

# Comparative Review of Muslim Family Laws in the Greater Horn of Africa Region

Gofran Abdulrahman Al-Absi



**musawah**  
For Equality in the Family

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# Section



## Executive Summary

This report offers a high-level comparative review and analysis of Muslim family laws (MFLs) in seven countries in the Greater Horn of Africa (GHOA) region that was conducted to build the case for legal reform towards justice and equality in Muslim families.

The seven countries include three countries with Muslim-majority populations (**Sudan, Somalia, and Somaliland**<sup>1</sup>) and four countries with Muslim-minority populations (**Ethiopia, Kenya, South Sudan, and Uganda**).

The analysis examines twelve key areas of concern identified by Musawah in which discrimination often takes place against women and girls. These include:

- Issues related to entry into marriage: equality of spouses, age of marriage, consent, and capacity
- Issues during marriage: polygamy, violence against women, nationality rights
- Issues upon dissolution of marriage: divorce rights, financial rights after dissolution, custody and guardianship of children
- The general issues of inheritance and access to justice.

Analysis was conducted on data collected in the form of six country tables<sup>2</sup> and an internal brief on **Somaliland**, as well as additional data obtained from researchers and other sources on the subject.

### PART 1: Overview of family laws in the GHOA region

The first section begins with an explanation of three important terms related to Muslim family laws and practices: 'Sharia', 'fiqh', and 'Islamic law'. It is often argued that it is not possible to change religious laws because they are divine or sacred. Differentiating between Sharia, fiqh, and Islamic law demonstrates that laws relating to Islam can be changed, since they are based on human interpretations of the divine Sharia.

This explanation is followed by an analysis of the legislative frameworks and court systems in the seven countries. Some key points include:

- In the countries with Muslim-majority populations (**Somalia, Somaliland, and Sudan**), religious laws are compulsory. In **South Sudan**, no formal courts are available for family matters, so such matters are governed by customary courts and religious leaders. In the other countries with Muslim minority populations (**Ethiopia, Kenya, and Uganda**), religious laws are available for Muslims to use and apply in their private matters. Although constitutions offer equality provisions, there are generally exceptions for religious laws.

1 Somaliland declared independence, but this is not recognized by Somalia nor the international community. For ease of writing, the term 'country' will be used despite this political situation.

2 These country tables can be found on Musawah's website: <http://campaignforjustice.musawah.org/>

- None of the countries have a comprehensive codified Muslim family law. Limited codified laws exist in some of the countries, but generally uncodified religious and customary laws have a much larger influence. These customary and religious laws are structured around stereotypical gender roles and patriarchal views.
- Given the plural systems of law and lack of formal codifications, people face confusing and sometimes contradictory sets of laws and customs. Judgements are often left to the discretion of religious figures or elders in the community or to judges/kadhis based on the preferred schools of thought. There are few or no procedural regulations and mechanisms to ensure clarity, transparency, and predictability.
- Women face many challenges trying to access justice due to poverty, illiteracy, lack of information, too few courts and/or long distances to reach courts, cumbersome laws, and bureaucratic procedures. Even if they know about their options, women may fear negative reactions and repercussions from the community if they go to civil courts. Refusal to have their case adjudicated in a religious proceeding may be seen as disrespect and contrary to their faith.

These points are followed by a table listing constitutions and key legislation in the seven countries.

## **PART 2:** **Comparative analysis of key issues of concern**

This section examines twelve key areas relating to marriage and family matters in which Muslim

women and girls suffer discrimination under current Muslim family laws and practices. The report analyses findings from the seven countries for each area of concern. Key findings include:

### **Issues upon entry into marriage:**

- In many of the countries, there is no minimum age of marriage for Muslims and child marriage is common. Where laws exist, implementation and enforcement are weak.
- Consent is often required but not always pursued, especially in early marriages.
- In most cases, women cannot marry without the consent of their (male) guardians.

### **Issues during marriage:**

- Polygamy is allowed for Muslims in all seven countries; men may marry up to four wives with few or no restrictions.
- High rates of violence persist within families. Female genital mutilation is an ongoing concern; marital rape is either not criminalized or exempted in all seven countries.
- Women face discriminatory nationality rights in four of the seven countries studied.

### **Issues upon divorce:**

- Unilateral divorce (talaq) is allowed for men in five of the seven countries, while women can only access divorce through courts or elders. Men need not provide any justification for divorce; women must provide reasons and extensive evidence, which has implications in terms of time and resources.
- Women have unequal custodial and guardianship rights over children upon divorce or the death of their spouse.

**Other issues:**

- Unequal inheritance rights persist throughout the countries in the Greater Horn of Africa region.
- This comparative analysis is followed by a table summarizing all of the issues in the seven GHoA countries.

### **PART 3: Trends, barriers, and key recommendations**

The final section begins by outlining noteworthy trends against discriminatory laws in each country, whether these are being pursued by advocates or championed by the states themselves. Next, challenges and barriers in the road to reforming discriminatory laws are shared. These include:

- Limited awareness of women's rights in Islam
- Non-prioritization of issues related to Muslim women in these countries
- Absence of political will, especially where discriminatory MFLs are justified by minority, religious and cultural rights
- High resistance by so-called 'Islamist Groups', often using Islam/Sharia as justification
- Absence of codified MFLs
- Complexity of plural legal systems
- Socio-economic and demographic factors

Finally, a number of recommendations are presented that can help in efforts to promulgate family laws, policies and practices that reflect

equality and justice for all people. The many steps for improving laws for Muslim families include:

- Raising awareness in Muslim communities of women's rights in Islam
- Education, economic empowerment, and increased women's participation
- Closely working with all local stakeholders instead of relying just on religious authorities or local elders
- Capacity building of the legal and judiciary systems on women's rights and gender equality in Islam, good practices and lessons from other countries, and procedural and legal frameworks that can guarantee access to justice
- Dialogue and consensus on fiqh among scholars, advocates, policy makers and community members, including women
- Working to codify comprehensive MFLs based on progressive interpretations of the Sharia that ensure justice and equality
- Improving access to justice for all, especially women affected by poverty and illiteracy
- Holding governments accountable to their constitutional provisions and international and regional human rights commitments

### **Appendices: Country briefs**

Appended to the report are individual country briefs with country profiles, contextual details, key issues, reform attempts, and opportunities for reform.

## Conclusion

Muslim family laws in the Greater Horn of Africa region should be in alignment with core principles of the Sharia such as dignity, justice, equality, and beauty and goodness and in harmony with regional human rights instruments such as the the **Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)**. It is possible to promulgate MFLs based on such principles and to reform existing discriminatory laws. To do so, local, national, regional, and international stakeholders must commit to work together to protect and promote Muslim women's rights.

# Section





## PART ONE

## Overview of family laws in the GHoA region

This report assesses Muslim family laws (MFLs) in seven countries in the Greater Horn of Africa region:

### Muslim-majority countries



Sudan

97%



Somalia

>99%



Somaliland

>99%

### Muslim-minority countries



South Sudan

6.2%



Uganda

14%



Kenya

11%



Ethiopia

34%

Islam arose in the Arabian city of Mecca around 610 CE. Islamic teachings were carried into Africa by Arab traders, settlers, and soldiers and spread across North Africa, the eastern Horn of Africa, and West Africa. The arrival of Islam had a major impact on the political and social development of those regions, and remains a

significant force today. Laws based on Islam influence society and affect individuals' legal and social relationships. In numerous places, religious laws and indigenous practices have come together and intermingled. This history affects contemporary family laws, policies, and practices.

## 1.1

## Sharia, fiqh and Islamic law

The terms 'Sharia', 'fiqh', and 'Islamic law' are often used interchangeably. State and religious authorities often claim that laws derived from Islamic sources are not to be questioned, discussed, or challenged.<sup>3</sup> This misconception hinders reform. It is therefore important to define and distinguish between the terms.

The word 'Sharia' means 'the path or way leading to the water source'.<sup>4</sup> In Islam, it refers to the totality of God's will as revealed to the Prophet Muhammad PBUH, and comprises moral and ethical values to guide Muslims and grow close to God. It is divine and eternal. In contrast, tafsir is the interpretation of Islam's sacred texts, and fiqh is the human understanding of the Sharia used to deduce legal rules from the texts. Contemporary rulings and laws like Muslim family laws, often called 'Islamic law', are derived from these human interpretations. Tafsir, fiqh, and Muslim laws are the result of human processes, and not divine or eternal. Therefore, they can be discussed, challenged, and changed.

The Qur'an and the Sunna (words and practices of the Prophet Mohammad PBUH), which are the foundations of the Sharia, enshrine principles of justice, dignity, and equality. Men and women are equal in terms of their duties, rights, virtues, and merits. In the time of the Prophet, women took part alongside men in all aspects of social life, and the Prophet always preached kindness towards women.

However, the people who interpreted Sharia, who were generally male, were influenced by practices and customs from their eras, locations, and fiqh schools of thought.<sup>5</sup> Therefore, fiqh rulings and subsequent Islamic laws vary by location, and often incorporate patriarchal ideas embedded in rulings by male scholars.

This is often compounded by States using Islam and religion for political reasons to enforce their regimes. Religious references and norms are also used by political elites to 'localize' the nation-building process and legitimize state actors and policies.<sup>6</sup> Many mainstream interpretations of Islam reinforce distinct gender roles in society and in the home, and thus contribute to gender inequality.

Many Muslim countries state that they are following Sharia in family law matters, but they are actually using human interpretations of Sharia based on ideas from centuries ago. Fiqh and contemporary laws related to the family are not divine, but are human-made, temporal, contingent, and subject to change. They therefore can be changed based on new interpretations in order to achieve justice and equality for Muslim women, families, and communities today.

3 Musawah, 'Shari'ah, Fiqh, and State Laws: Clarifying the Terms', 2018, <https://www.musawah.org/wp-content/uploads/2019/02/KnowledgeBuildingBriefs-1-Shariah-Fiqh-and-State-Laws-EN.pdf>

4 Ibid

5 Ibid. The major Sunni schools of thought are Hanafi, Maliki, Shafi'i and Hanbali. The Shafi'i school of thought is predominant in east Africa; the Horn of Africa is also greatly influenced by the Wahabi Salafi position towards women.

6 Cesari, Jocelyne. 2021. 'Political Islam: More than Islamism'. Religions 12: 299, <https://doi.org/10.3390/rel12050299>.

## Constitutional and legislative frameworks

# 1.2

In all seven countries, constitutions and some statutory laws, including general family laws in some countries, are applicable to all. In some of the countries, there are also specific laws for only Muslims. But religion and customary laws highly influence the daily lives of people in the GHOA region, and regardless of statutory systems, it is not common for Muslims to resort to civil laws and courts.

All seven countries' constitutions include a right to practise customary and religious marriages and be governed by their laws. There are also additional statutory laws to govern family relations in many of the countries.

- **Ethiopia** enacted the Revised Family Code 2000 to address gender inequality. Article 1(2) allows marriages to be concluded in accordance with the religion or custom of the future spouses. Because there are no codified MFLs, Muslim marriages are governed by the predominant school of fiqh in the region.
- **Kenya's** comprehensive Marriage Act of 2014 excludes Muslims from most of its provisions through Section 3(4), which states that parties to a Muslim marriage shall only have the rights granted under Islamic law, and Section 49(3), which states that any provision in the marriage that is inconsistent with Islamic law and practices shall not apply to persons who profess the Islamic faith.
- The legal system in **Somalia** consists of religious laws, customary laws, and the Family Law of 1975, which is technically in force, but was never put into practice as it

was controversial and rejected overwhelmingly by the religious leaders and the people. Somalia's constitution provides that enacted legislation will be deemed invalid if it contravenes the basic principles of the Sharia. The Shafi school of law is applicable.

- **Somaliland** no longer uses the Somalia 1975 Family Law and instead relies on religious and customary laws. The 2001 Constitution of Somaliland provides that enacted legislation will be deemed invalid if it contravenes the basic principles of the Sharia. The Shafi school of law is applicable.
- **South Sudan** has never had a family law, and Muslims follow customary and religious laws. South Sudan does not recognize civil marriage as legal.
- **Sudan's** Personal Status Act for Muslims 1991, which is derived from the Sunni branch of Islam, regulates family issues for Muslims. Where a particular issue is insufficiently addressed in legislation or case law, the Hanafi school of law is applicable.
- **Uganda** has a general Marriage Act and a general Divorce Act, as well as an outdated and non-comprehensive Act called 'The Marriage and Divorce of Mohammedans Act' (1906) that is still enforceable.

In the three Muslim-majority countries of **Sudan, Somalia, and Somaliland**, the state and religion are highly intertwined. Family laws (codified or not) are said to be based on Sharia regardless of its practice in or out of courts (i.e., by elders). If statutory laws contradict Islamic law, the

statutory law may be outlawed or rejected by the people in practice, or not enforced or regulated by authorities.

Countries with Muslim minority populations like **Ethiopia, Kenya, South Sudan, and Uganda** are secular with plural legal systems that often contain striking contradictions between the constitutions and their family laws on one hand and the MFLs and customary rules applied in practice on the other. Even where equality provisions exist, there are stipulated or implied exceptions that allow Muslims to use religious and customary laws.

In practice, a mixture of customary rules and Islamic laws are applied in Sharia courts. Without comprehensive codified MFLs, judgement is left to the discretion of the judge and the preferred school of thought (*madhab*). In addition, there are no procedural regulations or mechanisms to ensure transparency and predictability.

### 1.2.1 – List of constitutions and key legislation by country

Ethiopia	Kenya	Somalia	Somaliland	South Sudan	Sudan	Uganda
The Federal Democratic Republic of Ethiopia (FDRE) Constitution (1995) <sup>7</sup>	The Constitution of Kenya (2010) <sup>8</sup>	The Provisional Federal Constitution of Somalia (2012) <sup>9</sup>	The Constitution of the Republic of Somaliland (2001) <sup>10</sup>	The Transitional Constitution of the Republic of South Sudan (2011) <sup>11</sup>	The Constitutional Charter for the Transitional Period of Sudan (2019) <sup>12</sup>	The Constitution of Uganda (1995) <sup>13</sup>
The Revised Family Code/ Law (RFL) of 2000 <sup>14</sup>	The Marriage Act <sup>15</sup>	The Family Law No. 23 of 1975 <sup>16</sup>			The Personal Status for Muslims Act 1991 <sup>17</sup>	The Marriage Act, chapter 251 <sup>18</sup> The Divorce Act, chapter 249 <sup>19</sup> Marriage and Divorce of Mohammedans Act, chapter 252 <sup>20</sup>
	The Children Act <sup>21</sup>		Somaliland Juvenile Justice Law (Law No: 36/2007) <sup>22</sup>	The Child Act 2008 <sup>23</sup>	Children's Act 2010 <sup>24</sup>	The Children's (Amendment) Act 2016 <sup>25</sup>
The Criminal Code <sup>26</sup>	The Penal Code (1930) <sup>27</sup> The Protection Against Domestic Violence Act <sup>28</sup>	The Penal Code <sup>29 30</sup>		The Penal Code of 2008 <sup>31</sup>	The Sudanese Criminal Act 1991 <sup>32</sup>	The Penal Code (Amendment) Act 2007 <sup>33</sup> The Domestic Violence Act 2010 <sup>34</sup>

7 Constitution of the Federal Democratic Republic of Ethiopia, 1995, <https://www.refworld.org/docid/3ae6b5a84.html>

8 The National Council for Law Reporting (Kenya), Constitution of Kenya, 2010, <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>

9 The Federal Republic of Somalia: Provisional Constitution, August, 2012, [http://hr.library.umn.edu/research/Somali-Constitution 2012.pdf](http://hr.library.umn.edu/research/Somali-Constitution%202012.pdf)

10 The Constitution of the Republic of Somaliland, May 2001, <https://www.refworld.org/pdfid/4bc581222.pdf>

11 The Transitional Constitution of South Sudan (2011), <https://www.refworld.org/pdfid/5d3034b97.pdf>

12 Sudan's Constitution of 2019, [https://www.constituteproject.org/constitution/Sudan\\_2019.pdf?lang=en](https://www.constituteproject.org/constitution/Sudan_2019.pdf?lang=en)

13 Constitution of Uganda, 1995, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/44038/90491/F206329993/UGA44038.pdf>

14 The Revised Family Code, Federal Negarit Gazetta of the Federal Democratic Republic of Ethiopia (July, 2000), <https://www.refworld.org/pdfid/4c0ccc052.pdf>

15 The National Council for Law Reporting (Kenya), The Marriage Act (2014), <https://rb.gy/jzkip>

16 The President of the Supreme Revolutionary Council (1975), <https://rb.gy/difwva>. Technically in force in Somalia, but not put into practice and outlawed in Somaliland by the current Constitution due to its controversial equality in inheritance provision that is rejected overwhelmingly by the religious leaders and the people.

17 The Muslims Personal Status Act, 1991 (24/7/1991), <https://sgbv-ihda.uwazi.io/en/document/jzy19rrxnbr?page=1>

18 Uganda Marriage Act, <https://rb.gy/kx9cgl>

19 Divorce Act 1904 (Ch 249), <http://jafbase.fr/docAfrique/Ouganda/Divorce%20act.pdf>

20 Uganda Marriage and Divorce of Mohammedans Act, Chapter 252 (April 1906), <https://rb.gy/mo3ngu>

21 The National Council for Law Reporting, (Kenya), The Children's Act, Chapter 141 (Revised Ed. 2010), <https://rb.gy/dvh7wg>

22 Somaliland Juvenile Justice Law (November 2020), <https://rb.gy/dl8i1d>

23 Sudan: Child Act, 2008 (Southern Sudan), October, 2008, <https://www.refworld.org/docid/49ed840c2.html>

24 <https://www.refworld.org/docid/5a8433da4.html>

25 The Children (Amendment) Act, May 2016, The Republic of Uganda, <https://rb.gy/yoi2ge>

26 Proclamation No. 414/2004, The Criminal Code of the Federal Republic of Ethiopia, <https://rb.gy/yg6mfr>

27 The National Council for Law Reporting, (Kenya), Penal Code, Chapter 63 (Revised Edition, 2012), <https://rb.gy/bwkzhi>

28 The National Council for Law Reporting, (Kenya), Protection Against Domestic Violence Act (No.2 of 2015), <https://rb.gy/wlypq5>

29 Somalia: Penal Code (April 1964), National Legislative Bodies/Authorities, <https://rb.gy/bf0r5y>

30 Somalia and Somaliland have a common criminal justice system and civil justice system, each treats the laws as its own.

31 The South Sudan Penal Code Act, 2008, <https://rb.gy/520fef>

32 The Criminal Code Act 1991, <https://rb.gy/ipgkvu>

33 Uganda Legal Information Institute, Penal Code (Amendment) Act, (July, 2007), <https://rb.gy/tagr1y>

34 Uganda: The Domestic Violence Act (2010), <https://rb.gy/tpwnxj>

Ethiopia	Kenya	Somalia	Somaliland	South Sudan	Sudan	Uganda
Federal Courts of Sharia Consolidation Proclamation No.188/1999	Khadi's Court Act <sup>35</sup>					
Federal Courts of Sharia Consolidation Proclamation No.188/1999						
	The Matrimonial Property Act <sup>36</sup>					
	Law of Succession Act <sup>37</sup>					The Succession Act <sup>38</sup>
Proclamation on the Registration of Vital Events and National Identity Card <sup>39</sup>						
Ethiopian Nationality Proclamation No. 378/2003 <sup>40</sup>			Somaliland citizenship law <sup>41</sup>	The Nationality Act of 2011 <sup>42</sup>	Sudanese Nationality Act (Amendment) 2018 <sup>43</sup>	The Uganda Citizenship and Immigration Control Act <sup>44</sup>

35 The National Council for Law Reporting, (Kenya), Khadi's Courts Act, Chapter 11 (Revised Edition 2012), <https://rb.gy/opcypi>

36 The National Council for Law Reporting, (Kenya), Matrimonial Property Act (2013), <https://rb.gy/u0uedp>

37 The National Council for Law Reporting, (Kenya), Law of Succession Act (Revised Edition, 2012), <https://rb.gy/xfzf8b>

38 Africa Legislation Commons, Uganda Succession Act, December, 2000, <https://rb.gy/mfrvcs>

39 Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, August 2012, <https://rb.gy/qqvini>

40 Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, December 2003, <https://rb.gy/dute9m>

41 Somaliland Citizenship Law, May and August 2014, <https://rb.gy/zyc5jv>

42 National Legislative Bodies/ National Authorities, South Sudan: National Act of 2011, July 2011, <https://rb.gy/oyqjnx>

43 National Legislative Bodies/ National Authorities, The Sudanese Nationality Act 1994 and Sudanese Nationality Act (Amendment) 2011 and 2018 (December), <https://rb.gy/flmt5o>

44 The Uganda Citizenship and Immigration Control Act, <https://rb.gy/8g91zq>

## 1.3

## Application of civil laws

Civil marriages are not available in **Somalia, Somaliland, and Sudan**, the three Muslim-majority countries. Where there are codified family laws or acts, they are based on understandings of the Sharia. If there are contradictions between the statutory laws and Islamic laws, the Islamic laws prevail. This can lead to discrimination against women. Sometimes customs prevail and increase the discrimination against women.

For instance, in inheritance matters in some parts of **Sudan**, women are excluded from the division of land shares in order to keep the family land within the family lineage. This clearly contradicts the constitution, Islamic laws, and the Sharia. However, with regards to crimes, including violence against women in the family, statutory criminal laws apply.

**South Sudan** does not recognize civil marriages and the Constitution provides for marriages to be governed in accordance with customary and religious laws and practices of the respective spouses, so there is no way around discriminatory interpretations of Sharia in family matters.

In **Ethiopia, Kenya, and Uganda**, which have Muslim minority populations, Muslims are not restricted from using civil laws. The Revised Family Code of Ethiopia is applicable for Muslims if either of the parties does not consent to have their case heard by Sharia courts. Muslims can be governed by the general Marriage Act in Kenya as well.

In **Uganda**, magistrate courts can handle matters involving Muslim personal law but apply Islamic law; Ugandan Muslims can decide either to proceed in civil courts or informal Sharia courts.<sup>45</sup> However, in many of these countries, most Muslims resort to MFLs and Sharia courts. In Ethiopia, Kenya, and Uganda, which have Muslim minority populations, Muslims are not restricted from using civil laws.

The Revised Family Code of **Ethiopia** is applicable for Muslims if either of the parties does not consent to have their case heard by Sharia courts. Muslims can be governed by the general Marriage Act in Kenya as well. In Uganda, magistrate courts can handle matters involving Muslim personal law but apply Islamic law; Ugandan Muslims can decide either to proceed in civil courts or informal Sharia courts. However, in many of these countries, most Muslims resort to MFLs and Sharia courts instead of civil laws due to community pressures to apply religious interpretations in family matters and due to some unique family justice challenges accessing civil courts.

45 Muslim Centre for Justice and Law (Uganda), 'Sharia (Qadhis) Courts Decisions are Legal and Binding', <https://mcjl.ug/articles/sharia-qadhis-courts-decisions-are-legal-and-binding/>

## Court systems

# 1.4

Islamic courts have different names in different countries, such as Sharia Courts in **Ethiopia**, Kadhis' courts in **Kenya**, and Qhadi Courts in **Uganda**. The general term 'Sharia Courts' will be mostly used for the purpose of this paper since it means courts that operate based on understandings and interpretations of Islamic law.

In terms of the Muslim-majority countries, the courts in **Somalia and Somaliland** have a limited or practically negligible role. Marriage and divorce processes can be performed out of the court, though the state is still assumed to have overall oversight on marriage governance. These countries' judiciaries are still weak, and courts have not fully reshaped and become effective after their absence during the conflict. There are also informal courts that deal with certain issues to which Islamic law is relevant, such as marriage, divorce, and succession.<sup>46</sup>

In **Sudan**, there are specialized courts for family issues. These are Sharia courts not regulated by a codified act yet with similar court procedures as the civil courts, with fewer formalities. There are also informal courts that deal with certain issues to which Islamic law is relevant, such as marriage, divorce, and succession.<sup>47</sup> In general, elders or authorized persons/offices handle family affairs in both urban and, even more, rural areas of Sudan.

In the countries with Muslim minority populations (**Ethiopia, Kenya, South Sudan and Uganda**), the constitutions recognize religious courts to decide private matters related to Muslim families. However, access to justice is a major challenge, as there are not enough to no Sharia courts within these countries:

- In **Ethiopia**, there are currently ten court systems: nine state court systems and one federal judiciary.<sup>48</sup> Sharia courts operate in all the regions except for the newly established regions and the region of Gambella.
- In **Kenya**, Sharia courts are established under Article 170 of the Constitution with jurisdiction limited to the determination of questions of Muslim law relating to personal status, marriage, divorce, or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Sharia courts. There are not enough courts, with only 14 stand-alone Sharia courts and the rest located at various Magistrates courts.<sup>49</sup> Women often must bear high fees and cover long distances to reach a court.
- In **South Sudan**, customary courts hear most of the cases (up to 90 percent).

46 Mohamed Farah Hersi, 'Research Guide to the Somaliland Legal System', February 2009, <https://www.nyulawglobal.org/globalex/Somaliland.html>

47 Ibid.

48 Michael Kebede, 'Ethiopia's 1999 Federal Courts of Sharia Consolidation Proclamation: The Function of the Sharī'a Court', Harvard Law School Islamic Law Blog, 29 August 2019, <https://rb.gy/bq55hl>

49 Kenya Judiciary, 'Kadhis' Courts', <https://www.judiciary.go.ke/courts/surbordinate/kadhis/>



- In **Uganda**, the 1995 constitution recognizes Qhadhi courts to administer justice for Muslims. These courts have been operating informally through Islamic leadership structures because of delays in their establishment. There are also magistrates' courts in Uganda that adjudicate all matters, including for Muslims. The judges do not have knowledge on Muslim personal law issues, and there are few codified laws governing this area. In some cases, the magistrate will invite a Muslim personal law expert to be part of the proceedings and advise the judge regarding matters involving Muslim personal law. The decision will be binding unless the litigant chooses to appeal. Like in Kenya, high fees and travel required are barriers for many women.

In all the countries with Sharia courts, these courts are empowered to apply MFLs without any restrictions. Sharia court judges are free to adopt any Muslim fiqh they deem fit to apply in the cases before their courts. In many cases, such as within Ethiopia's federal system, there is no cooperation among the Sharia courts; each acts independently and decisions are based on the discretion of the judge/kadhi.

Cumbersome laws and procedures in all seven countries are difficult for those not trained in law to comprehend and use. It is thus easier for elite classes to access justice through the courts. Many Muslim women are disadvantaged due to their poverty and illiteracy.

### Positive developments

- In **Ethiopia**, the Federal Sharia courts prepared a Strategic plan for the years 2021-2025 G.C., which evaluated the previous year's function of the Federal sharia court, highlighted the challenges and drawbacks,

proposed solutions and put a plan for the coming years.

- In **Kenya**, discussions are taking place around whether to have female kadhis/judges in Sharia courts. Kadhis have always been male, despite the fact that Article 170 of the Constitution, which provides for the appointment of kadhis, does not specify gender. The 2010 Constitution provides in Article 27 that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. These two points are being used by those agitating for the appointment of female kadhis.<sup>50</sup> While the courts were previously dominated by older kadhis/judges, the number of young kadhis has been increasing and their presence is having an effect on this issue as some of the young kadhis are considered allies to the efforts of having female judges.
- Also in **Kenya**, the Sharia courts have been required since 2013 to submit a monthly report to the department of performance management at the judiciary in Kenya to gauge the performance of the courts.
- In **Uganda**, there is a proposal for a constitutional amendment of the Uganda Muslim Supreme Council (UMSC) constitution that may bring some women judges to the Board /committee of Qhadhi courts of Uganda.

### Ongoing concerns

- There are no female judges in Sharia courts across the regions, except for in **Sudan**.
- In **Ethiopia**, there is an issue with confirming the consent of parties to Sharia courts' jurisdiction. A credible research report found

50 Tito Kunyuk, 'The Female Kadhis Controversy', 12 November 2021, <https://www.theelephant.info/features/2021/11/12/the-female-kadhis-controversy/>.

that judges in Sharia courts could simply ignore the requirement of consent.<sup>51</sup> In addition, the law provides that courts can proceed to hear a case *ex parte* if the defendant who has been duly served with the summons fails to appear at the first hearing of a suit.

- There is a draft bill on Qhadhi courts in **Uganda** but it has not yet been presented to parliament because of the ongoing government consultations on its content.

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51 Daniel E. Alemayehu, 2021, 'Multiple Legal Orders in Ethiopia: An Impediment on the Enforcement of Women Rights', 19 *Nw. J. Hum. Rts.* 38, <https://scholarlycommons.law.northwestern.edu/njihr/vol19/iss1/4>

## International and regional instruments

# 1.5

Two international and two regional human rights instruments are especially relevant for women's rights and issues related to equality in the family. All of the countries have ratified the **African Charter on Human and Peoples' Rights** and the **UN Convention on the Rights of the Child**. There are fewer ratifications of the **UN Convention on the Elimination of All Forms of Discrimination against Women** and the **Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, also known as the Maputo Protocol**. Somaliland is not recognized as a sovereign state so is not able to ratify human rights instruments.

### 1.5.1 – Ratification status

Country	UN CEDAW <sup>52</sup>	UN CRC <sup>53</sup>	African Charter on Human and Peoples' Rights	Maputo Protocol <sup>54</sup>
<b>Ethiopia</b>	Ratified in 1981 with reservation to Art 29(1)	Acceded in 1991	Ratified in 1998	Ratified in 2018 with reservations
<b>Kenya</b>	Ratified in 1984 without reservations	Ratified in 1990	Ratified in 1992	Ratified in 2010 with reservations
<b>Somalia</b>	Not ratified	Ratified in 2015	Ratified in 1985	Signed but not yet ratified
<b>Somaliland</b>	Not recognized as a sovereign state	Not recognized as a sovereign state	Not recognized as a sovereign state	Not recognized as a sovereign state
<b>Sudan</b>	Not ratified	Ratified in 1990	Ratified in 1986	Signed but not yet ratified
<b>South Sudan</b>	Acceded in 2015	Ratified in 2015	Ratified in 2013	Signed but not yet ratified
<b>Uganda</b>	Ratified in 1985 without reservations	Ratified in 1990	Ratified in 1986	Ratified in 2010 with reservations

### 1.5.2 Reservations

<b>Ethiopia</b>	Ratified the Maputo Protocol with multiple reservations and declarations, including relating to minimum age of marriage, equal rights and equal partnership in marriage, monogamy as the preferred form of marriage and protection of rights in polygamous relationships, definition of rape, etc. <sup>55</sup>
<b>Kenya</b>	Entered reservation to Article 14(2)(c) of the Maputo Protocol related to abortion <sup>56</sup> and stated that does not consider itself bound by the provisions of Article 10(3) to reduce military expenditure in favour of social development and the promotion of women. <sup>57</sup>
<b>South Sudan</b>	The President of South Sudan signed into law the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) <sup>58</sup>
<b>Sudan</b>	The cabinet approved CEDAW ratification in April 2021 with reservations on articles 2, 16, and 29(1), but this has not been filed with the UN and the Sudanese Fiqh Academy issued a fatwa barring ratification. <sup>59</sup>
<b>Uganda</b>	Placed reservations on Article 14(1)(a) and 14(2)(c) of the Maputo Protocol, which mandate Member States to ensure that women's right to sexual and reproductive health is respected and promoted. <sup>60</sup>

<sup>52</sup> UN Treaty Body Database, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx)

<sup>53</sup> Ibid.

<sup>54</sup> Ratification Status for the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 16 October 2019, <https://tinyurl.com/African-Union-Maputo-Protocol>

<sup>55</sup> Proclamation No. 1082/2018 - Proclamation to Ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, retrieved from <https://chilot.me/wp-content/uploads/2018/10/Proclamation-No.-1082-2018-Proclamation-to-Ratify-The-Protocol-to-the-African.pdf>

<sup>56</sup> 'KNCHR submits advisory on removal of Kenya's reservation under Article 14 (2) (c) of the Maputo Protocol', 15 October 2021, <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1120/KNCHR-submits-advisory-on-removal-of-Kenya%E2%80%99s-reservation-under-Article-14-2-c-of-the-Maputo-Protocol>

<sup>57</sup> Equality Now, 'The Maputo Protocol Turns 18 Today. But What Does This Mean For Women And Girls In Africa?', 11 July 2021, [https://www.equalitynow.org/news\\_and\\_insights/maputo\\_protocol\\_turns\\_18/](https://www.equalitynow.org/news_and_insights/maputo_protocol_turns_18/)

<sup>58</sup> 'Kiir signs 4 international treaties into law; Sudan's Post, Accessed on March 27th: [https://t.ly/gLh\\_](https://t.ly/gLh_)

<sup>59</sup> 'Sudan's Fiqh Academy prohibits ratification of CEDAW', Dabanga, 10 May 2021, <https://www.dabangasudan.org/en/all-news/article/sudan-s-fiqh-academy-prohibits-ratification-of-cedaw>

<sup>60</sup> Equality Now, 'The Maputo Protocol Turns 18 Today. But What Does This Mean For Women And Girls In Africa?', 11 July 2021, [https://www.equalitynow.org/news\\_and\\_insights/maputo\\_protocol\\_turns\\_18/](https://www.equalitynow.org/news_and_insights/maputo_protocol_turns_18/)

## Sustainable Development Goals

# 1.6

The United Nations' Sustainable Development Goals (SDGs) provide another mechanism to encourage states to make commitments and take action towards gender equality. SDG 5 is aimed at achieving gender equality and empowering all women and girls. SDG target 5.1 focuses on ending all forms of discrimination against women and girls everywhere, with indicator 5.1.1 explicitly focused on legal frameworks.

Other broad targets for SDG 5 include:

- 5.2: Eliminating all forms of violence;
- 5.3: Eliminating harmful traditional practices such as early and forced marriages and female genital mutilation;
- 5.4: Recognizing and valuing unpaid care and domestic work;
- 5.5: Ensuring women's full participation in decision-making;
- 5.6: Ensuring universal access to reproductive health and rights ;
- 5.a: Undertaking reforms to give women equal access to resources;
- 5.b: Enhancing the use of enabling technology towards women's empowerment; and
- 5.c: Adopting policies and enforceable legislation towards gender equality and empowerment.<sup>61</sup>

Achieving justice and equality in family laws relates to each of these targets.

The countries in this study have made various commitments towards attaining the SDGs:

- **Ethiopia:** Ethiopia has responded positively to the SDG framework, though challenges remain towards achieving gender equality and women's empowerment partly due to the complexity involved in defining, addressing, and monitoring these processes. Ethiopia has mainstreamed and aligned the SDGs with its Second Growth and Transformation Plan (2015/16 to 2019/20). Ethiopia also participated in the 2017 Voluntary National Review on SDGs of how the SDGs are mainstreamed into national and sub-national development plans and implemented. The Government is currently formulating a 10-year perspective development plan for the period 2019/20 to 2029/30 which is fully aligned to the 2030 agenda and SDGs. Progress made against commitments in the UNSDCF will be monitored jointly by the Government and the UN on an annual basis and evaluated in the penultimate year of the planning cycle.
- **Kenya:** Kenya launched the SDGs in 2016 and developed the country's SDGs Roadmap to guide the transition from MDGs to SDGs. Progress has been achieved in mainstreaming the SDGs in national and subnational

61 UN Department of Economic and Social Affairs, SDG 5, <https://sdgs.un.org/goals/goal5>

development frameworks through consultative and interactive processes. SDGs have been mainstreamed in sector plans, strategic plans, and annual performance contracts. A review of policies for the implementation of SDGs revealed that the Medium-Term Plan III and priorities of the Government under the Big Four Agenda adequately cover the 2030 Agenda targets. Several initiatives that were aimed at enhancing gender statistics were also undertaken, including a comprehensive poverty report, report on the status of women and men in Kenya in 2017, national assessment of gender statistics, and Gender Sector Statistics Plan. A Women's Empowerment Index that forms a baseline for monitoring of the government's progress towards SDG 5 was also developed in 2020 which showed that only 29 percent of women in Kenya between the ages of 15 and 49 years were empowered in 2014.

- **Somalia:** SDGs are now streamlined and localized through adoption into the country's national development plan 2020–2024. In 2020, Somalia reached an agreement with the United Nations on Sustainable Development Cooperation Framework for Somalia 2021–2025. This Cooperation Framework is anchored based on its responsiveness to a human rights-based approach and, at the same time, is underpinned by the principle of leaving no one behind and reaching those furthest behind first.
- **Somaliland:** Somaliland is not recognized as a sovereign state, so has not made a formal commitment to achieving SDGs.
- **South Sudan:** In September 2015, South Sudan adopted the 2030 Agenda for

Sustainable Development. The government is still far from realizing any of the 17 SDGs, and especially SDG5 because of the lack of inclusion of women in decision making and women's economic empowerment. UN partners like UNDP, UNFPA, UNICEF and other developmental partners have played a critical role towards the goals of SDGs in South Sudan. Women for Justice and Equality (formerly Islamic Development and Relief Agency - IDRA) plans to monitor and report on the progress and new frameworks in place.

- **Sudan:** An institutional structure has been established to oversee the implementation of Agenda 2030 and the SDGs in the country known as the High-Level National Mechanism (HLNM). In 2019, the National Audit Chamber of Sudan published a Report on the Preparedness of the Republic of Sudan to Implement the SDGs (2015–2030) that indicates that the HLNM has not performed adequately in establishing a clear programme of action or a national mechanism to oversee the SDGs at the state level. Currently, UNDP Sudan is the only entity that monitors progress of all goals through SDGs annual index reports.
- **Uganda:** The Government has worked to ensure that the 2030 Agenda is owned by the people through national coordination arrangements. Institutional delivery is guided by a multi-stakeholder National SDG Coordination Framework that was established in 2016 under the leadership of the Office of the Prime Minister. The Framework defines and delegates leadership roles and responsibilities for various aspects of coordinating implementation of the SDGs, and has been reformed since 2016 to improve implementation. A national roadmap was prepared through a consultative process

that included the government, private sector, civil society, the UN, and the development partner community. The UN Country Team in Uganda, in partnership with Government and non-state stakeholders, have developed a new UN Sustainable Development Cooperation Framework for Uganda (2021–2025), launched in September 2020 by the President of Uganda and RC/UNCT.

## PART TWO

## Comparative analysis of key issues

This section provides a regional analysis and comparison of findings assessed against twelve key areas relating to marriage and family matters in which women and girls suffer discrimination under current Muslim family laws and practices. The areas of concern, listed below, are grouped into four categories coinciding with family life: entry into marriage, during marriage, dissolution of marriage, and general issues. The comparative analysis for each issue will be followed by a brief summary of points to consider in the Greater Horn of Africa region.

### Entry into Marriage

1. Equality of spouses in marriage
2. Minimum and equal legal age of marriage
3. Women's consent to marriage
4. Women's capacity to enter into marriage

### During Marriage

5. Polygamous marriage
6. Violence against women (VAW) in the family
7. Nationality rights

### Dissolution of Marriage

8. Divorce rights
9. Women's financial rights after divorce
10. Custody of children
11. Guardianship of children

### General

12. Inheritance rights
13. Access to Justice



## 2.1

## Entry into marriage

The definition of 'equality of spouses in marriage' is the structural root of inequality in many Muslim family laws that exist today. The issue centres around the view held by many Muslims that marriage is a relationship of 'complementary' or 'reciprocal' rights and responsibilities (as opposed to 'same' or 'equal' rights and responsibilities), a view that is based on the recognition of husbands as the single head of the family. This view entrenches discrimination and sustains a maintenance-for-obedience legal framework that treats women as the inferior party – a submissive subject – in a marriage. Under such laws, men hold the primary responsibility as guardians for the women and children of the family, including wives and adult daughters.

This structural inequality vis-à-vis Muslim family laws institutionalises and perpetuates a broad range of inequalities and injustices with regard to numerous aspects of a woman's marriage and family life. They include a woman's choice of spouse and ability to consent to marry, a wife's rights and responsibilities during her marriage and at its dissolution, the custody and guardianship of children, as well as a woman's rights to her inheritance and her ability to bestow her nationality to a foreign-born husband or to her children.<sup>62</sup>

### 2.1.1 – Equality of spouses in marriage

General equality provisions are enshrined in all of the countries' constitutions and in additional

statutory laws where they exist, such as family codes. Provisions related to equality of spouses are present in four out of the seven countries – **Somalia, Ethiopia, Uganda, and Kenya**. Yet de facto equality between the spouses is not present in any of the countries. Rather, patriarchal concepts and traditional gender roles are embedded in customs and traditions, and regardless of laws the husband is considered the head of the household and decision maker.

- **Ethiopia** has a clause in the constitution that stipulates constitutional supremacy, along with provisions around equal rights of men and women, and the Revised Family Code of 2000 provides for equality within marriage. But both the constitution and Revised Family Code recognise an exception for marriages celebrated in accordance with religious or customary laws, and Sharia courts have jurisdiction over questions related to marriage when both parties consent. Because there is no codified law, substantive application of law varies depending on the judge's background and school of thought. The roles of spouses generally are that the husband provides maintenance for the family while the wife takes care of the internal affairs of the family. Men and women have socially defined roles, which have traditionally given women less access and control over resources and less participation in decision-making compared to men.
- While **Kenya's** Marriage Act of 2014 provides

62 Musawah, 'Comparative Legal Review of the Impact of Muslim Family Laws on Women Across Commonwealth and Asia', 2019: <https://www.musawah.org/wp-content/uploads/2019/12/Comparative-Legal-Review-Impact-Muslim-Family-Laws-on-Women-Commonwealth-Asia-Africa.pdf>

that it is applicable for all Kenyans, it along with article 170 of the constitution provides an exception to parties to Muslim marriages. Questions related to Muslim marriages are determined in Kadhis' courts. Because there are no statutory Muslim laws, practitioners (kadhis, lawyers, scholars and Muslims in general) generally have a free hand to resort to their favoured Muslim school(s) of thought. Therefore, Muslim husbands and wives generally take on 'traditional' roles: the husband provides maintenance for the family while the wife takes care of internal affairs of the family.

- In **Somalia**, Article 4 of the family law defines marriage as a contract between a man and a woman having equal rights and duties, but then says 'The husband is by law the head of the family'.
- In **Somaliland**, there is a constitutional equality provision, but a stipulation in Article 36 states, 'The rights, freedoms and duties laid down in the Constitution are to be enjoyed equally by men and women save for matters which are specifically ordained in Islamic Sharia'.<sup>63</sup>
- In **South Sudan**, the constitution is the only codified legal framework available on family matters, and it allows the use of customary and religious laws for family matters. Under the customary laws, the man is viewed as head of the family with all rights to decision making; women are not considered equal to men.
- In **Sudan**, the Personal Status Act for Muslims 1991 reinforces gender roles by stipulating different rights and obligations for each spouse. The husband is obligated to provide

for the family, and the wife is obligated to be 'obedient to her husband'. Article 52 states it is the husband's right that his wife takes care of him and is obligated to 'obey him in kindness'.

- In **Uganda**, the Constitution states that any law or custom that is inconsistent with any provision of the Constitution is null and void. And the general family law is applicable to all citizens, but the Marriage and Divorce Act of Mohammedans Act provides that the general Marriage Act is not applicable to Muslims whose marriages were solemnized under Islamic law.

#### Ongoing concern

- In **Uganda** the Marriage & Divorce Bill 2009<sup>64</sup> seeks to reform and consolidate the law relating to marriage, separation and divorce and to provide for the types of recognised marriages in the country and marital rights and duties.
- In **South Sudan**, the ongoing family laws bill yet to be passed and adopted seeks to address issues of marriage, divorce, polygamy, etc.

#### 2.1.2 – Minimum and equal legal age of marriage

Laws on minimum age of marriage in the seven countries range from no stated absolute minimum age of marriage, to a stated minimum age of marriage with exceptions, to penalizing child/early marriage. However, even in countries where there is an actual law against child marriage, there is no strict law enforcement. Therefore, families still marry off young girls. Moreover, most customary rules and religious

63 Art 36 of the Somaliland Constitution of 2001

64 The Marriage & Divorce Bill 2009 and Marriage Bill, 2017

laws, particularly MFLs, do not specify a minimum age of marriage.

- **Countries with no minimum age of marriage**

The three Muslim-majority countries (**Sudan, Somalia, and Somaliland**) as well as **South Sudan** do not have a minimum age of marriage even though their statutory laws provide for the age of 18 to be the age of majority. Minimum age of marriage is not seen as a priority issue in these countries.

- In the **Muslim-majority countries** that follow the Shafi'i school of thought, underage marriage is considered under the age of 15.
- In **Somalia**, the constitution and statutory laws have conflicting provisions. The constitution<sup>65</sup> and the Juvenile Justice Law<sup>66</sup> provide that the age of majority is 18 years, while the family law implies that marriage is possible for individuals less than 18 years of age.<sup>67</sup> Somali parents encourage the marriage of their daughters while they are still young, in the hope that marriage will benefit the girls financially and socially.<sup>68</sup>
- In **South Sudan**, the transitional constitution speaks of 'marriageable age' without defining that term. The constitution and the Child Act 2008 provide that a child is a person below the age of 18. Yet 'children' under this definition are still married at high numbers – South Sudan has the seventh highest rate of child marriage in the world. About 52

percent of all girls are married before 18 years of age and 9 percent are pregnant before their 15th birthday.<sup>69</sup>

- In **Sudan**, the Child Act 2010 recognizes any person below the age of 18 as a minor. However, the Muslim Personal Status Act does not prohibit early marriage, but rather implies that the minimum age for marriage is 10 years for both genders.<sup>70</sup> Although the provision in the Child Act restricts the guardian's authority to marry off a minor without obtaining court approval, this condition is never fulfilled. It does not pose any restrictions in practice, and people are not aware of this stipulation.

#### Case law

In **Somalia**, a minor girl who has completed ten years of age may be married with the courts' approval if there is a risk of moral delinquency, the husband is suitable, and she accepts him.<sup>71</sup>

#### Ongoing concerns

- In **Ethiopia** a trend analysis of child protection indicators shows that progress in eliminating child marriage and teenage pregnancy has been slow over the last 16 years. Even though incidence of child marriage nearly halved between 2000 and 2016, from 20 to 11 percent, in Afar nearly a third of 15- to 17-year-olds were already married in 2016. Incidence of teenage pregnancy declined to 13 percent in 2016, but in Somali it was as high as 19 percent and in Afar 23 percent.<sup>72</sup>

65 Art 29(8) of the Constitution of Somalia provides that a child means a person under 18 years of age.

66 The age of criminal responsibility is 18 years and above.

67 Article 19 of the 1975 Family Law provides that girls who have not attained the age of majority may be represented in contract of marriage by her guardian.

68 Directorate of National Statistics, Federal Government of Somalia. The Somali Health and Demographic Survey 2020.

69 UNICEF press release, 'Some Things Are Not Fit for Children', 5 October 2020, <https://www.unicef.org/southsudan/press-releases/some-things-are-not-fit-for-children>

70 The Child Act 2010

71 Judicial Circular No. (45) / 1960 – Section 8.

72 Elezaj, Erëblina, Nesha & Ramful, Nesha & Victor Cebotari, Victor & Chris De Neubourg, Chris. (2019), 'Gender Equality, Women's Empowerment and Child Wellbeing in Ethiopia'.

- Since 2005, multiple attempts have been made in **Sudan** to reform the Personal Status Act. Eighty-eight articles with gender issues were identified, including having 18 years as the minimum age of marriage. The committee based its arguments on the Sharia, yet the proposals were rejected by Islamic leaders.
- Child rights organisations working within the Girls Not Brides **Uganda** National Partnership warn that the rate of child marriage in the country is rising due to school closures, food insecurity, and economic uncertainty triggered by COVID-19.
- The Draft Administration of Muslim Personal Law (AMPL) Bill of **Uganda** under Clause 22 placed the age for marriage for both men and women to be at 18.<sup>73</sup> Since the Mohammedans Act does not specify the age, there is a danger that some parents may force their daughters into marriage when they are below the age of 18.

### 2.1.3 – Women’s consent to marriage

#### Countries that provide mandatory consent to marriage / forced marriage is an offence

- Consent of both parties to a marriage is technically mandatory in the constitutions and statutory laws, where available, of all the seven countries.
- Forced marriage is considered an offence in the penal laws of **Ethiopia, Kenya, and South Sudan**.
- Article 31(3) of **Uganda’s** constitution requires ‘free consent’ of both parties to a marriage,

but Uganda has no laws specifically pertaining to forced marriages and evidence shows that forced marriages occur.<sup>74</sup>

#### Practices based on schools of jurisprudence

- In **Kenya**, a prospective bride who is an adult and has married at least once can consent to her subsequent marriage. However, it is understood that based on the rules of Shafi’i fiqh, a father has the right to conclude a marriage on behalf of a virgin daughter of any age even if it is against her will. Consequently, ijbar (forced marriage) of a prospective bride who has not attained puberty or who has never been married may occur behind the scenes in Kenya.<sup>75</sup>
- **Somalia, Somaliland, Sudan, Uganda, Ethiopia, and South Sudan** all predominantly follow the Shafi’i school of thought, supporting the practice of fathers marrying off young (virgin) daughters.
- In **Sudan**, a provision in Article 34 of the Personal Status Act provides that the guardian (wali) has the power to contract the marriage of his daughter so long as she consents to it later.

#### Countries with mandatory registration

Mandatory registration is provided for in the statutory laws of **Sudan, Ethiopia, and Kenya**, though this does not always occur in practice. **Uganda** also has an agency mandated with registering marriages.

#### Case law

In **Ethiopia**, multiple issues related to consent arose in the case *Abdurahman Ali et al Vs Hajji Kassim Mohammed and Zenit Ali*. Kassim

73 The Draft Administration of Muslim Personal Law (AMPL) Bill 2008

74 ‘Uganda: Forced marriages’, October 2015, <https://www.refworld.org/docid/577b73384.html>

75 Information obtained from Kenyan advocate, February 2017; Woodrow Wilson International Centre for Scholars, ‘Best Practices: Progressive Family Laws in Muslim Countries’, 2005, p. 16, <https://www.wilsoncenter.org/sites/default/files/Best%20Practices%20%28English%29.pdf>

Mohammed and Zenit Ali concluded their marriage before a Sharia court judge in the presence of two witnesses, but without the presence of their families, who they felt would not approve. Zenit's two brothers and her uncle filed an objection to the marriage before the First Instance Sharia Court alleging that there was no consent of her parents and relatives to the marriage, and this is required under Islamic law. The spouses did not appear in court or express their consent to the jurisdiction of the First Instance Sharia Court. Nevertheless, the court decided to annul the marriage. The couple appealed to the High and Supreme Sharia Courts, but the decision of the lower court was upheld. This case shows complexity both in terms consent to the court's jurisdiction<sup>76</sup> and who consents to a marriage.

#### Room for reform:

The Draft Administration of Muslim Personal Law Bill of Uganda provides for free consent of both men and women intending to marry under Clause 24 (b)(c).<sup>77</sup>

### 2.1.4 – Women's capacity to enter into marriage

The Muslim legal concept of *wilaya*, in which a male is considered to have guardianship over a female, means that many countries still require a woman, regardless of age, to obtain a male guardian's consent to enter into marriage. The exception for this is countries where jurists and communities follow the Hanafi school of law.

#### Permission of a male guardian required to solemnise a marriage

- In all seven countries, the bride requires consent of her closest male relative or

guardian (*wali*) consent to conclude a Muslim marriage regardless of her age. This is based on the Shafi'i school of thought.

- In some instances, such as in **Kenya and Sudan**, the prospective bride may seek the authorisation of a Sharia court judge to marry even if the wali opposes the marriage.
- In **Ethiopia**, some females state that they do not follow the Shafi'i school of thought and rather follow the Hanafi school of thought. Using this loophole, they are allowed to marry if they have previously been married and are thus not virgins.
- In **Sudan**, women who have been married before have recently been permitted to act as their own guardians, without the need of a male.

76 Daniel E. Alemayehu, 2021, 'Multiple Legal Orders in Ethiopia: An Impediment on the Enforcement of Women Rights', 19 Nw. J. Hum. Rts. 38, <https://scholarlycommons.law.northwestern.edu/njihr/vol19/iss1/4>; Mohammed Abdo, 'Legal Pluralism Vs Human Rights Issues: Sharia Courts and Human Rights Concerns in the Light of the Federal Constitution of Ethiopia', <https://backoffice.biblio.ugent.be/download/3160168/5874552>.

77 The Draft Administration of Muslim Personal Law (AMPL) Bill 2008

## 2.2

## During marriage

### 2.2.1 – Polygamous marriage

In all seven countries, polygamy is allowed for Muslims, and men may marry up to four wives. Laws differ as to the restrictions and conditions placed on the polygamous marriages:

- In **Somalia**, a man is required to get an authorization from a competent district court to have an additional wife. Yet in practice a man can marry up to four wives without authorization.
- In **Kenya**, section 6(3) of the Marriage Act states that an Islamic marriage is presumed to be polygamous or potentially polygamous unless a couple declares their intention to convert their marriage to a monogamous one.
- Polygamy is an offence in the Criminal Code of **Ethiopia** and the Marriage Act of **Uganda**. Yet in Ethiopia there is an exception where bigamy is conformity with religious practices recognized by the law, such as for Muslims. Similarly in Uganda, section 4(2) of the Marriage Act provides that customary marriages may be polygamous.
- In **Ethiopia** there is neither synergy nor is there a proper data system to know how many wives a man has.<sup>78</sup>
- In **Kenya**, monogamous marriage is the societal norm, but there is a general presumption that Muslim marriages will be polygamous or potentially polygamous.
- In **South Sudan**, 'the practice of polygamy is prevalent, legal, practised, and widely accepted in South Sudan where a South Sudanese man can marry as many women as he can afford to pay bride price / dowry for, so the number of wives often depends on a man's wealth'.<sup>79</sup>

#### Reform attempt

- In **Uganda**, a bill that attempted to outlaw polygamy was rejected in 2011 because polygamy was considered to be a 'central part of the Muslim faith'. Christians also opposed the law allegedly because it would promote promiscuity and 'cheapen the institution of marriage'. This issue was resolved by a decision that Muslim marriage would be provided for under a separate law. The last tabling of the bill before Parliament was in February 2013, but it was withdrawn in order to give Members of Parliament more time to consult their constituents. In 2019, the Bill was meant to be considered at the Second Reading in Parliament but suffered postponement again.<sup>80</sup>

As such, in all the seven countries polygamy is practised without strict regulations nor enforcements.

#### Ongoing concerns

- Polygamous marriages are practised with no restrictions, prerequisites, nor conditions for men who want to marry more than one wife

<sup>78</sup> The president of the Sharia court of Addis Ababa mentioned an incident where a national of a neighbouring country had multiple marriages and due to his frequent visits they checked their documents where it was found to be his fifth time and therefore he was denied the marriage.

<sup>79</sup> HSBA, 2012, 'Women's Security and the Law in South Sudan', [https://docs.southsudannforum.org/sites/default/files/2016-06/hsbawomensecuritylaw\\_0.pdf](https://docs.southsudannforum.org/sites/default/files/2016-06/hsbawomensecuritylaw_0.pdf)

<sup>80</sup> Uganda Country Page by Musawah.

### Case Law

- In **Uganda**, in the case of *Mifumi (U) Ltd & Anor<sup>81</sup> v Attorney general and Anor*, Mifumi argued that polygamy denied women their right to equality in marriage and was in violation of Article 21(1) of the Constitution, which states that all people are equal before the law. Uganda's Constitutional Court dismissed this petition.

### 2.2.2 – Violence against women (VAW) in the family

#### Countries with specific laws on VAW

Two out of the seven countries in the study have specific laws relating to VAW: **Uganda's** 'Domestic Violence Act 2010' and **Kenya's** 'Protection Against Domestic Violence Act 2015'.

#### Countries with VAW covered under general laws

- **Ethiopia, Somalia, Somaliland, and South Sudan** have general provisions in their statutory laws related to violence.
- In addition to general statutory laws, the **South Sudan** Child Act of 2008 protects children from violence.
- In **Somaliland**, Article 36(2) of the Constitution provides that the government shall encourage, and shall legislate for, the right of women to be free of practices which are contrary to Sharia, and which are injurious

to their person and dignity. Furthermore, the National Declaration of Somaliland Traditional Leaders provides that the rights of women must fully be protected in accordance with the Sharia. The government adopted a gender-based violence (GBV) plan that devised actions for the prevention and management of Gender-Based Violence, and the Ministry of Religious Affairs has issued a fatwa delegitimizing the use of Pharaonic FGM and recommended the 'Sunna type'.<sup>82</sup>

- In **Somalia**, a sexual offences bill was unanimously passed by the cabinet in 2018 to criminalize range of issues including domestic violence and rape. While the law was pending before the parliament, a motion to table a Sexual Intercourse Related Crimes Bill was presented before the parliament in 2020. The sexual offences bill was to repeal the outdated provisions on sexual crimes in the Penal Code of 1962.
- In **Sudan**, violence is regulated under the Criminal Act (Penal Code), however, its provisions are not gender-sensitive, hence there is no recognition of gender-based violence. Additionally, domestic violence is not criminalized unless it amounts to gross harm, battery or murder attempt.

#### Marital rape is either not stipulated in laws or exempted from being an offence

- Marital rape is either not criminalized or is exempted in all seven countries.

81 Constitutional Petition no.12 of 2007.

82 Somaliland Ministry of Religious Affairs and Endowment. There are generally considered to be four types of FGM that range 'from removal of the clitoral hood to its most severe form, infibulation', which is practiced predominantly in Somalia, Sudan, Djibouti, Egypt, and Ethiopia. Type 1, 'partial or total removal of the clitoris and/or the prepuce (clitoridectomy)', is called the 'Sunna type', and is considered to be less severe. Type 4, called Pharaonic FGM or infibulation, is the most severe and is associated with longer-term gynecologic or urinary-tract difficulties, cysts and pelvic infection, dysmenorrhea, hematocolpos, painful intercourse, infertility, and problems during childbirth' and sometimes leads to death. Abathun, A. D., J. Sundby and A. A. Gele (2016). 'Attitude toward female genital mutilation among Somali and Harari people, Eastern Ethiopia'. *International Journal of Women's Health* 8: 557-569. WHO, 'Classification of female genital mutilation'. (2019). Retrieved from <https://www.WHO.int/reproductivehealth/topics/FGM/overview/en/>; Lukale, N. (2014). 'Harmful Traditional Practices: A Great Barrier to Women's Empowerment'. *Gender Based Violence* <https://www.girlsglobe.org/2014/02/24/harmful-traditional-practices-a-great-barrier-to-womens-empowerment/>; Lelieveld, M. (2011). 'Child Protection in the Somali Region of Ethiopia'. Feinstein International Center, Tufts University.

- In the criminal code of **Ethiopia**, rape is defined as whomever compels a woman to submit to sexual intercourse outside wedlock.
- Section 43(5) of the Sexual Offences Act of **Kenya** specifically exempts marital rape from being an offence.
- There are no specific laws that recognize spousal rape in **Somalia** and in **Somaliland**.
- In **South Sudan**'s Penal Code, sexual intercourse by a married couple is not considered rape.
- In **Sudan**, marital rape is not recognized by law; on the contrary, it is considered a demand by the husband that the wife must obey as part of her obligations to be 'obedient'.<sup>83</sup>
- The Penal Code of **Uganda** also does not criminalize a husband's rape of his wife.

#### Case law

- In a recent case in **South Sudan** involving a Sheikh that abused a teenage girl in Juba, religious leaders paid bribes to transfer the case from civil court to a customary court managed by Muslim religious leaders.<sup>84</sup>

#### Positive developments

- The Government of **Ethiopia** adopted the National Strategy on Harmful Traditional Practices and the accompanying action plan on female genital mutilation, child marriage and abduction in 2013 and revised Sentencing

Guideline No. 2/2012 by the Federal Supreme Court to guide determination of criminal sentences where the judges are required to increase the lower end of the penalty in sentencing GBV. Additionally, the Ministry of Women, Children and Youth established a 'National Alliance to End Child Marriage and FGM'<sup>85</sup> consisting of concerned stakeholders to implement the strategic interventions set out in the National Strategy. A national platform for the prevention of all forms of HTPs has also been launched. This platform consists of federal ministries, regional counterparts, United Nations agencies and international organizations.

- The **Kenyan** government has developed a National Policy on Prevention and Response to Gender Based Violence.<sup>86</sup>
- According to Article 26 of the Child Act (2008) of **South Sudan**, 'Every female child has a right to be protected from sexual abuse and exploitation and gender-based violence, including rape, incest, early and forced marriage, female circumcision and female genital mutilation'. Further provisions in Article 23.1 state that every child has the right to be protected from early marriage, forced circumcision, scarification, tattooing, piercing, tooth removal or any other cultural rite, custom or traditional practice that is likely to negatively affect the child's life, health, welfare, dignity or physical, emotional, psychological, mental and intellectual development. Furthermore, the Ministry of Gender in South Sudan finalised a national Gender Policy in 2021 that prioritizes sexual

83 More details about marital rape can be found in the Musawah Sudan country table on the website: <https://www.musawah.org/resources/country-table-sudan/>

84 Women for Justice and Equality (formerly Islamic Development and Relief Agency - IDRA) Key Informant Interview with affected women, October 2021, as outlined in the Musawah Sudan country table.

85 National Costed Roadmap to End Child Marriage and FGM/C 2020-2024, UNICEF, August 2019, <https://rb.gy/q5gjjs>

86 Kenya State party report, U.N. Doc. CEDAW/C/KEN/8 (2016), para. 63, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FKEN%2F8&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FKEN%2F8&Lang=en)



and gender-based violence, although it is currently stagnant in the Ministry of Justice. A revised National Action Plan 2015–2020 has been reviewed with objectives to protect women and girls, including those with disabilities, against any form of sexual and gender-based violence (SGBV) and respect human rights, human dignity and equality to eradicate sexual and gender-based violence.<sup>87</sup>

- In **Sudan**, the Sudanese Criminal Act criminalized the practice of FGM in the country.

#### Ongoing concerns

- In **Ethiopia** there is no single comprehensive law addressing VAW with an approach and specific provisions for investigation, prosecution, and punishment of the perpetrator nor protection and support services for survivors. Yet violence against women (VAW) is one of the top human rights violations experienced in the country, with physical and sexual violence of serious concern, particularly intimate partner violence, which was recorded to have a rate as high as 54 percent. Domestic violence is a socially condoned reality in the country, with 88 percent of rural women and 69 percent of urban women still believing that their husbands are entitled to beat them.<sup>88</sup>
- Although FGM is criminalized in **Ethiopia**, it is still almost universal in the Eastern regions such as the Somali region of Ethiopia. The 2016 Demographic Health Survey data on FGM among the age group of 15–49 showed a prevalence of 98 percent of women and girls affected in Afar and 99 percent in Somali, respectively. Data also shows that more rural women (68 percent) than urban women (54 percent) are likely to have undergone the practice.<sup>89</sup>
- The common penal code of **Somalia and Somaliland** is outdated and thus does not provide sufficient provisions against domestic violence or harmful traditional practices.
- In **Kenya** although the The Protection Against Domestic Violence Act (2015) prohibits any form of violence against the women, some forms of domestic violence such as wife battering, are rampant. Among Kenyan Muslims, there are some who believe that what the law considers as violence against women, are religious rights. Such acts include female circumcision, marital rape, etc.<sup>90</sup>
- The sexual offences law has been a hotspot throughout **Somalia** in recent years. Rights groups and policy makers have discussed the issue, and achievements have been made in that the law was passed by the cabinet and sent to the parliament for approval. There has also been significant pushback to defend the status quo. Therefore, in two consecutive years (2018–2020), there were two contradictory motions on child marriages and age, sexual issues, domestic violence, consent.
- In **Somaliland**, a new sexual offences law which includes GBV and HTPs was passed in 2018, but it was immediately resisted by both Islamists and politicians. Islamists resisted on the ground that it is ‘anti-Sharia’. Furthermore,

87 IDRA KII with Ministry of Gender, Child and Social Welfare, October 2021.

88 Woldu, T.H., 2017, ‘Human Rights of Women and the Phenomenon of Marital Rape in Ethiopia: A Critical Analysis’.

89 Central Statistical Agency/CSA/Ethiopia and ICF, 2016, Ethiopia Demographic and Health Survey 2016. Addis Ababa, Ethiopia, and Rockville, Maryland, USA: CSA and ICF.

90 Information obtained from Kenyan advocate, February 2017, Kenya Country Table by Musawah.

the Somaliland 2010 SOP for Prevention and Response to GBV is recognized as a guiding document to counter and manage GBV cases, including domestic violence. However, the document was to demonstrate affirmative action from the part of the government. It has neither legal authority to be enforced nor popular support to pressure legal reform.<sup>91</sup>

- In **South Sudan**, like most countries, cases of violence against women have significantly increased during the coronavirus pandemic. Statistics show that 97 percent of the reported GBV incident survivors were female while 3 percent were male.<sup>92</sup> Physical assault accounts for 39 percent, followed by psychological / emotional abuse (21 percent), sexual violence (21 percent), rape cases (17 percent) and sexual assault cases (4 percent).<sup>93</sup>
- In many parts of **Sudan**, different forms of violence are normalised and women usually do not seek legal action or support. This is particularly true when the violence is committed by the husband, as many believe that the husband is entitled to discipline his wife if she commits any wrongdoing.
- Domestic violence is among the most frequently reported criminal offences in **Uganda**. In 2019, at least 13,639 domestic violence cases were reported to police, and these accounted for 6.3 percent of the total criminal cases reported during the year. Notwithstanding the relatively large number of domestic cases reported, only a small proportion of the cases are prosecuted through the Courts of Law. Cases prosecuted

through the courts are often withdrawn because relatives of the complainants prefer to settle amicably without lengthy prosecution procedures.<sup>94</sup>

### 2.2.3 – Nationality rights

#### Countries with unequal nationality rights

- There are discriminatory nationality rights in the three Muslim-majority countries – **Somalia, Somaliland, and Sudan**.
- In **Somalia and Somaliland**, women have unequal rights in obtaining and losing nationality. In cases where a woman is married to a foreign husband, she cannot pass her nationality to their children.
- In **Sudan**, a foreign wife is entitled to receive Sudanese citizenship from her husband, but a foreign husband cannot be granted citizenship from his Sudanese wife. Children born to Sudanese mothers or fathers will gain Sudanese citizenship.

#### Countries with equal nationality rights

- The four Muslim-minority countries – **Ethiopia, Kenya, Uganda, and South Sudan** – have statutory laws that guarantee equal nationality rights.
- In **South Sudan**, however, the reality is different from the legislation. It is exceedingly difficult for women to even pass on nationality to their children and foreign husbands due to cultural norms.

91 Somaliland Standard Operating Procedure for Prevention and Response GBV, 2010.

92 Ellsberg, M, et al, 2020, 'No Safe Place: Prevalence and Correlates of Violence against Conflict Affected Women and Girls in South Sudan', 2020, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0237965>

93 Ibid.

94 Kato, J., 2017, 'Access to justice for domestic violence cases in Uganda', Policy brief Issue No. 122, November 2020.

## 2.3

## Dissolution of marriage

### 2.3.1 – Divorce rights

#### Unilateral divorce (talaq) is allowed for men

- In **five out of seven of the countries** (all but Ethiopia and Uganda), unilateral divorce (talaq) is allowed for men, while women can only access dissolution of marriage through courts where they are available or by elders in Somaliland.
- In **Kenya**, the equal divorce rights provision in the constitution provides an exception for Muslims, thus allowing unilateral divorce by husbands without restrictions.
- In **Somalia and Somaliland**, unless the divorce is about a critical dispute, a man can unilaterally divorce outside the court, but the marriage dissolution (faskh) filed by the wife can only be sought through the court. The court may authorise a divorce only after referring the case to a conciliation committee and upon ascertaining that it has failed its attempted reconciliation between the husband and wife. Both husband and wife are entitled to file a petition for dissolution of the marriage if they have one of the cases listed in the law. The list includes suffering from incurable diseases, disappearance, habit to refuse maintenance, extreme poverty to care for each other, serious disagreement, perpetual sterility, and long imprisonment of either. Additionally, a man who is seeking divorce need not provide reasons, but a woman must bring a convincing justification and evidence.
- In **Sudan**, there are two types of divorce available for the wife: (1) Judicial divorce (taleeq), which is filing for divorce grounded on legal justifications stipulated by law for which the court must be satisfied with the wife's claim; and (2) Divorce for consideration (khula').<sup>95</sup> Similar to Somalia and Somaliland, if divorce is initiated by the wife, it must be granted by a judge, whereas the husband can obtain a divorce by repudiation. The wife may seek judicial divorce on the grounds of husband's incurable physical or mental illness; his impotence; his cruelty or discord between spouses; his inability to provide maintenance; his absence or being sentenced to prison; divorce by ransom (i.e., if a wife is declared nashiza/nushuz (disobedient) by court order, a wife may waive her rights, and if the man does not agree to the divorce, arbitrators must be appointed; if she proves that she suffers from remaining with him, divorce will be ordered by the Court). Each of these has specific conditions and requires extensive evidence.
- In **Uganda**, the Marriage and Divorce of Mohammedans Act Cap 252 provides that all marriages between persons professing the Mohammedan religion, and all divorces from such marriages, shall be valid and registered as provided in this Act. No additional details are provided in the act. Since the civil court cannot pronounce Islamic divorces, a Muslim must apply to the Sharia court to obtain a Sharia-based divorce. Unilateral divorce (talaq) is allowed for Muslim men who married under Muslim laws.

95 More details about divorce laws and practices in Sudan can be found on the Musawah Sudan country table via the link: <https://www.musawah.org/resources/country-table-sudan/>

### Unilateral divorce (talaq) is not allowed

- In **Ethiopia**, the only divorce recognized under Ethiopian laws is a judicial divorce obtained through either civil or Sharia courts. Unilateral divorce (talaq) is not allowed.
- In **Uganda**, the Constitution grants equal divorce rights and Section 5(l)(b)(ii) of the Marriage and Divorce of Mohammedans Act provides for registering the Khula divorce by the man and woman jointly or by her guardian. Also, Section 11 of the Divorce Act provides that a husband or wife may present a petition to court praying that his or her marriage may be declared null and void. In addition to that, section 14 of the Marriage Act provides that a husband or wife may apply by petition to the court for judicial separation on grounds of cruelty, adultery, or desertion, and the court on being satisfied that the allegations of the petition are true. Since the civil court cannot pronounce Islamic divorces, a Muslim must apply to the Sharia court to obtain a Sharia-based divorce.

### Case law

- In **South Sudan**, a woman was divorced without consultation by her husband, who is an imam, and was not given anything from their marital property. When she reported the case to the civil court, she was referred to the customary court.<sup>96</sup>

### Ongoing concerns

- Unequal provisions of divorce and dissolution of marriage in all the countries **except for Ethiopia**.
- In most of the customary law systems in **South Sudan**, a divorce is finalized upon the

return of the bride price or dowry to a husband's family. Repayment of the dowry (dower, customary bride price) can cause logistical problems and friction within families.<sup>97</sup> As such, families have a financial incentive to ensure that marriages remain intact even if the girl faces abuse. Women may be pressured to reconcile, even if they face violence and risks to their safety and wellbeing.<sup>98</sup> Divorce often leaves Muslim women vulnerable. For this reason, most women choose to remain in abusive marriages instead of going through the painful process that usually ends up in favour of the husband.<sup>99</sup>

- In **Sudan**, the Court often rules in favour of men, refusing women the right to divorce.

### 2.3.2 – Financial rights after dissolution of marriage

Most Muslim family laws state that women have defined financial rights after talaq and faskh divorce. This includes varying forms of maintenance and compensation and/or share of matrimonial property. In the event of a khul' divorce initiated by a woman, the woman needs to provide compensation to her spouse, either by returning her dower or an amount specified by the court or mutually agreed between both parties.

### Maintenance based on fault

- In **Somalia and Somaliland**, maintenance is based on fault. This means where divorce (talaq) or dissolution (faskh) resulted through the fault of the husband, the court shall order him to maintain his former wife for a period

96 IDRA KII with affected woman (October 2021)

97 South Sudan's women in the spotlight, Reliefweb (October 2012): <https://rb.gy/wptn>

98 Human Security Baseline Assessment, 2012, <https://issat.dcaf.ch>.

99 DRA KII with Muslim religious leaders and law makers from the Islamic University of South Sudan, October 2021.

not less than three months and not more than one year. If the divorce or dissolution results through a fault on the part of the wife, the court shall order her to pay to the husband a sum not less than her dowry. In both countries the husband is required to continue providing maintenance to his wife during the period of *iddah*. Also, regardless of fault, the man should maintain his former wife if she is pregnant or has children. The amount is fixed either by court or by elders of the parties.

- In **Somaliland**, maintenance is not according to precise articles of law, but understandings of the Shafi'i school of jurisprudence. In rural areas, laws are administered by religious authorities backed by the customary rules.

#### Maintenance regardless of fault

- In **Sudan**, the divorced wife is entitled to post-divorce maintenance (*mut'ah*), in addition to maintenance for children, as per classical rules. In most cases, the post-divorce maintenance is assessed according to the means of the ex-husband to a maximum of the equivalent of six months' maintenance. The cost of breastfeeding is required to be included in the maintenance for nursing mothers' up to two years.

#### Matrimonial property

- Under the Revised Family Code of **Ethiopia**, there is a concept of common property among spouses that is applied in civil courts. It allows for spouses, including Muslim women, to equally divide property among spouses. However, in practice, Federal Sharia Courts, while acknowledging the limits to their power, tend to assume jurisdiction over matrimonial property if parties raise such issues in a particular suit. If the parties'

consent, the courts seem to believe they can legitimately take on these matters, even though they are not specifically outlined under their jurisdiction as defined by the enabling legislation. Also, Muslim women seldom resort to civil courts and instead consent to the jurisdiction of Sharia courts where they will only get the *muaaker*, *mut'ah*, *iddah*, and child maintenance depending on the case and calculated by the judges/*kadhis* as they see fit.

- In **Kenya**, the Matrimonial Property Act provides for a legal concept of matrimonial assets. However, Section 3 provides that Muslims may be governed by Islamic law in all matters relating to matrimonial property. Therefore, upon divorce Muslim wives may receive *'iddah* maintenance, the balance of her *mahr*, and *mut'ah* compensation.
- In **Uganda**, Muslims may choose to proceed under civil courts or Sharia courts. The Constitution entitles men and women to equal rights in marriage, during marriage and at its dissolution. The court can order permanent alimony as per the Divorce Act, based on a sum of money that the court thinks reasonable having regard to her assets, the ability of the husband, and the conduct of the parties. The law relating to matrimonial property hinges on the concept of marriage. This law only and strictly applies to marriage and or formally married persons.<sup>100</sup> In the case *Rwabinumi v Bahimbisomwe*<sup>101</sup>, it was concluded that whether individual property became joint matrimonial property and whether it should be divided equally on divorce depends on the facts of each individual case. However, where a spouse makes a substantial contribution to the

100 Herbert Kolya v Erikiya Mawemuko Kolya, Civil Suit No. 150/2016, *Rwabinumi v Bahimbisomwe* (Civil Appeal-2009/10) [2013] UGSC 5 (20 March 2013)

101 Civil Appeal - 2009/10 [2013] UGSC 5 (20 March 2013) 65779

property, it shall be considered matrimonial property. A 2023 case rolled back some of the progress on matrimonial property by requiring a spouse to provide receipts to demonstrate their contributions to the matrimonial home. This is often impossible in the case of household and care work, thus these contributions will often be undervalued if this case is allowed to stand.<sup>102</sup>

### No provisions on matrimonial property or maintenance after divorce

- In **South Sudan**, unlike the other six countries, there are no provisions on maintenance after divorce and women are not given property upon divorce.

### Reform possibilities

- In **Ethiopia**, there was an attempt to argue the principle of matrimonial property in the Sharia courts of Addis Ababa. The argument was to give half of properties earned after the marriage to the woman. However, most women failed to provide enough evidence to prove the property they contributed to was earned after marriage.
- According to a Senior Principal Kadhi in **Kenya**, even though matrimonial assets are not commonly granted in the Sharia courts, if such cases are strongly presented and argued, many kadhies will recognise the contributions of women including housewives to the property acquired during the marriage. This sets a strong foundation for jurisprudence.<sup>103</sup>

## 2.3.3 – Custody of children

### Mothers gain/lose custody of a child upon the child reaching a prescribed age

- In the three Muslim-majority countries of **Somalia, Somaliland, and Sudan**, mothers are entitled to the physical custody of their children (hadana) until a certain age and in accordance with certain conditions that affect the mothers' rights.
- In **Somalia**, the mother is entitled to the custody of her male child until he has completed the age of 10 years and of her female child until she has attained the age of 15 years.
- In **Somaliland**, the mother is primarily entitled to the custody (hadana) of her children when the marriage ceases; she has priority for child custody over the husband. This right is guaranteed until the children reach an age that they can make a choice.
- In **all three Muslim-majority countries**, the mother loses custody if she remarries unless the father consents; in Sudan women face an additional condition if they travel.

### Countries which emphasise the 'best interests of the child' principle

- **Ethiopia, Uganda, and Kenya** have the principle of the 'best interests of the child' (BIC) in their statutory laws.
- In **Ethiopia**, however, mothers in practice have custody of the children until the age of 7 years as per the MFL practices in the Sharia courts, then the children get to choose.
- The courts in **Uganda** have emphasized the welfare of the child at the forefront in all matters concerning children. Courts have made it a principle that where the child is of tender years, the custody of such child should be given to the mother. Given

<sup>102</sup> Primah Kwagala, 'She cooks, cleans and cares ... so why is a woman in Uganda worth only 20% of divorce assets?', The Guardian, 10 Feb 2023,

<sup>103</sup> This information was gathered by Musawah Researchers from Human Rights Watch, 2013.

the cultural set up of Uganda where the factors that affect girls are far different from those of the male children, the law is justified when it does take in consideration that girl children of tender age should in most cases stay with the mother in custody matters.

- In **Kenya**, the Children Act grants exclusive jurisdiction over all matters related to children, including custody and/or maintenance, to judicial officers who are gazetted under the Children Act. Therefore, Kadhis' courts cannot preside over matters relating to custody and maintenance of children. Custodial rights between women and men are equal. Upon divorce, Section 83(1) of the Children Act requires the court to consider factors that ensure the best interests of the child when deciding on custody matters.

#### Practice based on custom

- In **South Sudan**, statutory laws totally differ from the practice. Statutory laws guarantee equal rights of both parents in case of divorce, but in practice most versions of customary law place children with their fathers in case of separation or divorce as children are considered part of the male lineage. Young children are permitted to remain with their mothers until they turn between 3 and 7 years old. The prospect of losing custody acts as a strong disincentive to mothers who are considering a divorce. Custody decisions are mostly made by customary courts. Although these courts are supposed to be governed by the Child Act and the child's best interests, in practice they often rule based on custom. This forces women to make the decision to stay in abusive marriages rather than lose custody of their children.

#### Positive developments

- In **Kenya**, custodial rights between women and men are equal and best interests of the child is a main criterion to decide custodial rights.
- The courts in **Uganda** have been successful in custody matters in ensuring that the welfare of the child is at the forefront in all matters concerning children.

#### Ongoing concerns

- In **South Sudan** there are concerns that when a separated woman that was not formerly divorced enters into a new relationship or marriage, any children with a new partner will 'belong' to her former husband.<sup>104</sup>
- In **Kenya**, a Senior Principal Kadhi stated that limiting cases regarding children to the Children's Court has caused confusion among Muslim women, and also results in costly litigation because a Muslim woman must file a suit for her own maintenance in the Sharia courts and a separate suit for the children's maintenance at the Children's Court.

### 2.3.4 – Guardianship of children

Guardianship in these seven countries' statutory laws and in practice ranges from the requirement that a guardian be 'an adult Muslim male' and guardians must be part of the father's lineage to the use of the 'best interests of the child' (BIC) principle to determine guardianship.

- In **Kenya and Uganda**, guardianship is determined based on the best interests of the child.

- In **Somalia**, the family law states that if the mother dies or there is a legal impediment, the custody of the child (hadana) shall pass to the father or some other relative. In the absence of the above-mentioned persons or if they are not fit guardians, the court may rely on the interests of the child. In practice, however, elders representing each spouse usually mediate when there is a guardianship dispute. This is sometimes authorized by the court.
- In **South Sudan**, guardianship is always based on the father's lineage, regardless of the laws.
- In **Sudan**, the law provides that a guardian must be 'an adult Muslim male'. There have been many attempts by women to obtain guardianship when the children are harmed by the named guardian's incompetence. This has been recently challenged in court in a case that is the first of its kind in Sudan in an attempt to revoke the guardianship and transfer it to the mother instead.<sup>105</sup>

### Positive developments

- The national parenting guidelines in **Uganda**<sup>106</sup> target the parents, guardians, and caregivers as primary users in ensuring that the role of parenting is duly fulfilled.

In addition, the duty bearers have a responsibility of planning, equipping, and monitoring and resource mobilization to enable the smooth implementation of the guidelines.

<sup>105</sup> In Pursuit of Full Guardianship under Sudan Personal Status Law- SIHA Network, November 2018, <https://sihanet.org/gender-alert-in-pursuit-of-full-guardianship-under-the-sudan-personal-status-law/>

<sup>106</sup> The Uganda National Parenting Guidelines, May 2018.



## General

# 2.4

### 2.4.1 – Inheritance

Inheritance rights are unequal in law and/or in practice for Muslim women and men in the seven countries in the study.

#### Unequal inheritance rights

- In **Somalia and Somaliland**, the 1975 Family Law, which was a piece of legislation common to the two countries, provides for equality in inheritance. For this reason, it was rejected in the former and outlawed in the latter.
- Currently, in **Somalia** inheritance is governed according to Shafi'i fiqh in which shares are divided and distributed by a formula-based method. Using that formula, women get their shares of inheritance. Depending on how they are related to the deceased, females may sometimes gain more than males. In general, however, males get more than females.
- In **Sudan**, the general rule is that men are entitled to twice as much as women. However, there are some rare cases in which women receive as much or more. Sudanese Muslims adhere to inheritance laws as set by the Personal Status Act, which is believed to be derived from Sharia. There are some practices that are not in alignment with Sharia laws. These generally relate to the division of land shares. Women may be excluded from inheriting lands since women may get married to men who are not from the same family or tribe. This is viewed as a risk of losing the

land to the family or tribe of her husband by way of gift or inheritance. This practice is believed to be a way of protecting the ownership of lands within the same lineage.

#### Civil laws grant equal inheritance rights but practices for Muslims differ as per the MFLs

- In **Ethiopia, Kenya, Uganda, and South Sudan**, there is generally equality in inheritance as per statutory laws, but practice may differ for Muslims.
- Muslims in **Ethiopia** can either go to civil courts or consent to the Sharia court's jurisdiction, which uses interpretations of Sharia.
- In **Kenya**, inheritance rights between Muslim women and men are unequal. In general, as per the MFLs practised in these countries, a woman is entitled to half the share of a man.
- In **Uganda**, the Succession Act provides no specific provisions for Muslim succession; the current position is that a Muslim may apply for exemption from its provisions. The position of the courts is that the national laws take precedence, but in many Muslim communities customary and religious practices of succession are preferred to the statutory laws, to the detriment of women and children. Additionally, in cases where a Muslim makes a will and it is deemed to favour some children, the will is disregarded (destroyed) and the property is distributed according to Sharia law.<sup>107</sup>

107 Per Secretary General Uganda Muslim Supreme Council and Director General Sharia UMSC

### Ongoing concerns

- Women face unequal inheritance rights among the Muslim communities within all of the countries. Even where women are awarded inheritance shares, they may face difficulties in accessing such shares.
- In **Uganda**, the Succession (Amendment) Bill 2021 was proposed, but it was opposed by Muslim activists with the argument that the bill disregards the teachings of Islam in seeking to ensure equality and equity in the distribution of the deceased's assets.<sup>108</sup>

#### 2.4.2 - Access to Justice

Access to justice is still a challenge for many women and girls in all countries reviewed. In countries such as South Sudan where there are no Sharia courts, the situation becomes worse. Some countries have cumbersome laws and processes that hinder women, especially those affected by poverty and illiteracy. Additionally, there are no clear and transparent processes to enable people to understand the system (e.g., available options, how appeals work, decision-making processes by police, judicial system and judges/kadhis, etc.). Access to justice must include physical accessibility, especially where there are no or not enough Sharia courts

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108 'Muslims oppose Secession Bill passed by Parliament', The Independent, 2 April 2021, <https://www.independent.co.ug/muslims-oppose-succession-bill-passed-by-parliament/>

## 2.5

## Overall issues of concern

A number of concerns and trends are relevant throughout the region:

### Structural and legal issues

- None of the countries in the study has a comprehensive codified Muslim family law. Citizens face confusing and sometimes contradictory sets of laws and customs. Judgements are often left to the discretion of religious figures or elders in the community or to judges/kadhis based on the preferred schools of thought.
- There are few or no procedural regulations and mechanisms to ensure clarity, transparency, and predictability of the justice to be rendered.
- Legal and institutional frameworks are insufficient to regulate the complex operation of multiple legal orders and their interaction with formal laws and institutions.
- In the plural legal systems, women face high social pressure not to use civil courts. Women may not be aware of their options to access justice (i.e., Sharia courts or civil courts), especially in rural settings. Many are illiterate, poor, and/or have little to no information about legal matters. Even if they know about other options, women may fear negative perceptions and reactions from the community if they go to civil courts. Refusal to have their case adjudicated in a religious proceeding may be seen as disrespect and contrary to their faith.

### Issues upon entry into marriage

- There is no minimum age of marriage for Muslim communities in many of the countries,

and lax enforcement where minimum age laws are in place. Early marriage is therefore common in Muslim communities especially where the Shafi'i school of law is prevalent, as it is believed to allow girls under the age of eighteen to marry.

- A girl/woman's consent is viewed as secondary or almost insignificant to Muslim marriage contracts, especially in cases of early marriages.
- The conclusion of the marriage contract is usually strictly a male affair; the bride herself is very rarely present. Although the person celebrating the marriage is obligated by law to ascertain the bride's consent, custom sometimes prevents him from venturing into the women's quarters to verify approval of the bride. Thus, he can only take the word of the nearby male relatives. Many women are accustomed to accepting whatever the wali decides on their behalf. It is often perceived as taboo for a woman to be unagreeable towards her wali.

### Issues during marriage

- In all seven countries reviewed for this research, polygamy is allowed for Muslims and men may marry up to four wives with few restrictions.
- Although progress is being made throughout the region on gender-based violence and harmful traditional practices, high rates of violence persist within families.
- Marital rape is either not criminalized or exempted in all seven countries reviewed in this research.

- There are discriminatory nationality rights in the Muslim-majority countries and **South Sudan**.

#### **Issues upon divorce**

- In five out of seven of the countries of study (**all except for Ethiopia and Uganda**), unilateral divorce (talaq) is allowed for men while women can only access dissolution of marriage through courts where they are available or by elders in **Somaliland**.
- Women have unequal custodial and guardianship rights, or face conditions that affect their custodial rights in the Muslim-majority countries as well as **Ethiopia** (as per the MFL in practice) and **South Sudan** (as per the customary practice). For instance, a woman can only have custody of children up to a certain age, and loses such rights if she remarries or travels.

#### **Other issues**

- There are unequal inheritance rights throughout the countries in the Greater Horn of Africa region.

## 2.6 Summary of findings for key areas of concern<sup>109</sup>

Issue	Ethiopia	Kenya	Somalia	Somaliland	South Sudan	Sudan	Uganda
The Constitution contains comprehensive equality provisions prohibiting discrimination on all grounds including race, gender, sex, pregnancy, marital status, ethnic/social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.	The preamble of the Federal Democratic Republic of Ethiopia (FDRE) Constitution states that the fulfilment of its objective requires the full respect of individual and people's fundamental freedoms and rights to live together on the basis of equality and without any sexual, religious or cultural discrimination. Article 25 provides for equality before the law and non-discrimination for all persons.	Article 27(1) provides that every person is equal before the law and has the right to equal protection and equal benefit of the law; equality includes the full and equal enjoyment of all rights and fundamental freedoms. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. The State and individuals shall not discriminate directly or indirectly against any person on any ground, including sex and marital status.	According to Article 11 of the Constitution, All citizens, regardless of sex, religion, social or economic status, political opinion, clan, disability, occupation, birth or dialect shall have equal rights and duties before the law. The State must not discriminate against any person on the basis of age, race, colour, tribe, ethnicity, culture, dialect, gender, birth, disability, religion, political opinion, occupation, or wealth.	Article 8(1) of the Somaliland constitution states: 'All citizens of Somaliland shall enjoy equal rights and obligations before the law, and shall not be accorded precedence on grounds of colour, clan, birth, language, gender, property, status, opinion etc.' Article 8(2) states: 'Precedence and discrimination on grounds of ethnicity, clan affiliation, birth and residence is prohibited...'	Article 14 of the Transitional Constitution guarantees that all persons are equal before the law and are entitled to the equal protection of the law without discrimination as to race, ethnic origin, colour, sex, language, religious creed, political opinion, birth, locality, or social status.	Article 48 of the Constitutional Charter of 2019 states that 'People are equal before the law, and have the right to the protection of the law without discrimination between them based on ethnicity, colour, gender, language, religious faith, political opinion, racial or ethnic origin, or any other reason'. Article 49 states that 'the State guarantees to both men and women the equal right to enjoy civil, political, social, cultural and economic rights'.	Art 21(1) of the Constitution provides that all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. (2) Provides non-discrimination on the grounds of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.
Child marriage is unlawful (girls or boys under 18 years prohibited from marriage without exception)	No. The age of majority is 18, but it is possible to get dispensation for not more than 2 years (i.e., 16 years) in order to get married with court approval.	Yes. The Marriage Act 2014 in Kenya law provides 18 as the minimum age of marriage for all women across religious and cultural divides as outlined in Section 4 of the Act.	No	No	No	No	No, even though the Article 31(1) of the Constitution provides that men and women of the age of 18 and above have the rights to marry and to found a family and are entitled to equal rights in marriage during and its dissolution. There is an exception for Islamic and customary marriages.
A Muslim woman is legally required to consent to marry	Yes	Yes	Yes, but not in practice.	Yes, but not in practice.	Yes, but not in practice.	Yes, but not in practice.	No
A Muslim woman has a legal capacity to marry without a guardian (wali)	No, only for non-virgins who follow the Hanafi school of thought	No	No	No	No	No	No

<sup>109</sup> This table compiles information from the individual country tables can be found on Musawah's website: <https://www.musawah.org/mapping-muslim-family-laws/>

Issue	Ethiopia	Kenya	Somalia	Somaliland	South Sudan	Sudan	Uganda
Polygamy is prohibited	Yes in general, but with an exception for Muslims	No	No	No	No	No	No, it is allowed for Muslims in the Marriage and Divorce of Mohammedans Act and also allowed in the 1973 Customary Marriages Act (Chapter 248).
There is specific legislation on domestic violence	No	The Protection Against Domestic Violence Act No. 2 of 2015 <sup>110</sup> to solely address violence within the family set-up.	No	A sexual offences law was signed off but rejected as 'anti Islam' in 2018.	No	No	Yes, the Domestic Violence Act of 2010.
Marital rape is fully criminalized in all circumstances	No	No	No	No	No	No	No
A Muslim husband can unilaterally divorce his wife (talaq)	No	Yes	Yes	Yes	No	Yes	Yes
A Muslim woman can unilaterally divorce her husband	No	No	No	No	No	No	No
A woman is entitled to maintenance after divorce (without additional conditions)	Yes	Yes	No, determined based on fault. Matrimonial property is divided. The wife collects properties brought by her or those usually used by women (influenced by gender stereotypical roles).	A woman is entitled to iddah and child maintenance	No	The Act obligates the husband to purchase and prepare all matrimonial assets; anything that is purchased by the wife will be her own property maintenance (mut'a), in addition to maintenance for children, as per classical rules. Depending on the ex-husband's capacity, maximum of the equivalent of six months' maintenance.	Yes
There is a formal legal regime which divides matrimonial property equally between husband and wife after divorce	No	The Matrimonial Property Act provides a legal concept of matrimonial assets. However, Section 3 provides that Muslims may be governed by Islamic law in all matters relating to matrimonial property	No	No	No	No	Yes, as per the statutory laws but this does not necessarily govern Muslim marriages.

110 Heinrich-Böll-Stiftung, The Protection Against Domestic Violence Act (PADV) 2015 (August 2015): <https://ke.boell.org/en/2015/08/27/protection-against-domestic-violence-act-padv-2015>

Issue	Ethiopia	Kenya	Somalia	Somaliland	South Sudan	Sudan	Uganda
The Muslim father has preferential legal rights of guardianship of his children	Yes	No, the Children Act grants exclusive jurisdiction over all matters related to children, including custody and/or maintenance, only to Judicial Officers gazetted under the Children Act. Custodial rights between women and men are equal and best interests of the child is a main criterion to decide custodial rights.	Yes	Yes	The Child Act (2008) states in case the child is in the care of a legally appointed guardian or foster parent both parents have equal rights to reasonable contact with the child, unless it is not in the best interests of the child. But in practice it is always with father's lineage.	Yes, it is a stipulation by law that only a male (father/uncle/grandfather) can be the guardian.	No, guardianship is based on the best interests of the child.
Child custody rights between Muslim women and men are equal	No	Yes	No. The woman has primary custody of her male child until he has completed the age of 10 years and of her female child until she has attained the age of 15 years. In case of her marriage to another man she may continue with custody of the children provided that the father consents.	No	No. The Child Act (2008) <sup>111</sup> Article 112-114 guarantees the rights for both parents over their children in case of divorce, separation, or nullity. But practice totally differs, despite the provisions in the Child Act, and common practice along with most versions of customary law place children with their fathers	No. The mother has custody of her child for up to 7 years for boys and up to 9 years for girls. Mothers can lose custody if they remarry or travel to another country where it is difficult for the father to reach his children. For a woman to retain custody, it must be granted by a judge.	Custody is based on the best interests of the child. In custody matters, the courts in Uganda emphasize that the welfare of the child is at the forefront in all matters concerning children.
A Muslim woman can confer citizenship on a foreign spouse or on her children	Yes	Yes	No for foreign husbands but yes for children.	No. Unequal right of women in obtaining/losing nationality and passing nationality to children from a non-Somaliland husband	Yes, as per the constitution but not in practice.	No for foreign husbands but yes for children.	Yes
Inheritance rights are equal in law for Muslim women and men	Yes as per civil laws but not in practice for Muslims families.	As per civil laws yes but not in practice for Muslim families. The general rule is that men are entitled to twice as much as women.	Art 158 of Family Law provides equal rights, which is rejected in practice for being against the Sharia.	Art 158 of Family Law provides equal rights, which is rejected in practice for being against the Sharia.	There is equality in statutory laws, but in practice customary laws focus on ensuring property remains within the family. Women often forfeit all of their belongings and continue to be owed by their husbands' families.	Yes, as per the civil laws but not in the MFLs. The general rule is that men are entitled to twice as much as women.	Yes, in statutory laws, but not as per customary and religious laws.

111 The South Sudan Child Act (2008)

## PART THREE

## Positive examples and emerging trends

## 3.1

Women and advocates are taking steps to address discriminatory laws in the region. This section will highlight some of the positive steps, examples, and trends taking place in the journey to reform discriminatory laws and practices.

**Ethiopia:** The Revised Family Code of 2005, which was a major success for women, is also applicable to Muslim marriages. Ethiopia's constitution provides that expressed consent of parties is required for jurisdiction in the Sharia court, giving Muslim women the option of using the civil law. The Government of Ethiopia adopted the National Strategy on Harmful Traditional Practices (HTPs) and the accompanying action plan on FGM, child marriage and abduction in 2013. Sentencing Guidelines No. 2/2012 were adopted to guide determination of criminal sentences; judges are required to increase the lower end of the penalty in sentencing GBV. The state commenced implementation of the Strategic Plan for an Integrated and Multi-Sectoral Response on Violence Against Women and Children and Child Justice in Ethiopia. The Strategic Plan focuses on prevention, protection of GBV and devises response mechanisms concerning violence against women and children. Another significant step in the fight against HTPs and GBV has been that the Inter-Faith Council<sup>112</sup>, which consists of seven faith-based organizations, has endorsed the cause and begun dissemination of messages to an estimated 9 million people. These efforts contributed to the decrease in the rate of FGM from 56 percent to 23 percent; child marriage

from 21 percent to 8 percent; and decline in the incidence of abduction by 12.7 percent. Regarding access to justice, recent research shows that gender relations are undergoing changes in urban settings, particularly in big cities like Addis Ababa. Education and financial independence have paved the way for increasing access to dissolution of marriage.

**Kenya:** The enactment of the Marriage Act 2014 in Kenya law was a major victory as it champions equality in marriage and reiterates the minimum age of marriage as 18 for both women and men across all religions and cultures (Section 4). In addition, child marriage is criminalized in the Penal Code and forbidden by the Child Act of Kenya. The Kenyan government has also developed a National Policy on Prevention and Response to GBV. As in Ethiopia, awareness raising and advocacy efforts continue to be the main instruments of change on child marriage. Community conversations have been successful because they are wide reaching and carried out in a continuous and sustainable manner.<sup>113</sup>

**Somalia:** The National GBV Strategy provides for three strategic priorities: strengthening GBV service provision, evidence-based advocacy, and promoting positive gender and social norm

112 'A Timeline of Faith-Based Organisations' Commitment to End Female Genital Mutilation and Child Marriage in Ethiopia', <https://www.kirkensnodhjelp.no/contentassets/768da43e79a54015b58381312af2500b/fbos-fgm-cm-timeline-2016-2019-design-sample.pdf>

113 CEDAW/C/ETH/8, available at <https://undocs.org/en/CEDAW/C/ETH/8>.



change<sup>114</sup>. In 2015, Somalia appointed its first six female prosecutors<sup>115</sup>. Women in Somalia are increasingly able to obtain dissolution of marriage via faskh, despite the hurdles and challenges.

**Somaliland:** The National Declaration of Traditional Leaders of Somaliland provides that the rights of women must fully be protected in accordance with Sharia law. This was intended to cover violations such as rape, slander, harassment, inheritance rights, forced marriage, arranged marriage, divorce, and dowry payments. Also, the Somaliland GBV plan devises actions for the prevention and management of GBV incidents.

**South Sudan:** A draft of the GBV Act is still awaiting codification by the government. This act is expected to apply to the general population. The Ministry of Gender, Child and Social Welfare is also mandated to address GBV issues. At the State level, the implementation of GBV prevention, protection and response programmes is carried out by the Ministry of Social Development. The Ministry of Interior, Ministry of Health, and Ministry of Justice are all involved in addressing GBV.

**Sudan:** A recent reform to the Sudanese Criminal Act criminalized the practice of FGM, although no crime had been recorded as of late 2021.<sup>116</sup> There has been real progress over the past decade in Sudan on the issue of FGM due to continuous awareness raising by civil society organizations. Nevertheless, FGM is still practiced in some rural areas. Sudan has specialized governmental agencies in Sudan

dedicated to the protection of wives, mothers, and children. These include the Directorate for the Protection of Family and Children as well as a specialized Prosecution Department. A victim of violence can file a complaint to the Family and Child Protection Unit, and if the investigation by the unit proves the violence, the wife can either proceed with criminal charges or choose to file for divorce.<sup>117</sup> Women in Sudan are also starting to file for divorce and challenge court verdicts, even though it is still viewed as a social taboo. It is also worth noting that there are female judges in Sudan. Furthermore, in Sudan, in a landmark step, women who have been married before are permitted to act as their own guardians, without the need of a male. Despite these successes, the government has not adopted many CSO recommendations, and the family law remains unchanged since 1991.

**Uganda:** In the case of Law and Advocacy for Women in Uganda v Attorney General, FIDA-U and the organisation Law and Advocacy for Women in Uganda initiated several cases before the Constitutional Court in which they successfully challenged discriminatory provisions in the Penal Code and Succession Act.<sup>118</sup>

114 Somalia National GBV Strategy 2018-2020, <https://reliefweb.int/sites/reliefweb.int/files/resources/Somalia%20-%20National%20GBV%20strategy%202018-2020.pdf>

115 UNSOM, <https://unsom.unmissions.org/somalia%E2%80%99s-first-female-prosecutors-change-face-justice>

116 DirNour&Co. interview with Consultant at the Ministry of Justice.

117 Sudanese Organization for Research and Development, Paper on Women Rights and the Personal Status Act 1991

118 Constitutional Petition-2005/13 [2007] UGSC 71 (05 April 2007)

## 3.2

## Key barriers

There are many challenges and barriers in the road to reform discriminatory laws that are based on religion such as MFLs. A main challenge is that these laws are often considered sacred because of a lack of awareness regarding the distinction between Sharia, or divine guidance, and fiqh and Islamic law, both of which are based on human interpretation and thus can be changed.

In addition, there are various deep-rooted factors including:

**Limited awareness of women's rights in Islam:**

Muslim communities are often not aware of the ways in which women's rights are embedded in Islam in the Qur'an, Sunna, historical evidence, etc. Gender equality is considered by many to be 'western'. Where women are aware of their rights, they may still be sceptical due to deep-rooted societal and familial teachings and pressures, as well as fear of being cast out of society.

**Non-prioritization of issues related to Muslim women:**

The issues of Muslim women are not given priority by governments and people in the region. In countries such as Sudan, Somalia, Somaliland, Sudan and recently Ethiopia, instability and conflict affect Muslim communities, including women who are especially vulnerable to such situations.

**Absence of political will, especially where discriminatory MFLs are justified by minority, religious and cultural rights:**

Governments may face extensive political resistance and be sensitive in enforcing constitutional provisions of equality in Muslim communities, especially in Muslim-minority countries. Fundamental rights

and human rights are not universally respected; MFLs are allowed to diverge from fundamental constitutional rights as well as international and regional human rights provisions. In Ethiopia, Kenya, and Uganda, for example, equality guarantees are exempted for MFLs. These states allow polygamy, unequal inheritance rights, etc. In the Muslim-majority countries, the states protect and promote the discriminatory laws in the name of Islam.

**High resistance by so-called 'Islamist Groups' using Islam/Sharia as justification:**

These groups claim that challenging laws related to Islam equates to challenging Islam itself, even though such laws are interpretations of scholars influenced by patriarchal views throughout history. The groups claim that any interpretation that upholds women's rights and equality against the predominant discriminatory interpretation is not acceptable.

**Absence of codified MFLs:**

The lack of comprehensive codified MFLs makes the process of ensuring justice and equality in the family more difficult. Uganda's Marriage and Divorce of Mohammedans Act of Uganda is outdated and not comprehensive while Sudan's Muslim Personal Status Act of 1991 is discriminatory. Judgements in Sharia courts are

also mostly left to the judges'/kadhis' discretion, so there is little consistency or predictability for litigants or to help with reform processes.

**Complexity of plural legal systems:** The lack of legal and institutional instruments to regulate interplay between multiple laws significantly affects the rights of women, and prevents systemic evaluation and reform.

**Socio-economic and demographic factors:** Many women in the region face poverty and illiteracy, which further incapacitates them in fighting for their rights.

## 3.3

## Preliminary Recommendations

**There is an urgent need to revise discriminatory laws in the Greater Horn of Africa region, including laws related to Islam.** While some say that laws based on Islam cannot be changed because they are sacred or divine, these laws are actually human interpretations and are therefore changeable. In addition, reforming such laws to ensure gender equality is consistent with Islamic principles.

The following recommendations can help in the efforts towards family laws, policies and practices that reflect equality and justice for all people:

**Awareness raising:** Muslim communities, including women, must be aware of women's rights in Islam. Female scholars and judges must also be included in the reform process; Islamic jurisprudence and lawmaking processes have been and still are predominantly occupied by men.

**Women's empowerment and participation:** Education and economic empowerment are key, in addition to involving women in all aspects of law reform, including identifying significant issues, proposing solutions, and implementing these solutions. Women must have a voice in all matters, religious, political, socioeconomic, and more importantly taking part in developing legislation around family issues.

**Closely working with local stakeholders:** A key element of legitimizing change on the ground is supporting local women and advocates and finding the best way to support local women's movements depending on their individual contexts.

**Capacity building:** It is essential to build the capacity of the judiciary systems, including the

Sharia courts, kadhis/judges, law enforcement groups and communities at large. Topics should include women's rights and gender equality in Islam, good practices and lessons learned from other countries, and procedural and legal frameworks that can guarantee access to justice.

**Dialogue and consensus on fiqh:** States should bring together scholars, advocates, policy makers and community members, including women, to build consensus around controversial issues and achieve all-inclusive and contemporary family laws based on progressive rather than patriarchal and traditional interpretations.

**Codifying MFLs:** Having comprehensively codified MFLs based on progressive interpretations of the Sharia (i.e., interpretations that ensure justice and equality) will encourage positive marriage and family practices and enable consistency and predictability in judgments that are dependent on the laws. This will also help advocates to assess and suggest improvements in the laws and judgements, ensure transparency, and keep the powers of the kadhis/judges in check. Codifying laws can sometimes introduce rigidity in application and interpretation. As such, the codification process should consider the diversity of Muslim schools of thought and also allow room for flexibility

in interpretation while enshrining principles of equality, non-discrimination, and human rights.

**Improving access to justice:** Cumbersome laws and processes should be simplified to ensure access to justice for all, especially women affected by poverty and illiteracy. In addition, it is essential to have clear and transparent processes that enable people to understand the system (e.g., available options, how appeals work, decision-making processes by police, judicial system and judges/kadhis, etc.), so the system is predictable, transparent, and accountable. Countries with plural systems should put in place well-organized, clear, and simplified referral processes. Access to justice must include physical accessibility, especially where there are no or not enough Sharia courts.

**Holding governments accountable:** States have an obligation to protect constitutional rights and human rights with regards to Muslim women. Mechanisms must be in place and followed through to ensure states are held accountable.

# Section



## Conclusion

The arrival of Islam had a major impact on the political and social development of the Greater Horn of Africa region, and it remains a significant force in Africa today. In numerous places, Islamic law and local practices have evolved together and intermingled.

Within the Greater Horn of Africa, religious and customary laws are often more influential than statutory laws. There are few clear or comprehensive codified MFLs or procedural laws. Instead, a mixture of customary rules and Islamic laws are applied to matters decided within communities or Sharia courts. Judgements are often left to the discretion of the religious figure, elder, or judge/kadhi. In addition, there are few procedural regulations and mechanisms to ensure transparency and predictability.

In the three Muslim-majority countries (Sudan, Somalia, and Somaliland), religious family laws (codified or not) are unequal and discriminatory. The plural legal systems in the Muslim-minority countries of Ethiopia, Kenya, Uganda, and South Sudan demonstrate striking contradictions between constitutional provisions of equality and the MFLs and customary rules applied in practice. In all the countries, spouses within Muslim families have unequal rights. Women face injustice in the form of polygamy, child marriage, forced marriage, unequal inheritance rights, and even such simple matters as whether they can consent to their own marriages or need a guardian (wali) to enter into marriage.

Muslim family laws should be in alignment with core principles of the Sharia such as dignity, justice, equality, and beauty and goodness. These laws must be rooted in the lived realities of Muslim women, address discrimination against them, and ensure that they have equal

protection of the law and access to justice and redress. However, the journey to achieving this future for Muslim women and girls in the GHOA is still long and hard. There are numerous barriers on the road to reform. The main challenge is often that discriminatory laws are justified in the name of Islam, and said to be sacred and unchangeable. However, these laws are manmade and can be changed.

Muslim women activists, women's groups, allies, and advocates are challenging discriminatory laws to ensure justice and equality within their families and communities at large. However, more needs to be invested in building knowledge capacity of and alliances with key progressive stakeholder groups (such as religious leaders, policy makers, etc) on issues of Islam and gender to ensure that a just and egalitarian ethos is reflected and promoted in Muslim family/personal status laws, legislation and practices. Additionally, Muslim women in these GHOA countries should continue to loudly claim their right to speak about Islam and expand avenues for amplifying their voices for more equal and just family laws and practices.

# Section







# 4.1

## Appendix A – Ethiopia<sup>119</sup>

Muslims account for at least 34 percent of the population of Ethiopia. The legal system combines elements of both civil and common law with traditional practices, resulting in multiple intermingled layers of modern, traditional, and religious laws and processes.

**Legislative framework:** Ethiopia is a Federal Democratic Republic with a federal government and 11 National Regional States<sup>120</sup> that each have jurisdiction over legislative, executive and judicial matters of the state. The Constitution provides a strong basis for equality in marriage and family and prohibits any laws, policies and practices that discriminate against women. However, it also allows for religious and customary laws to apply in instances of disputes, albeit with consent of both parties involved. Article 78(5) allows for the House of Peoples' Representatives and State Councils to establish or give official recognition to religious and customary courts.

Article 34(4) of the Federal Democratic Republic of Ethiopia (FDRE) Constitution allows that a law giving recognition to marriage concluded under systems of religious or customary laws may be enacted. The 'Federal Courts of Sharia Consolidation Proclamation No.188/1999' was thus enacted to grant Sharia Courts common jurisdiction over questions related to marriage, divorce, maintenance, guardianship of minors and family relationships, provided that the marriage to which the question relates was

concluded or the parties have consented to be adjudicated in accordance with Islamic law, and questions related to inheritance provided that the endower or donor is a Muslim or the deceased was a Muslim at the time of his death.

The federal government enacted the Revised Family Code 2000 to rectify the inequality between men and women in the political, social and economic realms. Article 1(2) of the Revised Family Code allows marriage to be concluded in accordance with the religion or custom of the future spouses, and because there are no codified MFLs, these marriages are governed by the predominant school of fiqh in the region. Many states enacted their own family codes applicable within their own jurisdictions, though these have not been fully harmonized with the Revised Family Code and the Somali regional state and the Afar regional state, both of which have large Muslim populations, have not yet enacted family laws.

**Court systems:** Ethiopia as a Federal Democratic Republic is composed of 11 National Regional States and 2 City Administrations. Most of the regions have their own Sharia court consolidation proclamation that establishes Sharia courts, and each court system acts independently and adjudicates based on the school of thought used in the region and in accordance with their respective regional Sharia courts consolidation proclamation. Multiple schools of law are followed, including Shafi'i, Hanafi, and the Wahabi Salafi position towards women. Based on the Federal Proclamation No.

<sup>119</sup> This overview is based on the Musawah Ethiopia country table, updated March 2022, <https://www.musawah.org/wp-content/uploads/2022/04/Ethiopia-Overview-Table.pdf>

<sup>120</sup> World Statesman.org, Ethiopia Administrative Divisions, n.d., [https://www.worldstatesmen.org/Ethiopia\\_Regions.html](https://www.worldstatesmen.org/Ethiopia_Regions.html)

188/1999, a female cannot be a judge in Addis Ababa, but this is possible in other regions such as Tigray and Afar based on their own proclamations.

The Revised Family Code is applicable to Muslim marriages if either of the parties does not consent to the Sharia court's jurisdiction. Yet confirming the consent is not always complied with in practice, and parties often do not know about the consent requirement thus do not know they have the option to take their case before regular courts.

Judges in Sharia courts lack capacity in their knowledge of both Islamic law and state law, as there is no institution dedicated to the education and training of Kadis in Islamic law and in constitutional principles. The absence of training may result in Kadis applying customary rules rather than Islamic law. The problem of capacity affects the quality of justice rendered by the courts and derails the development of the Sharia justice system as a viable and dynamic justice system. There is also the issue of a tacit consent where Sharia courts proceed to hear a case, *ex parte*, if the defendant who has been duly served with the summon fails to appear at the first hearing of a suit.

**Ongoing concern regarding the justice system:**

The capacity of the Sharia justice system cannot be duly assessed and improved in relation to the capacity of the judges and the jurisprudence. Judges in Sharia courts lack capacity in their knowledge of both Islamic law and state law, as there is no institution dedicated to the education and training of Kadis in Islamic law and in Constitutional principles. The absence of training may result in Kadis applying customary rules rather than Islamic law. The problem of

capacity affects the quality of justice rendered by the courts and derails the development of the Sharia justice system as a viable and dynamic justice system. Moreover, no reporting and publication of Sharia court decisions and judgments exists.<sup>121</sup>

**Equality in families:** In Ethiopia, the unwritten MFL system is mostly patriarchal as per the practice and the gender roles in the Ethiopian society where men are mostly assumed to be the providers and the head of the households.

**Age of marriage:** The Revised Family Code sets 18 as the minimum age of marriage, but provides an exception in which courts can grant emancipation of not more than 2 years in certain cases. Two regional states with predominantly Muslim populations – Afar and Somali – have an exception under customary practices which condones child marriage below 18 years of age. In practice, families may also use imams or sheiks to conclude marriage in informal settings. In 2019, 22 percent of girls under the age of 18 were married.<sup>122</sup>

**Polygamy:** Polygamy is also allowed for Muslims as an exception to the general law that criminalizes it. Furthermore, there are no prerequisites; the first wife is not required to know about or permit the polygamous marriage. Neither is there a systematic data collection system nor synergy among the Sharia courts in Ethiopia in their functions in general including to know exactly how many wives a person in a polygamous marriage has.

**Violence against women:** There is no domestic violence law nor laws adopted to give specific civil remedies for survivors/victims. Yet, violence against women (VAW) is one of the top human

121 Alemu Aneme, Girmachew, 2018, 'The Coupling of State and Sharia Justice Systems in a Secular State: The Case of Ethiopia', SFB-Governance Working Paper Series, No. 75, Collaborative Research Center (SFB) 700, Berlin. ISSN 1864-1024.

122 OECD Development Centre Social Institutions and Gender Index, Ethiopia Fact Sheet, 2019, <https://www.genderindex.org/wp-content/uploads/files/datasheets/2019/ET.pdf>.

rights violations experienced by women and girls in the country. Among these, physical and sexual violence are of serious concern, particularly intimate partner violence, which was recorded to have a rate as high as 54 percent. Domestic violence is a socially condoned reality in the country, with 88 percent of rural and 69 percent of urban women still believing that their husbands are entitled to beat them.<sup>123</sup> Decades after criminalizing female genital mutilation (FGM), the FGM rate is still almost universal in the Muslim dominated Somali region of Ethiopia. Even though there is no religious endorsement for FGM, the Somali ethnic group performs FGM with the belief that it is 'required by the religion of Islam.' Furthermore, the most severe type of FGM 'infibulation' which is considered as a 'protection against rape' comprises around 6 percent of procedures in the Muslim-minority Somali region of Ethiopia.

**Women's financial rights after divorce:** Divorce in Ethiopia is easier for economically empowered women in the urban settings than the ones who are economically dependent on their partners and therefore will have financial problems afterwards. The financial arrangements might be arranged externally out of court upon agreement.

**Access to justice:** There is a high disparity in women's empowerment between the urban and rural settings; 85 percent of the Ethiopian people live in rural areas and over 45 percent of them practise Islam.<sup>124</sup> Empowered women in the urban settings of Ethiopia such as Addis Ababa are more aware of their rights and more economically independent and thus have better access to justice in family matters. Many women

in rural areas are illiterate and do not know their rights and/or cannot access information about their rights.

**Preliminary Recommendations:**

The Federal Government of Ethiopia should take steps to ensure that Muslim women living under the jurisdiction of Islamic laws benefit equally from the Constitution and the 2000 Revised Family Code's equality and non-discrimination provisions.

The Federal Government must implement sufficient legal and institutional frameworks that regulate the complex operation of multiple legal orders and their interaction with formal laws and institutions to enable all-inclusive enforcement of Constitutional rights.

There is also a need to have clear harmonization, linkages, and referral mechanisms between the Revised Family Code and the regional legal systems.

MFLs should be codified in accordance with the progressive interpretations of the Sharia, and Muslim women should be involved in this codification and reform process.

The capacity of judges within the Sharia justice system should be assessed and improved.

The 'Federal Courts of Sharia consolidation proclamation No.188/1999' needs to be amended to be women inclusive.

All of this should be done in accordance with provisions in regional and international human rights instruments.

123 Woldu, T.H., 2017, 'Human Rights of Women and the Phenomenon of Marital Rape in Ethiopia: A Critical Analysis'.

124 Global Majority E-Journal, Vol. 11, No. 1 (June 2020), pp. 47-60.



# 4.2

## Appendix B – Kenya<sup>125</sup>

Islam is a minority religion in Kenya, with Muslims representing 10.9 percent of the Kenyan population or approximately 5.2 million people. Muslims in Kenya apply Shafi'i jurisprudence (fiqh) in Muslim personal status matters. However, Kenya also has a sizable Hanafi community as well as Jafari, Zaydi and Ahmadi minority communities. Like many African countries, Kenya has a pluralistic legal system with several systems of law coexisting at the same time in the same jurisdiction among a common people.

**Legislative framework:** The legal framework in Kenya is governed by the Constitution. The Constitution of Kenya was amended in 1964 when Kenya became a republic, and it was amended several times after that before it was redrafted in 2010. The Marriage Act 2014 is the main codified law that governs marriage and family relations in Kenya and consolidated various laws governing religious, customary, and civil marriages and divorces in the country. The Act repealed previous legislations, such as the Mohammedan Marriage and Divorce Registration Act, Succession Act, and the Hindu Marriage and Divorce Act. Thus, Kenya does not have specific codified laws relating to Muslim marriages and family relations. These areas are governed by a combination of sources, including constitutional provisions, provisions in the Marriage Act 2014, regulations related to

the 2014 Marriage Act entitled 'The Marriage (Muslim Marriage) Rules, 2017'<sup>126</sup> that primarily relate to registration and jurisdictional matters, Sharia principles, and judicial precedence and preference. The diverse Muslim population in Kenya has resulted in a diversity of applicable Muslim fiqh governing Muslim personal status matters in Kenya.

**Court system:** The Kadhis' Courts were active during colonisation, which led to the incorporation of the Kadhis' Courts in the Kenya's Independence Constitution in 1963.<sup>127</sup> This gave legitimacy to the Kadhis' Courts and led to the dual legal system in Kenya. The new constitution that was promulgated in 2010 not only retained the Kadhis' Courts, but also gave them jurisdiction all over the country. Therefore, Kenya's Kadhis' courts have existed in the Constitution since independence from the British. The Constitution of Kenya provides in Article 169 of the Constitution establishes Kadhis' courts and Article 170 outlines the structure, judges, and jurisdiction of the courts; jurisdiction is limited to questions of Muslim law relating to personal status, marriage, divorce or inheritance where all parties are Muslim and submit to the Kadhis' courts. Kadhis' courts are empowered with unlimited powers to apply Muslim family law without any restrictions.

**Equality in marriage:** Article 24(4) of the Constitution of Kenya qualifies the right to equality 'to the extent strictly necessary for the

125 This overview is based on the Musawah Kenya country table, updated 2 January 2022, <https://www.musawah.org/wp-content/uploads/2019/03/Kenya-Overview-Table-2022.pdf>

126 No. 4 of 2014, The Marriage Act Subsidiary Legislation, [http://kenyalaw.org:8181/exist/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/M/Marriage%20Act%20-%20No.%204%20of%202014/subsidiary\\_legislation/docs/MarriageAct4of2014\\_subsidary.pdf](http://kenyalaw.org:8181/exist/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/M/Marriage%20Act%20-%20No.%204%20of%202014/subsidiary_legislation/docs/MarriageAct4of2014_subsidary.pdf)

127 Cussac, A., 2008, 'Muslims and Politics in Kenya: The Issue of the Kadhis' Courts in the Constitution Review Process', *Journal of Muslim Minority Affairs* 28 (2), 289-302. At pp. 291.

application of Islamic law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance', even though Article 45 requires enactment of such legislation only to the extent that any such marriages or systems of law are consistent with the Constitution.

**Child marriage:** According to UNICEF's State of the World's Children 2016 report, 23 percent of women aged 20–24 in Kenya were first married by 18 and 4 percent were first married by 15 years of age.<sup>128</sup>

**Women's consent to marriage:** A prospective bride who is an adult and has married at least once must consent to her subsequent marriage. However, it is generally understood that based on the rules of Shafi'i fiqh, a father has the right to conclude a marriage on behalf of a virgin daughter of any age even if it is against her will, i.e., *ijbar* or forced marriage.

**Women's capacity to enter into marriage:** Regardless of her age, a prospective bride requires the consent of a marital guardian (*wali*) to enter into marriage based on the rules of Shafi'i fiqh. If the *wali* opposes the marriage, the prospective bride may seek the authorisation of a Kadhis' court judge to get married.

**Polygamy:** Section 6 of Kenya's Marriage Act 2014 states that marriages are monogamous, but 6(3) allows an exception for marriages celebrated under customary or Islamic law, which are presumed to be polygamous or potentially polygamous. As a result, a Muslim man may marry up to four wives at one time. There is no legal requirement for him to seek the permission of the court or his existing wife or wives to enter into a polygamous marriage.

**Divorce:** A husband may unilaterally repudiate a marriage without judicial supervision. A wife must always petition a court for divorce regardless of whatever form of divorce she is seeking (e.g., *khul'*, etc.)

**Women's financial rights after divorce:** The Matrimonial Property Act provides for a legal concept of matrimonial assets. However, Section 3 provides that Muslims may be governed by Islamic law in all matters relating to matrimonial property.

**Custody of children:** The Children Act grants exclusive jurisdiction over all children matters including custody and/or maintenance to Judicial Officers who are gazetted under the Children Act. Thus, the Children's Court adjudicates all matters regarding custody and maintenance of the children regardless of religion. Custodial rights between women and men are equal.

**Inheritance rights:** Generally, inheritance rights between women and men are unequal in accordance to the MFLs applied.

**Access to justice:** Muslim women face many challenges to accessing justice and redress in Kadhis' courts, whether physical, procedural, or practical. These may include limited numbers of Kadhis' courts, long distances to access the courts, high court fees, and cumbersome laws and procedures that may be difficult to comprehend or access. For example, the Kenyan Constitution provides that all parties must submit to Kadhis' court jurisdiction for it to have jurisdiction in a particular case. Over 80 percent of Kadhis' court petitioners are Muslim women, and many men have resorted to using this 'submission clause' to frustrate women's access to justice. The clause not only allows men to

128 UNICEF, 'The State of the World's Children 2016', Table 9, pp. 150-153, [https://www.unicef.org/publications/files/UNICEF\\_SOWC\\_2016.pdf](https://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf)

cause delays in the dispensation of justice but can also lead to higher costs of litigation and ultimately mental torture for women.

In addition, Kenya instituted a Children's Court for custody cases, which is beneficial in some ways but has caused confusion and additional challenges for Muslim women. Now a Muslim woman must file separate suits for her own maintenance in the Kadhis' court and that of her children in the Children's Court, which can be costly and burdensome.

**Preliminary Recommendations:**

The government of Kenya must conduct a national consultation to revisit the cumbersome laws and procedures that hinder women's access to justice. This should be done with Muslim women's direct engagement.

The State should implement its regional and international treaty obligations and upholding the fundamental rights and equality rights enshrined in the constitution to all Kenyans without exceptions.



# 4.3

## Appendix C – Somalia<sup>129</sup>

Somalia had a population of 20 million in 2021. All are Somali by ethnicity, Muslim by religion, Sunni and Shafi'i by order. About 52 percent of the population live in the urban areas while the remaining 48 percent form either rural or nomadic populations. Somalia is considered a customary, religious, and egalitarian society. Religion and customary practices influence their way of living more than statutory regulations. The country is now recovering from a prolonged conflict and terrorism spearheaded by 'Al Shabab'. Somaliland and Puntland claim to be independent from the rest of Somalia and have their own political orders, but neither of them is recognized as a sovereign state by the international community.

**Legislative framework:** Under Article 11 of Somalia's transitional federal constitution (2012), all citizens are equal regardless of sex and the law must achieve full equality.<sup>130</sup> This provision is not implemented in practice, as women face discrimination and unequal rights in marriage.

There are three main legal systems that contribute to the governance of Muslim marriages. The Shafi'i school of fiqh provides the fundamental and substantial rules to observe in performing a marriage. Customary rules provide traditional procedural approaches to manage the marriage process. Somalia's Family Law No. 23 of 11th January 1975 is technically in force, but has never been put into practice as it was controversial and rejected

overwhelmingly by the religious leaders and the people. This law is mainly based on interpretations of Sharia, particularly the Shafi'i school of thought.

A draft gender policy by the federal government has the goal of promoting gender equality and sustainable human development in Somalia by ensuring that equal value is placed on the contributions of women and men as equal parents in the post conflict reconstruction process and national development.<sup>131</sup>

**Court system:** The courts have practically limited or negligible role, and the understanding is that as long as there is no dispute between parties, the marriage and divorce process can be performed out of the court. However, the assumption is that the government has overall oversight on marriage governance. The country's judiciary is still weak and courts are yet to fully reshape and get effective after the effects of the protracted conflict. The civil courts including the family sections are particularly incapable to fully function or still absent in some districts due to disagreement over how judicial structure should look like in a federal system.

**Equality in marriage:** The codified family law treats marriage as a contract between a man and women having equal rights and duties, but the same law recognizes the husband as the head of the family. In practice, men are treated as the heads of their families.

129 This overview is based on the Musawah Somalia country table, updated March 2022, <https://www.musawah.org/wp-content/uploads/2022/04/Somalia-Overview-Table-1.pdf>

130 Somalia's transitional federal constitution (2012), <http://mop.gov.so/wp-content/uploads/2018/04/Somalia-Constitution2012.pdf>

131 National Gender Policy (draft), <http://www.mwhrd.gov.so/en/wp-content/uploads/2018/10/Draft-of-National-Gender-Policy-4.pdf>

**Age of marriage:** In Somalia, the legal age is contentious. Statutory law tends to 18 years as maturity age, but practice based on Sharia understandings and customary rules agree on 15 as the age of maturity. Therefore, a girl or a boy can be married off below 15 years with the consent of the guardians (wali). In 2020, 34 percent of girls were married by the time they turned 18, and 16 percent by the time they turned 15 years of age.

**Consent to marriage:** Based on understandings of Sharia and local practice, women have no capacity to enter marriage without the consent of the guardian (wali).

**Polygamy:** Polygamy is restricted under the family law, but it is widely practised without any control or regulation.

**Violence against women:** The sexual offences law has been in dispute throughout Somalia in recent years. Rights groups and policy makers have debated the topic, and achievements have been made in that the cabinet passed the law and sent it to Parliament for approval. But there has been significant pushback. Therefore, contradictory motions have been filed on child marriages and age, sexual issues, domestic violence, consent, etc., including the introduction of a bill to legalize child marriage.<sup>132</sup>

**Divorce:** A man may divorce without seeking court authorization or justification; they are only required to perform it before authorized persons, which is common in both rural and urban settings, or a court. However, a woman can request dissolution of marriage (faskh) only via a court, and she must provide adequate justification for her request. Combined with

delays, bureaucratic procedures, and financial costs, women's requests for divorce are time-consuming and cannot be easily resolved.

**Inherited widow (Dumaal):** A practice whereby a widow marries the brother or close relatives of her deceased husband, which is a commonly accepted norm in Somalia.<sup>133</sup>

**Access to justice:** Women are affected by the time-consuming bureaucratic nature of the judiciary because, unlike men, it is their only mechanism to request a dissolution of marriage. Financial constraints also challenge women's access to justice. Women also face barriers because of a lack of enforcement mechanisms.

#### **Preliminary Recommendations:**

There is widespread consensus on the need for unified family law, and an opportunity for reform has been opened up by new lawmakers in both Mogadishu and Hargeisa. The state must engage in dialogue and build consensus on contested provisions in the family law such as legal age of marriage, outlining clear rules of procedure, and establishing simple court structure for family cases. This should be done simultaneously managing the politics of the process – make sure that religious groups, political parties, media and customary leaders are brought together under the championship of the policy makers.

The State should take action to prevent and respond to GBV, including FGM. University of Hargeisa/College of Law and Nafis Network are now active civil society groups that can partner in these efforts through legal aid and livelihood support.

132 Sheikh, A, 'Uprouar after Somali lawmaker presents bill to legalise child marriage', August 2020, <https://www.reuters.com/article/us-somalia-child-marriage-idUSKBN25G0VK>

133 Canada: Immigration and Refugee Board of Canada, Responses to Information Requests (RIRs), September 2007, <https://www.justice.gov/sites/default/files/eoir/legacy/2013/12/13/SOM102612.E.pdf>





# 4.4

## Appendix D – Somaliland<sup>134</sup>

Somaliland is an autonomous region in northern Somalia. She has been a self-ruling administration since 1991, but it is not yet recognized as a sovereign state by the international community. She is relatively peaceful and politically stable, and has built functioning institutions, law-making mechanisms and a judicial sector based on a two-decade-old constitution. Somaliland also has homogeneity with the Somalis in the Horn of Africa, regardless of political borders. All are Somali by ethnicity, Muslim by religion, Sunni and Shafi'i by order. By constitution, 'Islam is the religion of the Somaliland State' and 'the laws of the nation shall be grounded on and shall not be contrary to Islamic Sharia'. The people make up a customary, religious, and egalitarian society that is less influenced by formal administrations. The population was estimated at 3.6 million in 2014 and projected to 4.2 million in 2020 with the bulk of population living in urban areas.<sup>135</sup>

**Legislative framework:** Following three grand conferences in 1991, 1993 and 1997, Somaliland adopted a constitution in 2001. In addition to its constitution and parliamentary legislation developed from 2001, some of the laws enacted in Somalia's post-independence in 1960 and during the union of both Somalia and Somaliland up until 1991 are still equally applied separately in both Somalia and Somaliland. Each treats these laws as its own. This includes the criminal justice system and civil justice system. According to Art. 130(5) of the constitution:

'All the laws which were current, and which did not conflict with the Islamic Sharia, individual rights and fundamental freedoms shall remain in force in the country of the Republic of Somaliland until the promulgation of laws which are in accordance with the Constitution of the Republic of Somaliland'.

There is no specific codified family law in Somaliland. Like in Somalia, there are three main legal systems that contribute to or complement the governance of Muslim marriages: (1) Sharia and particularly the Shafi'i school provides for the fundamental and substantial rules for performing a marriage; (2) customary rules provide traditional procedural approaches to manage the marriage process; (3) statutory laws also exist, with statutory courts that register and adjudicate marriage, divorce, maintenance, child custody and succession cases using the civil procedure code for procedural matters and understandings of the Shafi'i school jurisprudence for substantive areas.

**Court systems:** Courts are more effective in urban areas, where they have a presence. In the rural areas, laws are administered by religious authorities backed by the customary rules and religious teachings. If there is no dispute between parties, the marriage and divorce process can be performed out of the court. Regardless of the statutory legal gaps or the parallel processes of customary and Sharia rulings on marriage, all marriage activities must happen according to Islamic laws.

<sup>134</sup> Central Statistics Department, Ministry of Planning and National Development, Somaliland Government. The Somaliland Health and Demographic Survey 2020, [https://somalia.unfpa.org/sites/default/files/pub-pdf/slhds2020\\_report\\_2020.pdf](https://somalia.unfpa.org/sites/default/files/pub-pdf/slhds2020_report_2020.pdf)

<sup>135</sup> Somaliland Gender Policy, <https://slmesaf.com/wp-content/uploads/2019/08/National-Gender-Policy.pdf>

A draft National Gender Policy was developed, and it aims to facilitate the mainstreaming of the needs and concerns of women and men, girls, and boys in all areas for sustainable and equitable development.<sup>136</sup>

**Areas of discrimination:** Despite the equality provision in Article 38 of the Constitution, there are many discriminatory provisions and practices, such as child marriage, polygamy unequal divorce rights, nationality rights and inheritance rights, among others.

**Violence against women:** The penal code is outdated and thus does not provide sufficient provisions against domestic violence or harmful traditional practices. A new sexual offences law, which includes gang rape, exploitation, abuse, and harmful traditional practices, was passed in 2018, but it was immediately resisted; the president thus halted its application. Both Islamists and politicians from opposition groups denounced it for various reasons. Therefore, the reform attempt was unsuccessful.

**Access to justice:** Harmonization and application of the diverse legal systems has led to complications and confusion. There are no guidelines as to which legal rules should apply to which issues. Transparency in the rules and processes is also lacking, making the application of family laws complicated and unpredictable. Accessing justice is thus challenging. Similarly, even though the courts are mandated to administer, record, and oversee marital issues, due to the absence of a single codified family law the court employs discretionary authority in marital dispute management. In most cases they end up referring the cases back to the elders of the spouses.

### **Preliminary Recommendations:**

There is a need to manage the politics around family law development since it is more of a political, social, and cultural project than a technical one that could be handled by legal drafters. It needs genuine dialogue and discussion involving all social groups, including political elite and religious groups. The key issues of the family law (i.e., forced marriage via-a-vis individual rights by the constitution, minimum age of marriage, consent to marriage, polygamy, equitable formula-based maintenance rate, as well as simplified rules of procedure for family cases and ending male dominance in the court operations) must be addressed.

The government's Ministry of Employment, Social Affairs and Family needs to spearhead the implementation of the National Gender Policy in the Government and WHRDs and CSOs should monitor implementation of this policy.

136 Somaliland Gender Policy, <https://slmesaf.com/wp-content/uploads/2019/08/National-Gender-Policy.pdf>



## 4.5

## Appendix E – South Sudan<sup>137</sup>

South Sudan was part of Sudan before she gained independence in 2011. According to Pew Forum (2012), 60.5 percent of the population are Christian, 32.9 percent followers of African traditional religions, and 6.2 percent Muslim. South Sudanese Muslims coexisted with non-Muslims in the region for over two hundred years, but this changed after South Sudan gained independence in 2011. South Sudan Muslims continue to be associated with Sudan, and have been subject to oppression based on their religion such as attacks on Muslim places of worship, women being made to feel uncomfortable wearing religious attire, etc.

According to the National Bureau of Statistics (2010), 51 percent of the population of South Sudan live below the poverty line and women make up 51.6 percent of the poor. The South Sudan Development Plan (SSDP) (2011–2013) acknowledges the high prevalence of female households which make up a big number of rural and urban poor (National Gender Policy, 2012: 20, 21). The government of South Sudan has not yet developed family laws or policies that clearly define women's rights within the household.<sup>138</sup>

**Legislative framework:** The South Sudanese legal system is built on a combination of statutory and customary laws. South Sudan has two bodies of law that operate side by side. The legal system consists of the constitution, legislations, and precedents created through court judgements operating

alongside customary laws, which consists of numerous unwritten bodies of law that have regulated South Sudan's tribes for centuries. The government's judiciary is centralized in administration, and all appointments are made by national government officials. South Sudan's pluralist legal system grants customary courts concurrent jurisdiction, and the laws of both systems are binding. The law enforcement services are weak across the country, and police are undertrained and under-resourced.

South Sudan does not have a codified Muslim family law; most of the family matters are controlled using customary and religious laws. Under the customary laws, the man is viewed as head of the family with all rights to decision making; women are not considered equal to men.

**Court system:** Referrals from customary to statutory courts are made usually inconsistently and without clear regulatory guidelines, with individual chiefs adjudicating in the manner they feel is appropriate. Given the poor state of the statutory courts, customary courts hear the vast majority of up to 90 percent of cases. While it is theoretically possible to appeal from the customary to the statutory courts, the widespread absence of local courts prevents many from accessing the formal legal system. Chiefs who preside over customary courts are generally older men with deeply ingrained patriarchal views. Also, Muslim women face challenges while seeking justice on family matters.

<sup>137</sup> This overview is based on the Musawah South Sudan country table, updated March 2022, <https://www.musawah.org/wp-content/uploads/2022/04/South-Sudan-Overview-Table.pdf>

<sup>138</sup> OECD Development Centre, 2019, Social Institutions and Gender Index, <https://www.genderindex.org/wp-content/uploads/files/datasheets/2019/SS.pdf>

**Reform processes:** Based on Article 16(4b) of the transitional constitution, which requires all levels of government to enact laws to combat harmful customs and traditions that undermine the dignity and status of women, CSOs have been working since 2017 to develop a family law bill. Recently, the Department of Gender and Social Welfare formed a steering committee to support the process. Lawmakers have also expressed the need for a MFL that can be used in cases of Muslim divorce, child custody and guardianship, forced marriage, inheritance, etc., since they refer to MFLs from Sudan to resolve cases in South Sudan.

**Child marriage:** South Sudan has the seventh highest prevalence rate of child marriage in the world.<sup>139</sup> About 52 percent of all girls are married before 18 years of age and 9 percent were pregnant before their 15th birthday. Despite all the legal measures put in place, child forced marriage continues to prevail in South Sudan. Islamic laws emphasize maturity as a criterion for marriage; this is generally based on physical maturity and not age.

**Forced marriage:** Despite the alleged freedom of women to choose whom to marry, common practices in South Sudan prevent women from making their own choices about marriage.

**Child custody:** Child custody is a particular challenge as many customs in South Sudan consider a child to belong to the father.

**Polygamy:** A Muslim man can marry up to four wives; there is no legal requirement to seek permission from the existing wife or court.

**Divorce Rights:** A woman who seeks divorce will go through various challenging procedures,

yet most of the time the final judgement is in favour of the man. In most of the customary law systems, a divorce is finalised upon the return of the bride price or dowry to a husband's family.

**Wife Inheritance:** South Sudan's ethnic communities widely practice 'wife inheritance', in which a wife is 'inherited' or remarried to the deceased's closest male relative.<sup>140</sup>

**Access to justice:** The absence of a codified national family law and MFLs leaves most women vulnerable to cultural and customary practices/approach. Access to and payment for lawyers is also a challenge; most women have limited knowledge of civil court procedures.

**Recommendations:** There is a need to have more strategic meetings between lawmakers and stakeholders, including those from Muslim communities, to push for the enactment of a family law that ensures justice and equality to women and girls within the family. There is also an urgent need to protect girls from child marriage in South Sudan through laws and their enforcement as well as extensive awareness raising programs.

139 UNICEF press release, 5 October 2020, 'Some Things Are Not Fit For Children', <https://www.unicef.org/southsudan/press-releases/some-things-are-not-fit-for-children>

140 Human Security Baseline Assessment, 2011, <https://issat.dcaf.ch>.



# 4.6

## Appendix F – Sudan<sup>141</sup>

Sudan possesses a rich cultural heritage due to its wide range of diversity in ethnicities, traditions, customs, and dialects. Despite ethnic and cultural differences, various groups have common customs and practices that negatively discriminate against girls and women and violate their rights, such as female genital mutilation, forced or underage marriage, and the narrowing of women's participation in decision-making and political life.

Most Sudanese people are Muslims, representing 97 percent of the population; the rest are Christians and atheists/agnostics. Currently, there are over 30 million Muslims in Sudan. Religion deeply influences governance and daily life. Muslims in Sudan generally adhere to the Sunni branch of Islam.

**Legislative framework:** Sudan's formal legal system is grounded in British common law and Islamic law. Sources of law are Islamic law, constitutional law, legislation, judicial precedent, and custom. All matters of Muslim marriage and family issues are codified in one single Act entitled 'The Muslim Personal Status Act of 1991'. The Act came into being following an intense period of Islamization led by the Islamist regime who came into power through a coup d'état in 1989. The law has been described as a conservative and patriarchal interpretation of Sharia and a backlash against women's rights activists. Although most of the population follow the Maliki school of thought within the Sunni branch, the Muslim Personal Status Act states

that any issue that has not been covered shall be governed by the Hanafi school of thought.

**Court system:** Sharia courts were established by presidential decrees throughout Sudan in the beginning of the Islamic regime in the early 1990s; these are not regulated by a codified Act. Court procedures in family laws are the same as other civil courts procedures, though Sharia courts require fewer formalities in terms of claims. Judges tend to act more swiftly than in any other court. There are also specialized courts for family law issues across the country. In some remote areas, such as Darfur, Eastern Sudan and the Blue Nile, citizens rely on customary justice, which is run by native administration consisting of laypersons, religious men, and tribe leaders. Some disputes are resolved by reconciliation involving family members of the spouses, typically men only.

**Government agencies:** Specialized governmental agencies in Sudan are dedicated to the protection of wives, mothers, and children. These include the Directorate for the Protection of Family and Children as well as a specialized Prosecution Department.

**Equality in marriage:** The Sudanese legislation differentiates between men and women in marriage in terms of rights and obligations. Spouses' duties are said to be complementary to each other rather than equal.

**Divorce:** Men have the right to instant divorce without constraints. Women can only request divorce through court proceedings.

141 This overview is based on the Musawah Sudan country table, updated March 2022, <https://www.musawah.org/wp-content/uploads/2022/04/Sudan-Overview-Table.docx.pdf>

**Minimum age of marriage:** The Muslim Personal Status Act does not specify a minimum age of marriage or prohibit child marriage.

**Polygamy:** Polygamy is allowed.

**Violence against women:** Violence is regulated under the Criminal Act (Penal Code); however, its provisions are not gender-sensitive, hence there is no recognition of gender-based violence. Additionally, domestic violence is not criminalized unless it amounts to gross harm, battery or murder attempt.

**Other:** There are unequal rights in nationality and inheritance.

**Reform efforts:** There have been multiple attempts to reform the Muslim Personal Status Act of 1991 since the promulgation of Sudan's Interim Constitution 2005. The first initiative for reform was undertaken by the Ministry of Welfare and Social Security in 2006 by the formation of the National Committee for Review of Women's Status in Laws (First National Committee) for review of all Sudanese laws considering the Interim Constitution of 2005 and the Bill of Rights. The Committee was composed of representatives from the Ministry of Justice, Ministry of Welfare and Social Security, the Police Department, UN Agencies, universities, organizations such as the State-sponsored Sudanese General Women's Union as well as independent lawyers. In the same year, the Ministry established the Women's Human Rights Centre, which activated the National Committee in 2009. The committee launched its first report in 2013 and has identified 88 articles in the Muslim Personal Status Act 1991 that need to be reformed for gender justice. The committee did not argue for radical changes. It based its

arguments on Islamic laws. However, religious leaders and conservative have strongly opposed the reform, and particularly the proposal to set the minimum age of marriage at 18 years old. As a result, none of the proposals of the committee were adopted.

In 2009, the Sudan Organization for Research and Development (SORD)<sup>142</sup>, a non-governmental organization, undertook reform efforts simultaneous to the government's efforts. SORD began its own initiative to draft an alternative family law, in view that Sudan needs a comprehensive reform in the shape of an entirely new law. SORD issued its report and proposal for an alternative law in 2012, and positioned them within international and national legal frameworks, including the 2006 Constitution and the National Child Act 2010. SORD also employed Islamic arguments based on family law reforms in the region as well as consultations with national Islamic leaders. However, the proposal was perceived as too radical and thus failed to achieve national adoption.

In 2016, the Ministry of Justice set up a new National Committee for Family Law Reform (Second National Committee) and invited a representative from SORD to participate, which was the furthest achievements for SORD's development of an alternative law. The reform was conducted parallel to SORD's initial efforts, however it remained at the consultations phase in the Ministry of Justice and was not taken further. Similarly, attempts for reform recurred in a National Dialogue process for constitutional reform in 2017. Family law constituted one of the contested issues, but the outcomes of the dialogue did not materialize. Reforms were not passed for promulgation during the previous

142 Research papers written by SORD can be found on their website: <https://www.sord-sd.org/>.

regime, as family laws had a strong political backing that stood in the way of the reform process due to the government's allegiance to Islamist ideologies that founded the 1991 Muslim Personal Status Act.

In addition to SORD, there are local networks in the reform process such as 'the Sudanese Network for Ending Child Marriage and Amending the Family Law'.

More recently, and after the overthrow of the previous regime, the transitional government of Sudan adopted a new constitution entitled 'Constitutional Charter 2019' that includes provisions related to strengthening gender equality. This resulted in reform of discriminatory laws negotiations on family laws being restated. The Ministry of Social Development established a new committee to reform the Muslim Personal Status Act 1991. This committee was comprised of different stakeholders, including religious leaders, civil society organizations, academics, and UN Agencies. The reform process was ongoing until the government administration changed due to the coup of 25th of October 2021. This resulted in suspension of the committee.

**Court challenges:** Women in Sudan are challenging discrimination and have had success claiming their rights in court. For example, Sudanese women who have been married before are now permitted to act as their own guardians for remarriage, without the need of a male guardian.

**Preliminary Recommendations:** There is a need for more support from the international community and nonstate actors to women's rights advocates and groups in their fight against inequality and discrimination in Sudan.

There is a need to conduct a comprehensive review of the Muslim Personal Status Act of

1991 by the ruling government to provide Muslim women equal rights in marriage and family matters. The review should be based on a progressive interpretation of the Sharia and be grounded in a legal framework that ensures equal rights and accords equal protection of the law to spouses.

Women should be engaged in the entire process. Areas to be prioritized include the concept of 'qiwama' (male authority over women), removing articles related to disobedience and stipulating the minimum age of marriage to be 18 and above.



# 4.6

## Appendix G: Uganda<sup>143</sup>

It is estimated that Muslims in Uganda constitute between 14 and 20 percent of the population. The Uganda Muslim Supreme Council (UMSC) is the governing body of all Muslims in Uganda. Founded in 1972, the body unifies all Muslims in Uganda as a national umbrella organization for all Muslim groups, institutions, and associations. Associations such as the 'Kibuli group', the Ismaili, foreign associations such as the World Islamic Call Society, and a few minor groups such as the Ahmadiyya of Kampala are Muslim groups that are answerable to the UMSC.

**Legislative framework:** Because Uganda was a British colony, its legal system is based on English common law and customary laws. However, customary laws are in effect only when they do not conflict with statutory law. Uganda has one Muslim-specific codified family law, the Marriage and Divorce of Mohammedans Act chapter 252, which was originally codified in 1906 and most recently reformed in 2000. The general family laws in Uganda are also applicable to Muslims and cover issues relating to marriage, divorce, children and their rights, financial provisions upon divorce, cohabitation, and unmarried families. The major laws related to family life for Muslims include:

1. The Constitution of the Republic of Uganda 1995, as amended
2. The Marriage Act, chapter 251
3. The Divorce Act, chapter 249
4. Marriage and Divorce of Mohammedans Act, chapter 252

The Marriage and Divorce of Mohammedans Act chapter 252, which commenced in 1906 and was revised in 2000, is outdated and not comprehensive. The Mohammedans Act establishes in section 2 that for people who profess Islam, all marriages and divorce that take place according to Muslim rites and celebrations shall be considered valid. The rest of the Act primarily relates to registration of marriages and divorces and jurisdiction. Thus, most elements related to marriage and divorce are based on local interpretations of the Sharia and the norms and customs of the preferred schools of law. Many areas related to family life are not codified. This creates problems for imams, courts, members of the legal profession and ordinary people. Many in the Muslim community in Uganda are encumbered by the absence of Sharia courts to help them resolve issues like inheritance and divorce.

**Court system:** Although the 1995 Constitution of the Republic of Uganda under article 129 provides for the establishment of specialized Muslim family law courts called Qadhi courts,<sup>144</sup> these courts are nonexistent. This is because the Parliament of Uganda has yet to pass a law to establish the Qadhi courts. In the absence of formalized Qadhi courts, the Uganda Muslim Supreme Council leadership decided to establish and operate informal Qadhi courts. These informal courts are unconstitutional. The current informal Qadhi courts are managed by all-male panels of judges, who impose deeply patriarchal approaches to handling Muslim family law matters. The majority of adjudicators under the informal Qadhi courts are mainly local

<sup>143</sup> This overview is based on the Musawah Uganda country table, updated March 2022, <https://www.musawah.org/wp-content/uploads/2022/04/Uganda-Overview-Table.pdf>

<sup>144</sup> Uganda Const. art.129 (d) 1995 at <https://ulii.org/akn/ug/act/statute/1995/constitution/eng%402018-01-05>



Imams who have not undergone any specialized training in delivering justice.

**Child and forced marriage:** The national ‘Strategy to End Child Marriage and Teenage Pregnancy 2022/23-2026/27’ was developed with the aim of ending child marriage in Uganda and having an enduring prosperity and social economic transformation. However, there are gaps in the various Ugandan laws regarding the age of consent to marriage. The Marriage and Divorce of Mohammedans Act does not specify the age at which parties may contract a Muslim marriage. Section 11(a) of the Customary Marriage Registration Act specifies 16 years as the minimum age of marriage for females and 18 for males, but allows parents to consent for minor marriages. These laws contradict the Constitution, which criminalizes child marriage and specifies 18 years as the minimum age at which both men and women can marry, yet the laws are still in operation. There is a danger of some parents forcing their daughters into marriage when they are below the age of 18. Such contradictions in the laws regarding minimum age hinder their effective enforcement and in the long term serve to perpetuate child and forced marriage in Uganda. Indeed, evidence shows that enforcement of the laws related to child marriage have been very weak. More than 34 percent of girls are married before their 18th birthday, and 1 in 10 is married before turning 15 years of age despite the Constitution setting 18 as the minimum legal age of marriage.

**Reform opportunity on the minimum age of marriage and consent to enter into marriage:**

The Draft Administration of Muslim Personal Law (AMPL) Bill of Uganda under Clause 22 placed the age for marriage for both men and women to

be at 18. The draft also provides under Clause 24 (b) (c) for free consent of both men and women intending to marry.<sup>145</sup>

**Polygamy:** Most marriages in Ugandan law must be monogamous, but there is an exception for customary and Muslim marriages. A bill that attempted to outlaw polygamy in 2011 was rejected because polygamy was considered a ‘central part of the Muslim faith’. Christians also opposed the law allegedly because it would promote promiscuity and ‘cheapen the institution of marriage’. This issue was resolved by a decision that Muslim marriage would be provided for under a separate law. The last tabling of the bill before Parliament was in February 2013 where it was withdrawn by the Government to give Members of Parliament more time to consult their constituents. In 2019, the Bill was meant to be considered at the Second Reading in Parliament but again suffered postponement.<sup>146</sup> Moreover, in the case of *Mifumi (U) Ltd & Anor V Attorney general and Anor.*<sup>147</sup> *Mifumi* argued that polygamy denied the women rights to equality in marriage and was in violation of Article 21(1) of the Constitution, which states that all people are equal before the law. Uganda’s Constitutional Court dismissed a petition seeking to declare polygamy unconstitutional. Around 28 percent of married women in Uganda are in polygamous unions.<sup>148</sup>

**Inheritance:** An attempt to reform inheritance laws in the form of the Succession (Amendment) Bill 2021 was opposed by conservative Muslim activists using the argument that the Bill disregards the teachings of Islam in seeking to ensure equality in the distribution of the deceased’s assets.

145 The Draft Administration of Muslim Personal Law (AMPL) Bill 2008

146 Uganda Country Page by Musawah.

147 Constitutional Petition no.12 of 2007

148 Uganda Demographic and Health Survey, UDHS, from 2006, mentioned in observation 20 of the Concluding Observations of the UN Committee on the Elimination of Discrimination against Women Forty-seventh session, 4–22 October 2010.

**Successes:** Women have initiated several cases before the Constitutional Court in which they successfully challenged discriminatory provisions in the Penal Code and Succession Act, such as in the case of *Law and Advocacy for Women in Uganda v Attorney General*.<sup>149</sup>

**Preliminary Recommendations:**

- The Government should review the outdated Marriage and Divorce of Mohammedans Act with a goal of reform or enactment of a new, comprehensive Muslim family law that is aligned with the fundamental rights and principles of equality of the Constitution. New legislation should address all family issues, including age of marriage, consent, equality in marriage, financial rights, divorce, child custody and guardianship, etc., in a comprehensive manner based on progressive interpretations of the Sharia and aligned with constitutional and human rights guarantees. It should provide procedures for all forms of divorce, and, through research and consultation, identify one uniform school of thought that the majority of Ugandan Muslims follow to apply to divorce processes.
- The Government should also address the barriers and challenges to justice that Muslim women face and facilitate a process whereby Muslim women can contribute and engage in the reform. Muslim should be enabled to claim the right and create the space to speak on Islam publically. It is essential that women's voices are considered legitimate and that women assert their demands so that they can be heard in the law-making process.
- The government should enact the Administration of Muslim Personal Law Bill to allow for the establishment of formalized Qadhi courts that cater for the needs of all genders.

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149 Constitutional Petition-2005/13) [2007] UGSC 71 (05 April 2007)

## About Musawah & the We Cannot Wait Project

Musawah is a global movement for equality and justice in the Muslim family. It was launched in Kuala Lumpur, Malaysia, in February 2009 to address the compelling need for women's groups working in Muslim contexts to come together to share strategies, build scholarship and promote best practices to advance the rights of Muslim women to equality and justice.

Musawah's key strategy is to challenge the ways Islam is being used to justify discrimination against women in law and practice and to build an international discourse and public voice to assert that equality is possible within Islam. It does this through knowledge building, capacity building, international advocacy, communications and outreach, which all contribute to Musawah's global Campaign for Justice in Muslim Family Laws.

This project is part of the Campaign for Justice, which is working at national, regional, and global levels for reform of discriminatory family laws in Muslim contexts. The research team mapped the status of Muslim family laws in seven countries in the Greater Horn of Africa region: Ethiopia, Kenya, Somalia and Somaliland, South Sudan, Sudan and Uganda. This comparative review is a culmination of that research. It will play a crucial part in deepening our knowledge and understanding of the context. It also helps to highlight strategic opportunities that can be used to overcome obstacles to reform family laws, policies and practices in the region, build evidence to justify legal and policy reform, and identify entry points in influencing decision makers on the issue of

family law reform. All told, the research and report serves as a tool for strengthening the courage and capacity of women's rights activists and organizations in the region.

The project was led by Musawah's Co-Director, Zharin Zhafrail Mohamed, and coordinated by the Sub-Saharan Africa Programme Lead Officer, Rehema Z Namukose, with substantive support from the Musawah team. The report was written by Gofran Abdulrahman Al-Absi, an independent Researcher and edited by Musawah Consultant, Jana Rumminger. It is part of a consortium led by SIHA Network, comprising national partners FIDA Uganda, EWLA, NAGAAD Network and Musawah, who are working together to build an inclusive women's movement in the Horn of Africa through the 'We Cannot Wait' Project under the Power of Women Fund from the Dutch Ministry's Ministry of Foreign Affairs.

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