Al-Aḥwāl: Jurnal Hukum Keluarga Islam
ISSN: 2085-627X (p); 2528-6617(e)
Vol. 16, No. 1 (2023), pp.43-68, DOI: 10.14421/ahwal.2023.16103

THE CONUNDRUM OF INTESTATE SUCCESSION FOR MUSLIMS IN UGANDA
Qadhis Court, Women's Rights, and Islamic Inheritance Law Issues

Jamil Ddamulira Mujuzi
Faculty of Law, University of the Western Cape, South Africa
Email: djmujuzi@gmail.com

Abstract

During the 2018–2022 process to amend the Succession Act, Muslims in Uganda requested a separate law to regulate their inheritance. However, this was rejected by the Parliamentary Committee. As a result, Muslims are governed by the Succession Act for intestate succession. This article aims to examine the legal uncertainty regarding the status of Qadhis' courts in Uganda and its impact on the unclear enforcement of Muslim inheritance law, particularly intestate succession, through these courts. Relying on the case law study, it is safe to argue that Qadhis' courts do not exist legally. Although the Constitution provides for the right to equality, allowing Muslims to follow Sharia in the distribution of an estate can be justified under the Constitution's guarantee of equality, as long as the rights of individual Muslims are balanced against the interests of the Muslim community. Overall, navigating the legal landscape of inheritance for Muslims in Uganda is a complex issue with various legal and practical considerations.

[Selama proses amandemen Undang-Undang Kewarisan pada 2018–2022, umat Islam di Uganda meminta undang-undang terpisah untuk mengatur kewarisan mereka. Namun, hal itu ditolak oleh Komite Parlemen. Akibatnya, umat Islam diatur oleh Undang-Undang Kewarisan yang lama. Artikel ini bertujuan untuk mengkaji ketidakpastian hukum mengenai status pengadilan Qadhis di Uganda dan dampaknya terhadap penegakan hukum kewarisan Muslim, khususnya kewarisan tanpa wasiat. Berdasarkan studi kasus, dapat dikatakan bahwa pengadilan Qadhis tidak ada secara legal. Meskipun Konstitusi memberikan hak atas

kesetaraan, mengizinkan umat Islam untuk mengikuti Syariah dalam pembagian harta waris dapat dibenarkan di bawah jaminan konstitusi atas kesetaraan, selama hak-hak individu Muslim seimbang dengan kepentingan komunitas Muslim. Secara keseluruhan, menavigasi lanskap hukum kewarisan bagi umat Islam di Uganda merupakan masalah yang kompleks dengan berbagai pertimbangan hukum dan praktis.]

Keywords

Inheritance, intestate succession, Qadhis court, women discrimination

Article History

Received 28 Maret 2023
Approved for Publication 23 April 2023

To Cite this Article

Jamil Ddamulira Mujuzi, "THE CONUNDRUM OF INTESTATE SUCCESSION FOR MUSLIMS IN UGANDA: Qadhis Court, Women's Rights, and Islamic Inheritance Law Issues," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 16, no. 1 (2023): 43-68, https://doi.org/10.14421/ahwal.2023.16103.

Introduction

Muslims are estimated to be between 14 and 35 percent of the Ugandan population.[1] Muslim marriages and divorces are governed by the Marriage and Divorce of

[1] According to the most recent census, conducted in 2014, 82 percent of the population is Christian. The largest Christian group is Roman Catholic with 39 percent; 32 percent of the population is Anglican, and 11 percent is Pentecostal Christian. According to official government estimates, Muslims constitute 14 percent of the population. The UMSC estimates Muslims (primarily Sunni) are closer to 35 percent of the population. There is also a small number of Shia Muslims, mostly in Kampala and the eastern part of the country, particularly in the Mayuge and Bugiri Districts.' See US Department of State, '2020 Report on International Religious Freedom: Uganda' (12 May 2021). Available at https://www.state.gov/reports/2020-report-on-international-religious-freedom/uganda/

Mohammedans Act.[2] Unlike in the case of marriage where Muslims have their own legislation, section 27 of the Succession Act,[3] which deals with intestate succession, is applicable to the estate of every intestate in Uganda – irrespective of his or her religious background,[4] such as Anderson who notes that civil regulation on marriage is applicable for immigrant regardless the origin nationality.[5] The ambiguous position of intestate succession has been criticized by, amongst others, the Muslim Centre for Justice and Law.[6] This should be contrasted with the position in other African countries such as Kenya[7] and Tanzania[8] where the estate of an intestate Muslim is governed by Islamic law. Article

2 Marriage and Divorce of Mohammedans Act (Chapter 252)(1906).

3 Succession Act, Cap 162 (1906).

4 However, the Succession of Ordinance (1906), the Governor's Order (1906) and the relevant case law stipulated that the Succession Ordinance (1906) was not applicable to the estate of intestate Muslims. See generally, J N D Anderson, "Uganda: The Law of Succession in Uganda An Unreported Case," *Journal of African Law* 7, no. 3 (1963): 201–6, https://doi.org/10.1017/S0021855300002096. It has also been stated that '[i]n Uganda, the Muslims in Uganda follow religious provisions of "Sharia law" in determining succession matters. By a Legal Notice Mohammedans were excluded from the operations of part V of the Succession Ordinance of 1906 which provided for distribution of an intestate's property. Therefore, the Mohammedans were entirely left to rely on the Sharia law in cases of intestate. This position has not changed much over the past decades. The distribution of property of a deceased among the Muslims is believed to have been determined by God in such a way that a widow is entitled to a quarter of the man's wealth, in case the couple did not have children. Where there are children, the wife is entitled to one eighth of the husband's wealth. The girl children receive half of what the boys receive. This distribution takes place after settlement of a deceased's death. Property distribution is done by an experienced Sheikh who is appointed by the Uganda Muslim Supreme Council. The recipients are expected to sign an agreement showing that they are contented with the distribution of property' Uganda Law Reform Commission, Study Report on The Review of Laws on Succession in Uganda (July 2013) pp. 57 - 58. Available at https://www.ulrc.go.ug/sites/default/files/Final%20succession%20study%20report%20presented%20to%20Commissioners.pdf

5 Anderson.

6 Muslim Centre for Justice and Law, 'Position Paper on Islam and Inheritance: A Case Study of the Muslim Traditions versus the Ugandan Legal Regime' (June 2017). Available at http://www.mcjl.ug/wp-content/uploads/2018/10/Position-paper-on-Islam-and-inheritance-Dr-Haafiz-Walusimbi-3.pdf , accessed on 28 March 2023.

7 Section 2(4) of the Law of Succession Act, Cap 160 provides that 'the provisions of Part VII [of the Act] relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim.' See also Elizabeth Cooper, "Challenges and Opportunities in Inheritance Rights in Kenya," *Chronic Poverty Research Centre Inheritance Working Paper Series*, 2011, https://doi.org/10.2139/ssrn.1775756; Mariaflavia Harari, "Women's Inheritance Rights and Bargaining Power: Evidence from Kenya," *Economic Development and Cultural Change* 68, no. 1 (2019): 189–238, https://doi.org/10.1086/700630; Moza Jadeed, Attiya Waris, and Celestine N Musembi, "The Application of Islamic Inheritance Law in Independent and Contemporary Kenya: A Muslim's Right to Equality and Freedom from Discrimination," *Iowa L Rev* 837 (2020): 841, https://doi.org/10.47348/ANULJ/v8/i1a2.

8 Tamar Ezer, "Inheritance Law in Tanzania: The Impoverishment of Widows and Daughters," *Geo. J. Gender & L.* 7 (2006): 599, https://ssrn.com/abstract=3825933; Abdulkadir Hashim, "Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation," *Journal of Muslim Minority Affairs* 25, no. 3 (2005): 449–60, https://doi.org/10.1080/13602000500408534; Mark J Calaguas, Cristina M Drost, and Edward

129(1) of the Constitution (1995) provides that courts in Uganda shall consist of courts of record[9] and 'such subordinate courts as Parliament may by law establish, including Qadhis' courts for marriage, divorce, inheritance of property and guardianship, as may be prescribed by Parliament.'

The drafting history of the Constitution shows that the Qadhis' court was specifically mentioned in Article 129(1)(d) because the drafters of the Constitution were convinced, inter alia, that the Muslims regard issues of personal law, including inheritance, as an integral part of their worship.[10] As the discussion below shows, although Parliament has not yet enacted legislation establishing Qadhis' court, some High Court judges have held that such courts exist. Although section 27 of the Succession Act is applicable to the property of an intestate Muslim, some judges of the High Court have held that such property is governed by Muslim law (Sharia). As will be discussed below, before its amendment in 2022, the Constitutional Court found that section 27 was unconstitutional for discriminating against women. In a 2022 amendment to section 27 to comply with the Supreme Court's 2007 decision, Parliament rejected a proposal from the Muslim community that section 27 should not be applicable to Muslims.

In this paper, the author argues that the courts have erred in holding that the property of an intestate Muslim is governed by Sharia and that Qadhis court in Uganda is competent within the meaning of Article 129(1)(d) of the Constitution. The author also argues that some of the reasons given by Parliament to reject the proposal by Muslims that section 27 of the Succession Act should not be applicable to Muslims are flawed. The author suggests ways in which the issue of the estate of an intestate Muslim may be addressed in Uganda. The discussion will start with highlighting the circumstances in which 27 was declared unconstitutional.

R Fluet, "Legal Pluralism and Women's Rights: A Study in Postcolonial Tanzania," *Colum. J. Gender & L.* 16 (2007): 471, https://doi.org/10.2139/ssrn.934668.

9 The Supreme Court, the Court of Appeal and the High Court. Under Article 137 of the Constitution, the Court of Appeal also sits as the Constitutional Court.

10 Jamil Ddamulira Mujuzi, "The Entrenchment of Qadis' Courts in the Ugandan Constitution," *International Journal of Law, Policy and the Family* 26, no. 3 (2012): 306–26, https://doi.org/10.1093/lawfam/ebs009; Abdulkadir Hashim, "Servants of Sharīʿa: Qāḍīs and the Politics of Accommodation in East Africa," *Sudanic Africa* 16 (2005): 27–51.

Section 27 of the Succession Act: Why It Was Declared Unconstitutional

Before the Constitutional Court declared section 27 unconstitutional, it provided that:

> (1) Subject to sections 29 and 30, the estate of a person dying intestate, excepting his principal residential holding, shall be divided among the following classes in the following manner—(a) where the intestate is survived by a customary heir, a wife, a lineal descendant and a dependent relative— (i) the customary heir shall receive 1 percent; (ii) the wives shall receive 15 percent; (iii) the dependent relative shall receive 9 percent; (iv) the lineal descendants shall receive 75 percent of the whole of the property of the intestate, but where the intestate leaves no person surviving him capable of taking a proportion of his property under paragraph (a)(ii) or (iii) of this paragraph, that proportion shall go to the lineal descendants; (b) where the intestate is survived by a customary heir, a wife and a dependent relative but no lineal descendant— (i) the customary heir shall receive 1 percent; (ii) the wife shall receive 50 percent; and (iii) the dependent relative shall receive 49 percent, of the whole of the property of the intestate; (c) where the intestate is survived by a customary heir, a wife or a dependent relative but no lineal descendant— (i) the customary heir shall receive 1 percent; and (ii) the wife or the dependent relative, as the case may be, shall receive 99 percent, of the whole of the property of the intestate; (d) where the intestate leaves no person surviving him, other than a customary heir, capable of taking a proportion of his property under paragraph (a), (b) or (c) of this subsection, the estate shall be divided equally between those relatives in the nearest degree of kinship to the intestate; (e) if no person takes any proportion of the property of the intestate under paragraph (a), (b), (c) or (d) of this subsection, the whole of the property shall belong to the customary heir; (f) where there is no customary heir of an intestate, the customary heir's share shall belong to the legal heir.
>
> (2) Nothing in this section shall prevent the customary heir from taking a further share in the capacity of a lineal descendant if entitled to it in that capacity.
>
> (3) Nothing in this or any other section of this Act shall prevent the dependent relatives from making any other arrangement relating to the distribution or preservation of the property of the intestate provided that the arrangement is sanctioned by the court.

In *Law Advocacy for Women in Uganda v Attorney General*[11] the constitutionality of sections 2n (i) and (ii),[12] 14,[13] 15,[14] 23,[15] 26,[16] 27, 29,[17] 43,[18] and 44[19] of the Succession Act was challenged on the ground that they were discriminatory and therefore contrary to

11 Law Advocacy for Women in Uganda v Attorney General (Constitutional Petition 13 of 2005) [2007] UGSC 71 (05 April 2007).

12 Section 2n(i) and (ii) defined a legal heir to mean: 'the living relative nearest in degree to an intestate under the provisions set out in Part III to this Act together with and as varied by the following provisions—
(i) Between kindred of the same degree a lineal descendant shall be preferred to a lineal ancestor and a lineal ancestor shall be preferred to a collateral relative and a paternal ancestor shall be preferred to a maternal ancestor; (ii) where there is equality under subparagraph (i) of this paragraph, a male shall be preferred to a female.'

13 Section 14 provided that 'By marriage a woman acquires the domicile of her husband, if she had not the same domicile before.' However, it didn't provide that a man could also acquire the domicile of the wife.

14 Section 15 provided that '(1) Subject to subsection (2), the domicile of a wife during the marriage follows the domicile of her husband. (2) The domicile of a wife no longer follows that of her husband if they are separated by the sentence of a competent court.'

15 Section 23 provided that '(1) In the table of kindred in the First Schedule to this Act, the degrees are computed as far as the sixth, and are marked by numeral figures. (2) The person whose relatives are to be reckoned and his cousin-german or first cousin are, as shown in the table, related in the fourth degree, there being one degree of ascent to the father, and another to the common ancestor, the grandfather, and from him one of descent to the uncle, and another to the cousin-german, making in all four degrees. (3) A grandson of the brother and a son of the uncle, that is, a great-nephew and cousin-german, are in equal degree, being each four degrees removed. (4) A grandson of a cousin-german is in the same degree as the grandson of a great-uncle, for they are both in the sixth degree of kindred.'

16 Section 26 provided that '(1)The residential holding normally occupied by a person dying intestate prior to his or her death as his or her principal residence or owned by him or her as a principal residential holding, including the house chattels therein, shall be held by his or her personal representative upon trust for his or her legal heir subject to the rights of occupation and terms and conditions set out in the Second Schedule to this Act. (2)Any other residential holding possessed by the intestate at his or her death shall be held by his or her personal representative upon trust and, subject to the rights of occupation and terms and conditions set out in the Second Schedule to this Act, shall be dealt with in accordance with the remaining provisions of this Part. (3)Any dispute arising as to the exact area of any portion of land subject to this section or as to what person has the right to occupy the land or any part of it shall be settled by the personal representative. (4)Any person who is aggrieved by any decision of the personal representative under subsection (3) may appeal from the decision to a magistrate.'

17 Section 29 provided that '(1) No wife or child of an intestate occupying a residential holding under section 26 and the Second Schedule to this Act shall be required to bring that occupation into account in assessing any share in the property of an intestate to which the wife or child may be entitled under section 27. (2) No person entitled to any interest in a residential holding under section 26(1) shall be required to bring that interest into account in assessing any share in the property of an intestate to which that person may be entitled under section 27.'

18 Section 43 provided that '[a] father, whatever his age may be, may by will appoint a guardian or guardians for his child during minority.'

19 Section 44 provided that '(1) On the death of a father of an infant where no guardian has been appointed by the will of the father of the infant or if the guardian appointed by the will of the father is dead or refuses to act, the following persons shall, in the following order of priority, be the guardian or guardians of the infant child of the deceased— (a) the father or mother of the deceased; (b) if the father and mother of the deceased are dead, the brothers and sisters of the deceased; (c) if the brothers and sisters of the deceased are dead, the brothers and sisters of the deceased's father; (d) if the brothers and sisters of the deceased's father are dead, the mother's brothers; or (e) if there are no mother's brothers, the mother's father. (2) If there is no person willing or entitled to be a guardian under subsection (1)(a) to (e), the court may, on the application of any person interested in the welfare of the infant, appoint a guardian.'

Articles 21, 31 and 33 of the Constitution. With regards to section 27, it was argued that it was discriminatory because 'where a man dies intestate his property is distributed according to the percentage provided. The provision 'has no provision for female intestate.'[20] It was argued further that 'the section should apply to properties of both female and male' and that 'the percentage is oblivious to the contribution of the wife to the wealth in the home.'[21] The Attorney General's representative did not object to the petitioner's submissions. She conceded that section 27 is 'discriminatory in as far as it does not provide for equal treatment in the division of property of intestate of male and female' and that the section 'should apply to both.'[22] The Constitutional Court held that section 27 and the other impugned sections were 'inconsistent with and contravene Articles 21 (1) (2) (3) 31, 33(6) of the Constitution and they are null and void.'[23] In other words, the only reason why Section 27 was declared unconstitutional was that it was not applicable to women. However, even after being declared unconstitutional, some litigants and courts continued to refer to section 27. For the purposes of this article, the discussion will be limited to cases of intestate Muslims.

The Estate of Intestate Muslims before the Amendment of the Succession Act

The Succession Act is silent on whether section 27 excludes Muslim intestates. Since section 27 is applicable to 'the estate of a person dying intestate', it means that it was applicable to all persons irrespective of their religious backgrounds. There were conflicting High Court decisions on whether section 27 was applicable to the estate of an intestate Muslim. In *Tumusiime & 3 Others v Semakula*[24] the Court held that the estate of an intestate Muslim has to be distributed in accordance with the Succession Act.[25] The court followed the same approach in other cases.[26] However, there is a decision in which the High Court

[20] Law Advocacy for Women in Uganda v Attorney General (Constitutional Petition 13 of 2005) [2007] UGSC 71 (05 April 2007) p. 12.
[21] *Ibid*, p. 12.
[22] *Ibid*, p.13.
[23] *Ibid*, 14
[24] Tumusiime & 3 Others v Semakula (Civil Suit No.76 of 2013) [2017] UGCOMMC 84 (14 JULY 2017).
[25] *Ibid*, p.6.
[26] Aisha Nantume Tifu v Damulira Kitata James (HCT Civil Suit 77 of 2007) [2011] UGHC 7 (12 January 2011); Hajjati Saidati Sentamu v Kyagulanyi Yasin (Administration Cause 23 of 1996) [2001] UGHC 94 (01 March 2001); Safina Bakulimya & Anor v Yusufu Musa Wamala (Civil Appeal 68 of 2007) [2010]

came to a different conclusion. In *Kassim Ssejemba Kabogoza and others v Dauda Mukasa*[27] the estate of the intestate had been distributed according to Sharia and the appellant had objected to the share of property allocated to them by a Muslim scholar under Islamic law. However, the magistrate 'upset' this arrangement and applied section 27 of the Succession Act and awarded the appellant a larger share of the property although their argument was that as heirs, they were entitled to the whole property.[28] One of the issues before the High Court was whether the magistrate had erred when he distributed the estate of the deceased Muslim in accordance with section 27 of the Act.

In holding that the magistrate had erred, the High Court referred to Article 129(1)(d) of the Constitution which requires Parliament to establish Qadhis' courts, and held that unfortunately, Parliament has not yet enacted such a law and no such courts have been established as yet. The Muslims however apply Islamic law when it comes to the distribution of property where a sheik appointed by the Uganda Muslim Supreme Council in every district presides over the distribution of the intestate. The exception is when there is a valid Will. Under Islamic law, the distribution of the property of an intestate is provided for under the Quran. The Surah IV of the Quran states that the Islamic law of inheritance follows Quranic traditions in a pure form which are intended to promote a conflict-free succession of property which in essence gives predetermined rights to shares of each individual under their respective category.[29]

The High Court held that because the land formed part of the estate of the deceased who was Muslim, the magistrate 'erred in law to apply section 27 of the succession Act' by allocating an extra percentage of the deceased's estate to the appellant 'contrary to the sharia law to which both parties subscribe. The Appellants are not entitled to it under the Sharia law.'[30] In this decision, the High Court held that Islamic law, as opposed to the Succession Act, was applicable to the estate of an intestate Muslim. It is argued that this

UGHC 105 (15 June 2010); Nalongo Sebyala and Others v Musisi Nanzuuka (Civil Appeal 35 of 2021) [2023] UGHCLD 81 (31 March 2023) (the case was decided based on the Succession Act before it was amended in 2022).

27 Kassim Ssejemba Kabogoza and Others v Dauda Mukasa (HCT-03-CV-CA-0098-2015)(Arising From Kayunga Civil Suit. No 095/2012) (High Court, Jinja)(29 March 2021).

28 *Ibid*, p.12.

29 *Ibid*, p.12.

30 *Ibid*, p.13.

decision is not supported by the text of the Succession Act.[31] This is so because section 27 of the Act is applicable to all intestate succession irrespective of the religious background of the deceased. Another challenge associated with the High Court's decision is that it failed to appreciate that under Article 129(1)(d), Islamic law on inheritance has to be administered by a Qadhis' court. In other words, by a court of competent jurisdiction. Without that court, such a law cannot be administered. The next question is whether such courts do exist in Uganda.[32]

The Status of Qadhis' Courts in Uganda

As mentioned above, Article 129(1)(d) of the Constitution empowers Parliament to establish Qadhis' court 'for marriage, divorce, inheritance of property, and guardianship.' This means that such courts can only be in existence after being created by Parliament. Without such courts, there is nobody or a person to enforce the Islamic law of inheritance. The Marriage and Divorce of Mohammedans Act[33] does not establish any court.[34] There are conflicting High Court decisions on whether or not Qadhis' courts exist in Uganda. In some cases, the High Court has held that Qadhis' courts exist. For example, in *Kinawa Jamila and another v Asuman Bakali*[35] the dispute was whether the Qadhis court had made the correct decision to the effect that the first applicant was the lawful successor of the deceased's estate. In resolving this issue, the High Court held that the decision of the Sharia [Qadhis] Court was that Jamila Kinalwa was the lawful successor of the late Amina Bilibawa (hereinafter referred to as the deceased) and that she would be the proper person

31 Lynn Khadiagala, "The Failure of Popular Justice in Uganda: Local Councils and Women's Property Rights," *Development and Change* 32, no. 1 (2001): 55–76, https://doi.org/10.1111/1467-7660.00196.

32 Jennifer Okumu Wengi, "The Law of Succession in Uganda: Women, Inheritance Laws and Practices-Essays and Cases," 1994.

33 Marriage and Divorce of Mohammedans Act (Chapter 252). For a discussion of the validity of a Muslim marriage, see, for example, Ayiko v Lekuru (Divorce Cause 1 of 2015) [2017] UGHCFD 1 (17 February 2017); Mayi Bint Salim & 10 Others v Hajji Sulaiman Mayanja (Civil Appeal 37 of 2008) [2010] UGCA 39 (04 October 2010), See Jamil Ddamulira Mujuzi, "Presumption of Marriage in Uganda," *International Journal of Law, Policy and the Family* 34, no. 3 (2020): 247–71, https://doi.org/10.1093/lawfam/ebaa008; Jamil Ddamulira Mujuzi, "The Ugandan Customary Marriage (Registration) Act: A Comment," *Journal of Third World Studies* 30, no. 1 (2013): 171–91, http://hdl.handle.net/10566/3173.

34 Section 18 of the Act provides that 'Nothing in the Divorce Act shall authorise the grant of any relief under that Act where the marriage of the parties has been declared valid under this Act; but nothing in this section shall prevent any competent court from granting relief under Mohammedan law; and the High Court and any court to which jurisdiction is specially given by the Minister by statutory instrument shall have jurisdiction for granting that relief.'

35 Kinawa Jamila and Another v Asuman Bakali (Miscellenous Application No. 427 of 2014 Arising from Civil Suit No.06 of 2014, Sharia Court of Law at Iganga)(High Court, Jinja) (07 January 2019).

to be granted Letters of Administration with respect to the deceased's estate. The Court thus appointed Jamila Kinalwa as the successor of the deceased and further ordered that she be entitled to receive land.[36]

The Court concluded that the applicant 'as the successful party in the Sharia Court must be allowed to enjoy the fruits of its decision through execution.'[37] However, the Court does not explain under which law the Qadhis' court in question was established and in terms of which it was exercising its jurisdiction. In *Nabawanuka v Makumbi*[38] the petitioner filed the petition for, inter alia, divorce before the High Court. In reply, the respondent argued that the matter was *res-judicata* since it had already been dealt with by 'The Sharia Court of the Muslim Supreme Council.'[39] He added that 'a Sharia Court is a court of competent jurisdiction as provided for Under Article 129 (1) (d) of the Constitution and that 'the Sharia Court of the Muslim Supreme Council is such Court that is envisaged under the Marriage and Divorce of Mohammedans Act.'[40] In response, the respondent argued that 'Parliament has not yet operationalized Art. 129 (1) (d) of the Constitution which requires Parliament to establish Qadhi's courts and that if there are such Courts in operation they are operating outside the dictates of Art.129 and are consequently incompetent.'[41] The Court agreed with the respondent that 'Qadhis Courts envisaged under Art 129 (1) (d) of the Constitution have not yet been established' but took issue with the argument that 'the Sharia Courts currently operating are operating outside the law.'[42] The Court referred to Article 274 of the Constitution which empowers it to interpret any law that was enacted before the coming into force 'with such modifications, adaptations, qualifications, and exceptions as may be necessary to bring it into conformity with this constitution.'[43] Against that background, the Court referred to the Marriage and Divorce of Mohammedans Act and held that it was in existence before the coming into force of the Constitution and had to be interpreted in the light of Article 274. The Court held that 'the Sharia Courts of the Muslim Supreme Council are operating within the law and are

36 *Ibid*, p. 2.
37 *Ibid*, p.3.
38 Nabawanuka v Makumbi (Divorce Cause 39 of 2011) [2013] UGHCFD 3 (13 February 2013).
39 *Ibid*, p.2
40 *Ibid*, p.2.
41 *Ibid*, p.3.
42 *Ibid*, p.4.
43 *Ibid*, p.4.

competent courts to handle divorce cases and grant relief.'[44] The Court added that although the High Court has jurisdiction to grant a divorce to persons who conducted a Muslim marriage, 'the law applicable in such cases must be Mohammedans law.' In one case, the High Court held that the divorce and custody orders issued by the Sharia courts were valid.[45] It is evident that in the above decisions, the High Court was of the view that Sharia courts exist in Uganda. However, in *Kassim Ssejemba Kabogoza and others v Dauda Mukasa*[46] the High Court referred to Article 129(1)(d) of the Constitution and held that '[u]nfortunately, Parliament has not yet enacted such a law and no such courts have been established as yet.'[47] There are also cases in which the High Court has held that a magistrate's court has jurisdiction to dissolve Muslim marriages.[48] This implies that Qadhis' courts do not exist.

It is submitted that the correct view is that Parliament has not yet enacted legislation to establish the Qadhis' courts as contemplated in Article 129(1)(d). The drafting history of Article 129(1)(d) shows that the drafters of the Constitution were of the view that a specific piece of legislation will be enacted to establish Qadhis' courts and stipulated, inter alia, their composition and jurisdiction.[49] As of the time of writing, Parliament had not yet enacted such legislation. This means that such courts do not exist. Our attention turns to the amendments to the Succession Act.

[44] *Ibid*, p.4. For a detailed discussion of how courts have interpreted Article 274 of the Constitution, see Jamil D Mujuzi, "Construing Pre-1995 Laws to Bring Them in Conformity with the Constitution of Uganda: Courts' Reliance on Article 274 of the Constitution to Protect Human Rights," *African Human Rights Law Journal* 22, no. 2 (2022): 520–47, https://doi.org/10.17159/1996-2096/2022/v22n2a9; Jamil Ddamulira Mujuzi, "The Contribution of Notions of Religion in Drafting Some of the Provisions in the 1995 Constitution of Uganda," *Nordic Journal of African Studies* 28, no. 2 (2019): 16, https://doi.org/10.53228/njas.v28i2.434.

[45] In Re: M.N. [infant] (Adoption Cause 289 of 2013) [2013] UGHCFD 22 (17 December 2013) p. 2, the High Court held observed that '[t]he facts of the instant situation are similar to those in Khardra Mhamme Warsame FC 89/2012 (Mukiibi J). In that case the applicant intended to migrate to Canada with her children. The American embassy [sic] did not issue a visa requesting that she first obtains a custody order from the High Court. The sharia court in Uganda had granted her divorce and custody of the children. The learned Judge ruled that the sharia court made a valid decision. He respected and stood by the order given by the sharia court in respect of custody of the two children.'

[46] Kassim Ssejemba Kabogoza and Others v Dauda Mukasa (HCT-03-CV-CA-0098-2015)(Arising From Kayunga Civil Suit. No 095/2012) (High Court, Jinja)(29 March 2021)

[47] *Ibid.*

[48] See for example, Hajji Kasoz Abdallah v Nalwoga Nakato (Civil Revision No.004 of 2018) (31 March 2021) (High Court at Mpigi); Darausi Tebandeke v Lugolobi Saidat, (Revision Application No. 6 of. 2011).

[49] JD Mujuzi 'The Entrenchment of Qadis' courts in the Ugandan Constitution' (2012) 26(3) International Journal of Law, Policy and the Family 306 - 326.

Amendments to section 27 under the Succession Amendment Act of 2022: The Committee Clarification

As mentioned above, in April 2007, the Constitutional Court declared section 27 'null and void.' This meant that it ceased to be part of Ugandan law. The effect was that there was no law governing both male and female intestates. This problem had to be addressed by the legislature and it is against that background that two Bills (the 2018 Bill and the 2019 Bill) were introduced in Parliament to amend the Succession Act and regulate the intestate succession.[50] The first Bill (the 2018 Bill) was a Private Member's Bill whereas the second Bill (the 2019 Bill) was drafted by the Office of the Attorney General. Clause 13 of the 2018 Bill suggested that section 27 should be amended to provide, inter alia, that:

> (l) Subject to sections 29 and 30, the estate of an intestate, except his or her principal residential property or other residential property, shall be divided among the following classes in the following manner- (a) where the intestate is survived by a spouse, a lineal descendant and a dependent relative - (i) the spouse shall receive 50 percent; (ii) the dependant relatives shall receive 9 percent; (iii) the lineal descendants shall receive 41 percent of the whole of the property of the intestate, (b) where the intestate leaves no surviving spouse or dependant relative under paragraph (a) (i) or (ii) of this paragraph capable of taking a proportion of his or her property, that proportion shall go to the lineal descendants; (c) where the intestate is survived by a spouse and a dependent relative but no lineal descendant - (i) the spouse shall receive 80 percent; and (ii) the dependent relative shall receive 20 percent, of the whole of the property of the intestate; (d) where the intestate is survived by a spouse or a dependent relative but no lineal descendant, the spouse or the dependent relative, as the case may be, shall receive 100 percent, of the whole of the property of the intestate; (e) where the intestate leaves no person surviving him or her, capable of taking a proportion of his or her property under paragraph (a), (b), (c) or (d), the estate shall be divided equally between the relatives nearest in kinship to the intestate; (f) where the intestate leaves no person surviving him or her, capable of taking a proportion of his or her property under paragraph (a), (b), (c), (d) or (e), the whole of their property shall be managed by the Administrator General in accordance with the Administrator General's Act.

On the other hand, Clause 7 of the 2019 Bill had proposed:

[50] Consolidated Report of the Sectoral Committee on Legal and Parliamentary Affairs on the Succession (Amendment) Bill 2018 and the Succession (Amendment) Bill, 2019 (February 2021) p.5

> to amend section 27 of the Succession Act to (a) Maintain the distribution scheme under section 27 as it is; (b) Expand the provision to apply to both male and female intestates as well as to spouses in a marriage; (c) reserve 20% of the estate to be held in trust for the education, maintenance, and welfare of the lineal descendants and minor children.[51]

In both cases, the provision would apply to males and females. However, the 2018 Bill was more detailed than the 2019 one on the percentages that should be allocated to the respective beneficiaries. Parliament decided to consolidate the two Bills. Before the consolidated Bill was debated in Parliament, the Sectoral Committee on Legal and Parliamentary Affairs wrote a report which, inter alia, explained the rationale behind each amendment and the people or organizations it consulted for the purpose of allowing citizens to take part in the law-making process. The Uganda Muslim Supreme Council was one of the 'people' consulted by the Committee.[52] After explaining the concept of intestacy and the circumstances in which section 27 was declared unconstitutional,[53] the Committee explained some of the weaknesses of the Bill. For the purposes of this article, it noted that the distribution scheme does not take into account religious requirements, especially of the Muslim faith, during the distribution of property. It should be noted that whereas Uganda is a secular state, Article 29 (1) (c) of the Constitution guarantees a person's freedom to practice any religion and manifest such practice which shall include the right to belong to and practice the practices of any religious body or organization. The Committee further notes that religious practices have been recognized as an influential factor in determining succession matters among certain sects of people. The Committee observes that Muslims in Uganda follow religious provisions of 'Sharia law and hadith as stipulated in the Koran in determining succession matters. The Committee also notes that Article 129 (1) (d) of the Constitution directs Parliament to establish Qadhi Courts for purposes of dealing with matters involving marriage, divorce, and inheritance of property and guardianship. It is the committee's considered opinion that the distribution scheme as prescribed in section 27 is not in accordance with the Koran and hadith and is further a contravention of Article 129

[51] *Ibid*, p.18.
[52] *Ibid*, p.6.
[53] *Ibid*, p.20.

(1) (d) which directs Parliament to prescribe a separate court [sic] to handle matters of Islamic inheritance.[54]

The Committee added that it was reliably informed by the Muslim Supreme Council that the distribution of the property of a deceased among Muslims is believed to have been determined by God in such a way that a widow is entitled to a quarter of the man's wealth, in case the couple did not have children. Where there are children, the wife is entitled to one-eighth of the husband's wealth. The girl child receives half of what the boys receive. This distribution takes place after the settlement of a deceased's debts. Property distribution is done by an experienced Sheikh who is appointed by the Uganda Muslim Supreme Council. The recipients are expected to sign an agreement showing that they are content with the distribution of property. In cases where a Moslem believer makes a will and it is deemed to favor some children, the will is disregarded (destroyed) and the property is distributed according to Sharia law.[55]

The Committee stated that given the differences between the distribution of the property of a deceased professing the Islamic faith in the Quran and the distribution scheme in the Succession Act, the provision should not apply to the distribution of the estate of an intestate professing the Islamic faith as is the case in other countries such as Kenya, Tanzania, Malaysia, India, Pakistan, Singapore, Sri Lanka, Sudan, and Nigeria where Islamic succession has its own distinct legislation.[56] [A]ware that the proposal to have distinct legislation to cater for the intestate succession of persons professing the Islamic faith will not be unique in Uganda considering that Mohammedans were excluded from the operations of part V of the Succession Ordinance of 1906 which provided for the distribution of an intestate's property and were entirely left to rely on the Sharia law in cases of intestate. Therefore, unless the distribution scheme is structured in a manner that takes into account the views and aspirations of persons professing the Muslim faith, the distribution scheme will continue facing challenges of implementation.[57]

Against that background, the Committee recommended that persons professing the Islamic faith be exempted from the provisions of section 27 and a special provision be

54 *Ibid*, p.21 – 22.
55 *Ibid*, p.22.
56 *Ibid*, p.22 – 23.
57 *Ibid*, p.23.

made for the distribution of their property based on the Quran and hadith with the option for parties under Islam who may wish to opt out of Sharia practice to apply the succession Act.[58] In its report, the Committee adopted the proposal which had been included in Clause 13 of the 2018 Bill with regard to amending section 27(1) of the Act. However, it recommended that changes should be made to other provisions of section 27.[59] On the issue of Muslims, it recommended that two subsections should be added to section 27 to the effect that:

> (11) Except as may otherwise be agreed, this section shall not apply to persons professing the Islamic faith.
> (12) Parliament shall by law regulate the inheritance and succession to property belonging to persons professing the Islamic faith.

The Committee explained the following as the justification for the above two draft provisions to exempt persons professing the Islamic faith from the application of section 27 of the [S]uccession Act since the provisions of the Succession Act, especially on inheritance, contravene the Quran and Hadith. The Constitution recognizes religious freedoms and specifically and also, [i]t's an international best practice for separate laws to regulate the succession and inheritance of persons professing different religions, taking into account the unique religious views of those religions.[60]

When the Bill was presented before Parliament for the second reading in March 2021, there was no mention of excluding the application of section 27 to Muslims.[61] However, it was proposed that the share of the spouse should be reduced from 50% to 20% because 20 percent of the estate is already reserved for the spouse and lineal dependents, thereby increasing the entitlement of such persons. This will increase the entitlement of lineal descendants (children of the deceased) to 75 percent from 41 percent. This is intended to ensure that a large percentage of the estate goes to the children of the deceased person since, in most cases, they are the neediest of all the beneficiaries under the estate and they constitute about 70 percent, of the total population of Uganda.[62]

58 *Ibid*, p.26.
59 *Ibid*, p. 98 – 99.
60 *Ibid*, p. 99 – 100.
61 Hansard of Parliament of Uganda, Wednesday, 24 March 2021 (discussion on section 27) p. 20.
62 Wednesday, 24 March 2021 (discussion on section 27) 20.

The Bill was passed on 30 March 2021.[63] It was published in the Government Gazette in September 2021.[64] In terms of the Constitution, it had to be assented to by the President before it becomes law.[65] The President declined to assent to the Bill on the basis that he required Parliament to revisit section 27.[66] He took issue with Clause 27(1)(c) of the Bill which increased the share of the surviving spouse to 80% in case the deceased had no lineal dependants. He argued that this is a complete departure from the earlier provisions of the law with no clear justification. It will interfere with the beneficiary's interests when the surviving spouse's share increases from 50 percent to 80 percent and reduces the dependent relatives' share from 49 percent to 20 percent.[67]

He added that the 'amendment would not only be unfair to the dependant relatives but would create misunderstandings between the surviving spouse and the dependant relative.'[68] He suggested that 'more research needed to be carried out so that a clear justification is given for reducing or increasing the shares clearly stipulated in the current law.'[69] Before the Bill was passed into law, the term of the 10th Parliament came to an end and the Bill 'lapsed.' This meant that it had to be considered by the 11th Parliament.[70]

The 11th Parliament 'discarded' all steps that had been taken by the 10th Parliament towards enacting the Bill into law and began the whole process afresh. In its report on the Bill,[71] the Sectoral Committee on Legal and Parliamentary Affairs indicated that it 'received memoranda and met with the Uganda Muslim Supreme Council, the Uganda Muslim Lawyer's Association as well as other Muslim scholars and clerics who proposed that the Succession Act should not apply to Muslims.'[72] The Committee added that Muslims argued that their position was informed by the fact that the Succession Act 'contravenes the

63 Hansard of Parliament of Uganda, (30 March 2021) p. 54.
64 Succession (Amendment) Bill, Bill No.24, Uganda Gazette No. 71, Volume CXIV, 27th September 2021.
65 Article 91 of the Constitution.
66 'President defers signing of Sexual Offences, Succession Bills' 17 August 2021. https://www.parliament.go.ug/news/5200/president-defers-signing-sexual-offences-succession-bills
67 *Ibid.*
68 *Ibid.*
69 *Ibid.*
70 John Odyek, 'Succession Bill expected in Parliament' The New Vision, 27 November 2021. Available at https://www.newvision.co.ug/articledetails/120922
71 Report of the Sectoral Committee on Legal and Parliamentary Affairs on the Succession (Amendment) Bill, 2021 (December 2021). Available at https://parliamentwatch.ug/wp-content/uploads/2021/10/LPA3-22-Report-on-the-Succession-Amendment-Bill-2021.pdf (accessed 19 November 2022).
72 *Ibid*, p. 55.

distribution of the property of a deceased person ordained by Allah in the Quran.'[73] The Uganda Muslim Supreme Council submitted that 'the distribution of the property of a deceased among the Muslims was determined by Allah in the Quran and cannot be amended or departed from.'[74] They outlined the different shares as stipulated in the Quran.[75] The Uganda Muslim Supreme Council also added that the deceased's property is only distributed after his/her debts, if any, have been paid and that 'in cases where a Moslem believer makes a will and it is deemed to favor some children, the will is disregarded and the property is distributed according to Sharia law.'[76] They also highlighted the importance of Article 129(1)(d) of the Constitution and added that in the past, the Succession Act did not apply to persons professing the Islamic faith. For instance, Mohammedans [Muslims] were excluded from the operations of Part V of the Succession Ordinance of 1906 which provided for the distribution of an intestate's property. Therefore, the Mohammedans were entirely left to rely on the Sharia law in cases of intestacy.[77]

In response to the above submissions, the Committee observed that it examined the proposals from Uganda Muslim Supreme Council and observes that religious practices have been recognized as an influential factor in determining succession matters among certain sects of people. In Uganda, the Succession Act determines Succession matters and applies to all persons in Uganda. That notwithstanding, the Committee notes that whereas the Succession Act is a law of general application, persons, including Muslims, may by Will elect to follow religious provisions of Sharia law and hadith as stipulated in the Koran in distributing their estates. The Committee observes that the proposal to exempt the application of the Succession Act to Mohammedans has some legal and practical challenges. For instance, the distribution scheme contained in the Quran might, when examined critically, not meet the standards of equality prescribed in the Constitution since it discriminates against a person based on their gender, contrary to Article 21 of the Constitution.[78]The committee argued that the proposal will create a lacuna in the law since

73 *Ibid*, p. 55.
74 *Ibid*, p. 55.
75 *Ibid*, p. 55.
76 *Ibid*, p. 55.
77 *Ibid*, p. 56.
78 *Ibid*, p. 56.

it will exempt the application of the Succession Act to Mohammedans yet there is currently no law as envisaged in Article 29 (l) (d). In such a situation, if a Muslim leaves no Will, how shall that estate be handled between the period when this Bill is passed into law and the enactment of a law envisaged in Article 29 (l) (d)? This will make estates of intestate Mohammedans subject to abuse and unregulated.[79]

The Committee observed further that 'exempting the application of the Succession Act to Mohammedans will have the effect of fettering the discretion of persons professing the Islamic faith who may wish to distribute their estates in accordance with the Succession Act.'[80] Against that background, the Committee rejected the proposal and recommended that the Succession Act should continue applying to Mohammedans until such a time when Parliament enacts the law envisaged in Article 129 (1) (d). This will also give the Government an opportunity to examine the proposal with a view to ensuring that the standards of equity enshrined in the Constitution are guaranteed. The Committee is further of the opinion that Mohammedans should continue electing to apply the distribution scheme in the Quran, as they do today, by making Wills providing for distribution under Sharia or otherwise handling their estates under the Succession Act. Once the law is passed concerning succession in respect of Muslims, the same may contain appropriate provisions ousting the application of any part of the Succession Act if that is the preference of the Muslim Community.[81]

The Committee's report was presented to Parliament when the Bill was being debated. The Chairperson of the Committee informed Parliament that the Committee had considered the proposal by the Uganda Muslim Supreme Council, the Uganda Muslim Lawyers Association, and Muslim scholars and clerics who were of the view, based on the Quran and Hadith, that the Succession Act should not apply to Muslims. For the same reasons included in the report (as mentioned above), the Committee recommended that Parliament should reject the proposals advanced by the Muslim community.[82] Although the Committee recommended that the proposal should be rejected, it suggested that 'the government [should] expeditiously introduce, in Parliament, a Bill for an Act envisaged in

79 *Ibid*, p. 56.
80 *Ibid*, p. 56.
81 *Ibid*, p. 56.
82 Hansard of Parliament of Uganda, (08 February 2022) p. 32.

Article 129(1)(d) of the Constitution.'[83] This implies that should a Muslim die intestate, his or her estate will be governed by section 27 of the Succession Act. Section 27(1) provides that:

> (1) Subject to sections 29 and 30, the estate of an intestate, except for his or her residential holding or another residential holding, shall be divided among the following classes in the following manner- (a) where the intestate is survived by a spouse, a lineal descendant, a dependent relative, and a customary heir- (i) the spouse shall receive 20 percent; (ii) the dependent relatives shall receive 4 percent; (iii) the lineal descendants shall receive 75 percent; and (iv) the customary heir shall receive 1 percent; of the whole of the property of the intestate. (b) where the intestate leaves no surviving spouse or dependent relative under paragraph (a) (i) or (ii) capable of taking a proportion of his or her property the- (i) lineal descendants shall receive 99 percent; and (ii) customary heir shall receive 1 percent; (c) where the intestate is survived by a spouse, a dependent relative and a customary heir but no lineal descendant- (i) the spouse shall receive 50 percent; (ii) the dependent relative shall receive 49 percent; and (iii) the customary heir shall receive 1 percent; of the whole of the property of the intestate; (d) where the intestate is survived by a customary heir, a spouse or a dependent relative but no lineal descendant- (i) the customary heir shall receive 1 percent; and (ii) the surviving spouse or the dependent relative, as the case may be, shall receive 99 percent, of the whole of the property of the intestate; (e) where the intestate leaves no person surviving him or her other than a customary heir capable of taking a proportion of his or her property under paragraph (a), (b), (c) or (d), the estate shall be divided equally between the relatives nearest in kinship to the intestate.

Section 27(2) provides, inter alia, that 'twenty percent of the estate shall not be distributed, but shall be held in trust for the education, maintenance and welfare' of minors, linear descendants who were dependant on the instate or those with disabilities. Sections 27(3) and (4) deal with some of the sources of income of the estate. Section 27(5) stipulates how the twenty percent provided for under section 27(2) has to be used should the provision cease to apply to the categories of people mentioned thereunder (under section 27(2)). Under section 27(6), '[a] lump sum settlement may be made for the maintenance and welfare of a lineal descendant who has a disability' as provided for under section 27(2) (c). In terms of section 27(7), '[a] spouse who remarries before the estate of

[83] *Ibid*, p.32.

the deceased is distributed shall be entitled to the share he or she would be entitled to under subsection (1).' Section 27(8) provides that for the share of a customary heir who is also a lineal descendant of the intestate.

Concluding Remarks

The submissions before the Sectoral Committee indicated that Muslim leaders were not prepared to have the estate of an intestate Muslim governed by the Succession Act. This position is very unlikely to change because, as their submissions indicate, Islamic law has clear provisions on the question of inheritance. Since it is not an offense under the Act for any person to ignore section 27 in dealing with the intestate's estate, one cannot rule out the possibility that the property of some intestate Muslim will be distributed in accordance with the teachings of Islam. However, the validity of such distribution can successfully be challenged by an aggrieved party. For a Muslim to ensure that his estate is distributed according to the teachings of Islam after his/her death, he/she has to make a will. However, it may be argued that even that will have to comply with the Constitution on issues including equality between the beneficiaries who belong to the same class/category (for example, children irrespective of their sex). Otherwise, it may be found discriminatory and contrary to Article 21 of the Constitution. Some people have argued that allowing Muslims in Uganda to distribute their estate according to Sharia perpetuates discrimination on the ground of sex because it favors males/boys over females/girls.[84] Likewise, the Uganda Law Reform Commission referred to the Sharia on inheritance and observed that some religious practices which discriminate against women in the distribution of property where females are entitled to half of what their male counterparts receive contravene the Constitution which is the supreme law of the land hence rendering them null and void ab initio. This further makes a case for law reform to bring these religious practices in conformity with the Constitution by addressing these imbalances as highlighted above.[85]

[84] Valerie Bennett et al., "Inheritance Law in Uganda: The Plight of Widows and Children," *Geo. J. Gender & L.* 7 (2006): 451; Rachel C Loftspring, "Inheritance Rights in Uganda: How Equal Inheritance Rights Would Reduce Poverty and Decrease the Spread of HIV/AIDS in Uganda," *U. Pa. J. Int'l L.* 29 (2007): 243, http://hdl.handle.net/10822/962633.

[85] Uganda Law Reform Commission, Study Report on The Review of Laws on Succession in Uganda (July 2013) p.58. Available at https://www.ulrc.go.ug/sites/default/files/Final%20succession%20study%20report%20presented%20to%20Commissioners.pdf , See also Anthony Luyirika Kafumbe, "Women's Rights to Property in Marriage,

It is inevitable that soon or later, Parliament will have to initiate the process of enacting legislation that will give effect to Article 129(1)(d) of the Constitution. The right to equality in cases of succession/inheritance is one of the issues that Parliament will have to grapple with. Article 21 of the Constitution of Uganda (1995) provides for equality before the law and freedom from discrimination. Article 21(3) defines discrimination to mean 'to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.' It is evident that sex is one of the prohibited grounds for discrimination. It should be recalled that discrimination is one of the reasons given by the Committee to reject the proposal that the Succession Act should not apply to Muslims. This is proved by the Committee's argumentation that the proposal to exempt the application of the Succession Act to Mohammedans has some legal and practical challenges. For instance, the distribution scheme contained in the Quran might, when examined critically, not meet the standards of equality prescribed in the Constitution since it discriminates against a person based on their gender, contrary to Article 21 of the Constitution.[86]

In *Law Advocacy for Women in Uganda v Attorney General*[87] the Constitutional Court found that nine provisions of the Succession Act were discriminatory against women and declared them unconstitutional. For the law governing Muslim instate to withstand constitutional scrutiny, it should not discriminate against people on any of the prohibited grounds unless that discrimination can be justified under the Constitution. The first justification, which Muslims advanced in their submissions to the Committee on the Succession (Amendment) Bill and which was also advanced during the drafting of Article 129(1)(d) of the Constitution, is that Islamic law of inheritance is an integral part of the Muslim's right to practice their religion. Article 29(1)(c) of the Constitution provides that everyone has the right to 'freedom to practice any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious

Divorce, and Widowhood in Uganda: The Problematic Aspects," *Human Rights Review* 11, no. 2 (2010): 199–221, https://doi.org/10.1007/s12142-008-0112-0.

86 Report of the Sectoral Committee on Legal and Parliamentary Affairs on the Succession (Amendment) Bill, 2021 (December 2021) p. 56.

87 Law Advocacy for Women in Uganda v Attorney General (Constitutional Petition 13 of 2005) [2007] UGSC 71 (05 April 2007).

body or organization in a manner consistent with this Constitution.' The Supreme Court has held that the right to practice one's religion is subject to some limitations.[88] For the legislation empowering Muslims to have their estate governed by Islamic law to pass constitutional scrutiny, it should not be contrary to any constitutional provision. In this case, it has to be shown that the right to practice one's religion by following the inheritance formula in the Quran does not violate the right to freedom from discrimination especially on the ground of sex. This requires the court to balance rights in the Constitution – the right of Muslims (as a community) to observe a very important component of their religion on the one hand and an individual's right not to be discriminated against on the ground of sex. In other words, as the Grand Chamber of the European Court of Human Rights has held, a fair balance has to 'be struck between the competing interests of the individual and of the community as a whole.' This balancing does not apply to absolute rights. The right to freedom from discrimination is not an absolute right. In implementing the Islamic law on inheritance as stipulated in the Quran, the Muslim community has an interest in maintaining a coherent system of inheritance that has been in place for over 1400 years and that is followed by billions of Muslims.

Another option would be for the Constitution to be amended to qualify the right to freedom from discrimination. This approach has been followed, for example, in Kenya. Article 27 of the Constitution of Kenya (2010) provides for the right to equality and freedom from discrimination. Article 27(4) prohibits discrimination on several grounds. However, Article 24(4) of the Constitution qualifies the right to equality. It provides that the provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Qadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce, and inheritance. In light of Article 24(4), section 2 of the Kenyan Law of Succession Act provides that as a general rule, the Act is not applicable to Muslims.

[88] Sharon and Others v Makerere University (Constitutional Appeal 2 of 2004) [2006] UGSC 210 (01 August 2006).

References

Anderson, J N D. "Uganda: The Law of Succession in Uganda An Unreported Case." *Journal of African Law* 7, no. 3 (1963): 201–6. https://doi.org/10.1017/S0021855300002096.

Bennett, Valerie, Ginger Faulk, Anna Kovina, and Tatjana Eres. "Inheritance Law in Uganda: The Plight of Widows and Children." *Geo. J. Gender & L.* 7 (2006): 451.

Calaguas, Mark J, Cristina M Drost, and Edward R Fluet. "Legal Pluralism and Women's Rights: A Study in Postcolonial Tanzania." *Colum. J. Gender & L.* 16 (2007): 471. https://doi.org/10.2139/ssrn.934668.

Cooper, Elizabeth. "Challenges and Opportunities in Inheritance Rights in Kenya." *Chronic Poverty Research Centre Inheritance Working Paper Series*, 2011. https://doi.org/10.2139/ssrn.1775756.

Ddamulira Mujuzi, Jamil. "The Entrenchment of Qadis' Courts in the Ugandan Constitution." *International Journal of Law, Policy and the Family* 26, no. 3 (2012): 306–26. https://doi.org/10.1093/lawfam/ebs009.

Ezer, Tamar. "Inheritance Law in Tanzania: The Impoverishment of Widows and Daughters." *Geo. J. Gender & L.* 7 (2006): 599. https://ssrn.com/abstract=3825933.

Harari, Mariaflavia. "Women's Inheritance Rights and Bargaining Power: Evidence from Kenya." *Economic Development and Cultural Change* 68, no. 1 (2019): 189–238. https://doi.org/10.1086/700630.

Hashim, Abdulkadir. "Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation." *Journal of Muslim Minority Affairs* 25, no. 3 (2005): 449–60. https://doi.org/10.1080/13602000500408534.

———. "Servants of Sharīʿa: Qāḍīs and the Politics of Accommodation in East Africa." *Sudanic Africa* 16 (2005): 27–51.

Jadeed, Moza, Attiya Waris, and Celestine N Musembi. "The Application of Islamic Inheritance Law in Independent and Contemporary Kenya: A Muslim's Right to Equality and Freedom from Discrimination." *Iowa L Rev* 837 (2020): 841. https://doi.org/10.47348/ANULJ/v8/i1a2.

John Odyek, 'Succession Bill expected in Parliament' The New Vision, 27 November 2021. Available at https://www.newvision.co.ug/articledetails/120922

Kafumbe, Anthony Luyirika. "Women's Rights to Property in Marriage, Divorce, and Widowhood in Uganda: The Problematic Aspects." *Human Rights Review* 11, no. 2 (2010): 199–221. https://doi.org/10.1007/s12142-008-0112-0.

Khadiagala, Lynn. "The Failure of Popular Justice in Uganda: Local Councils and Women's Property Rights." *Development and Change* 32, no. 1 (2001): 55–76. https://doi.org/10.1111/1467-7660.00196.

Loftspring, Rachel C. "Inheritance Rights in Uganda: How Equal Inheritance Rights Would Reduce Poverty and Decrease the Spread of HIV/AIDS in Uganda." *U. Pa. J. Int'l L.* 29 (2007): 243. http://hdl.handle.net/10822/962633.

Mujuzi, Jamil D. "Construing Pre-1995 Laws to Bring Them in Conformity with the Constitution of Uganda: Courts' Reliance on Article 274 of the Constitution to Protect Human Rights." *African Human Rights Law Journal* 22, no. 2 (2022): 520–47. https://doi.org/10.17159/1996-2096/2022/v22n2a9.

Mujuzi, Jamil Ddamulira. "Presumption of Marriage in Uganda." *International Journal of Law, Policy and the Family* 34, no. 3 (2020): 247–71. https://doi.org/10.1093/lawfam/ebaa008.

———. "The Contribution of Notions of Religion in Drafting Some of the Provisions in the 1995 Constitution of Uganda." *Nordic Journal of African Studies* 28, no. 2 (2019): 16. https://doi.org/10.53228/njas.v28i2.434.

———. "The Ugandan Customary Marriage (Registration) Act: A Comment." *Journal of Third World Studies* 30, no. 1 (2013): 171–91. http://hdl.handle.net/10566/3173.

Parliament of Uganda, 'President defers signing of Sexual Offences, Succession Bills' 17 August 2021. https://www.parliament.go.ug/news/5200/president-defers-signing-sexual-offences-succession-bills

Report of the Sectoral Committee on Legal and Parliamentary Affairs on the Succession (Amendment) Bill, 2021 (December 2021). Available at https://parliamentwatch.ug/wp-content/uploads/2021/10/LPA3-22-Report-on-the-Succession-Amendment-Bill-2021.pdf (accessed 19 November 2022).

Uganda Law Reform Commission, Study Report on The Review of Laws on Succession in Uganda (July 2013). Available at https://www.ulrc.go.ug/sites/default/files/Final%20succession%20study%20report%20presented%20to%20Commissioners.pdf

US Department of State, '2020 Report on International Religious Freedom: Uganda' (12 May 2021). Available at https://www.state.gov/reports/2020-report-on-international-religious-freedom/uganda/

Wengi, Jennifer Okumu. "The Law of Succession in Uganda: Women, Inheritance Laws and Practices-Essays and Cases," 1994.

Court cases

Aisha Nantume Tifu v Damulira Kitata James (HCT Civil Suit 77 of 2007) [2011] UGHC 7 (12 January 2011);

Ayiko v Lekuru (Divorce Cause 1 of 2015) [2017] UGHCFD 1 (17 February 2017);

Carolyne Turyatemba & 4 Others v Attorney General & Anor (Constitutional Petition 15 of 2006) [2011] UGCA 6 (08 August 2011)

Darausi Tebandeke v Lugolobi Saidat, (Revision Application No. 6 of. 2011).

Hajji Kasoz Abdallah v Nalwoga Nakato (Civil Revision No.004 of 2018) (31 March 2021) (High Court at Mpigi);

Hajjati Saidati Sentamu v Kyagulanyi Yasin (Administration Cause 23 of 1996) [2001] UGHC 94 (01 March 2001);

Hatton and Others v The United Kingdom (Application no. 36022/97)(8 July 2003)

In Re: M.N. [infant] (Adoption Cause 289 of 2013) [2013] UGHCFD 22 (17 December 2013);

Kassim Ssejemba Kabogoza and Others v Dauda Mukasa (HCT-03-CV-CA-0098-2015)(Arising From Kayunga Civil Suit. No 095/2012) (High Court, Jinja)(29 March 2021).

Kinawa Jamila and Another v Asuman Bakali (Miscellenous Application No. 427 of 2014 Arising from Civil Suit No.06 of 2014, Sharia Court of Law at Iganga)(High Court, Jinja) (07 January 2019).

Law Advocacy for Women in Uganda v Attorney General (Constitutional Petition 13 of 2005) [2007] UGSC 71 (05 April 2007).

Mayi Bint Salim & 10 Others v Hajji Sulaiman Mayanja (Civil Appeal 37 of 2008) [2010] UGCA 39 (04 October 2010).

Nabawanuka v Makumbi (Divorce Cause 39 of 2011) [2013] UGHCFD 3 (13 February 2013).

Nalongo Sebyala and Others v Musisi Nanzuuka (Civil Appeal 35 of 2021) [2023] UGHCLD 81 (31 March 2023).

Saadi v Italy (Application no. 37201/06)(28 February 2008)

Safina Bakulimya & Anor v Yusufu Musa Wamala (Civil Appeal 68 of 2007) [2010] UGHC 105 (15 June 2010);

Sharon and Others v Makerere University (Constitutional Appeal 2 of 2004) [2006] UGSC 210 (01 August 2006).

Tumusiime & 3 Others v Semakula (Civil Suit No.76 of 2013) [2017] UGCOMMC 84 (14 JULY 2017)

Reports and Hansard

Consolidated Report of the Sectoral Committee on Legal and Parliamentary Affairs on the Succession (Amendment) Bill 2018 and the Succession (Amendment) Bill, 2019 (February 2021)

Hansard of Parliament of Uganda, (08 February 2022)

Hansard of Parliament of Uganda, (30 March 2021)

Hansard of Parliament of Uganda, Wednesday, 24 March 2021

Legislation

Marriage and Divorce of Mohammedans Act (Chapter 252)(1906).

The Law of Succession Act, Cap 160

Succession (Amendment) Bill, Bill No.24, Uganda Gazette No. 71, Volume CXIV, 27th September 2021.

Succession Act, Cap 162 (1906).