheikh* and *imaam*
26	Annette Mbogoh	F	Advocate and Programme Coordinator, Kituo Cha Sheria – Mombasa
27	Jackline Polo	F	Advocate and Senior Legal Officer, FIDA Kenya – Mombasa
28	Yunus Abdul	M	*Imaam*
29	Mwanajuma Swaleh	F	Advocate
30	Yahya Abdulkarim	M	Advocate
31	Fatma Imran	F	Chairlady, Kenya Muslim Women Alliance
32	Adam Hamza	M	Advocate
33	Magdalene Okwaro	F	High Court Judge

34	Bintishungu Juma	F	Chairlady, Sauti ya Wanawake – Likoni Chapter
35	Muhdhar Khitamy	M	Chairman, Supreme Council of Kenyan Muslim (SUPKEM)
36	Hamadi Mwamtuza	M	Advocate
37	Mwanarusi Chitenga	F	Religious teacher, Madrasatul Inaba
38	Ahmad Akida	M	Religious teacher, Madrasatul Taqwa
39	Rosalia Sitiwa	F	High Court Judge
40	Khamisi Mwenesi	M	*Imaam*
41	Mohammed Khamis	M	*Imaam*
42	Hatib Hassan	M	Religious Leader
43	Khalid Ratemo	M	Kadhi
44	Omar Mahmoud	M	Religious Teacher, Madrasatul al-Answar Islamiyyah
45	Peter Oyugi	M	Chief
46	Salim Okongo	M	Sub-chief
47	Mwanajuma Ali	F	Village elder
48	Yahya Mudavadi	M	Volunteer, Mumias Muslim Community Programme
49	Khamisa Ali	F	High Court Judge
50	Mahmoud Ishaq	M	Kadhi
51	Abdallah Ateka	M	National Chairman, Council of Imams & Preachers of Kenya
52	Julius Kiprotich	M	Public Trustee
53	Wanyama Hemed	M	Curator, Nabongo Cultural Center
54	Sauda Athman	F	Religious Teacher, Madrasatul Fatihul Khayrat
55	Hammad Bahero	M	Scholar
56	Abdallah Bwanapwani	M	Chief
57	Anwar Omar	M	Naibul Kadhi
58	Abeid Bini	M	Village elder
59	Mbarak Asmani	M	*Imaam*
60	Mwinyi Khamis	M	Village elder
61	Twalib Heri	M	Kadhi
62	Ahmed Hamza	M	Former Registry Clerk
63	Opiyo James	M	Public Trustee
64	Mwijaka Protus	M	High Court Judge
65	Kennedy Njogu Kuria	M	Advocate
66	Mbwana Mustafa	M	Village elder
67	Abdallah Hajj	M	Principal, Madrasatul Badru
68	Abdiya Suo	F	Women's Rights Activist
69	Harun Abuu	M	Scholar

70	Zuwena Riyadh	F	Religious teacher, Madrasatul Mahdhratin Twayba
71	Kassim Bashamakh	M	Senior Chief
72	Marende Omwenga	M	Advocate
73	Salim Muhammad	M	Principal, Muslim Academy
74	Shariff Aboud	M	Chairman, Council of Imams & Preachers of Kenya – Lamu Branch
75	Maulid Kale	M	Scholar
76	Abdallah Khatib	M	Principal, College of Islamic Studies – Kikambala
77	Muhsin Ahmed	M	Advocate
78	Hassan Farhan	M	Scholar, Majlis ‘Ulamaa
79	Isa Ismail	M	Kadhi
80	Rashid Ali Omar	M	Deputy Chief Kadhi
81	Joshua Mwakireti	M	High Court Judge
82	Soud Kamau	M	Advocate
83	Billow Gudo	M	Preacher

*Save for the holders of specific offices or institutions, these names are pseudo names and have been used as such in the research.

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