

**Muslim women, less than equal: The constitutional limitation of the right to equality and its manifestation in Kadhi's' Courts.**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore University Law School

By

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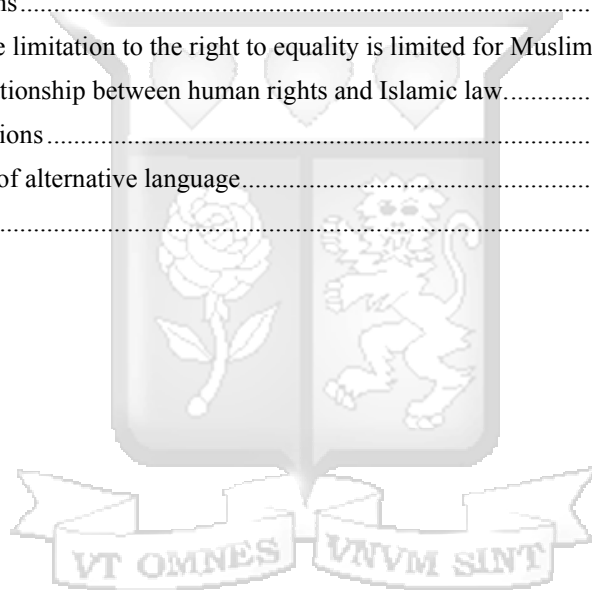
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## **Acknowledgements**

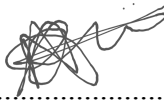
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## Declaration

I, NANA AZIZ, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

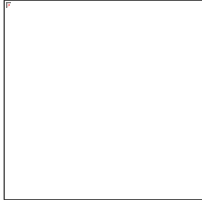
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## **ABSTRACT**

Article 24 of the Constitution provides for the limitation of rights and freedoms under the bill of rights. Clause 4 limits the fundamental right to equality to the ‘extent strictly necessary’ for the application of Muslim law before the Kadhis courts to persons who profess the Muslim religion in matters relating to personal status, marriage, divorce and inheritance. The ‘extent strictly necessary’ is not defined within the Constitution. Therefore, the standard and scope of the application of the limitation is ambiguous.

Kenya is a pluralistic state with multiple laws applying to the population which is characterised by a diverse religious and cultural background. Religious freedom is protected in the Kenyan constitution. For Muslims, this means that they are free to apply Islamic law, albeit limited to matters of personal law. The Kadhis courts have been created to advance the application of Islamic law and enhance access to justice to the Muslim demographic of Kenya.

The focus of this dissertation is the conflict of laws that presents itself when secular laws demand gender equality while Islamic Law has aspects that place women in subordination to men in personal matters. Exclusionary provisions such as Article 24(4) are an attempt to reconcile two different regimes of law and allow the application of both in spite of the conflict of laws. The dissertation questions the legitimacy of the limitation of equality for Muslims as this removes Muslim women from protection against gender discrimination because of their religion.

The dissertation engages in questions of how rights, as created and enforced in the realm of secular International Human Rights Law, engage with contradictions in the theologically centred Islamic law.

## CHAPTER ONE

### **1.1 Background**

Article 24 of the constitution provides for the limitation of rights and freedoms under the bill of rights. Clause 4 limits the fundamental right to equality to the ‘extent strictly necessary’ for the application of Muslim law before the Kadhi’s’ courts to persons who profess the Muslim religion in matters relating to personal status, marriage, divorce and inheritance.<sup>1</sup> The ‘extent strictly necessary’ is not defined within the Constitution. Therefore, the standard and scope of the application of the limitation is ambiguous.

Kenya’s legal regime is pluralistic. Muslims are excluded from secular law and Islamic law applies to them in personal matters. Though Kenya does not have a state religion, religious freedom is protected under the Constitution, and discrimination based on this is prohibited.<sup>2</sup> The Constitution also states that individuals shall not be compelled to act or engage in any act contrary to their belief or religion and that everyone has a right to manifest their religion through practice, observance, or teaching.<sup>3</sup>

Muslim Kenyans, in addition to being subject to Kenyan laws, are then also subjected to a separate legal regime known as Shariah Law. It is primarily sourced from the Holy Quran and the sayings and practices of the Prophet (Peace be upon him).<sup>4</sup> Another source summarily includes the general and accepted legal reasoning of Muslim jurists. The Quran is fiercely protected by Muslims, and it is prohibited to make any changes to it, especially the laws that are definitive. However, there are corpus legal provisions from the Quran and Sunnah that could be interpreted.<sup>5</sup> The Quran is interpreted in a number of ways, one of them being through context. This means that the meaning of a verse should be understood in light of the surrounding verses and the overall message of the

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<sup>1</sup> Article 24(4), The Constitution of Kenya, 2010.

<sup>2</sup> Article 45, The Constitution of Kenya, 2010.

<sup>3</sup> Article 32(2), 32(4), The Constitution of Kenya, 2010.

<sup>4</sup> *The “peace be upon him” next to Prophet Muhammad represents the invocation Muslims say with his name as a form of respect.* Hallaq WB, *An Introduction to Islamic Law*, Cambridge University Press, 2009, 15.

<sup>5</sup> Sunnah means the way of the Prophet Muhammad (peace and blessings be upon him). It includes everything he said, did, and approved of. We know the Sunnah from the statements called Hadiths that have been handed down from the Companions of the Prophet.

Quran. It also means that the Quran should not be interpreted in isolation from the Sunnah, or the teachings and practices of the Prophet Muhammad.

Additionally, historical, linguistic, philosophical and theological analyses are also done to comprehend the Quran and Sunnah. This flexibility allows for the application of the law to all cases regardless of time and place because of its amenability to change.<sup>6</sup> Evidently, the principles and laws of Islam hold significant status in the lives of Kenyan Muslims and the Constitution allows for its application in personal matters.

In recognition of this, the Constitution of Kenya provides for the freedom of religion and requires the Parliament to enact legislation governing the personal law of Muslims.<sup>7</sup> In the same vein, Kadhi's courts are established to adjudicate on matters involving personal civil issues.<sup>8</sup>

Section 3(4) of the Marriage Act provides that, although spouses have equal rights during marriage and at its dissolution, "the parties to an Islamic marriage shall only have the rights granted under Islamic law".<sup>9</sup> The Law of Succession Act states that it is generally not applicable to the estate of a deceased Muslim.<sup>10</sup>

The inclusion of special laws for Kenyan Muslims is a clear manifestation of legal pluralism in the country. Muslim Kenyans have multiple identities on account of their nationality and religious beliefs. Additionally, their culture also adds on to their identity. The Islamic community is made up of afro-Arabs, Indians, Somalis and Africans, identifying with their original culture while professing the Islamic faith.<sup>11</sup> Consequently, customs and social norms also influence the lives and mentalities of Muslim Kenyans including the Kadhis while they adjudicate in court. Muslim

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<sup>6</sup> Alwazna RY, 'Islamic Law: Its Sources, Interpretation and the Translation of It into Laws Written in English', 2016.

<sup>7</sup> Article 32, The Constitution of Kenya, 2010.

<sup>8</sup> Article 170, The Constitution of Kenya, 2010.

<sup>9</sup> Section 3, Marriage Act, 2014.

<sup>10</sup> Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of this death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law. Section 2(3), The Law of Succession Act, 1981.

<sup>11</sup> Minority Rights Group International, "Kenya - Muslims," <https://minorityrights.org/minorities/muslims/>

women's gender intersects with their other identities and patriarchal social norms and this shapes their experiences in court. As a result, they could often face discrimination and marginalization.<sup>12</sup>

Islamic law is not codified, and it is subject to different schools of jurisprudence and frameworks of interpretation.<sup>13</sup> Therefore, in making judicial decisions Kadhis apply Islamic law according to their understanding, the school of thought that they follow, ethnic and cultural traditions and other personal factors.<sup>14</sup>

The Kenyan Constitution under Article 27 then provides for the equal treatment of men and women in political, social, cultural and economic spheres. However, the limitation of equality for Muslims under Article 24 is directed towards recognizing their subjection to religious principles in personal matters. The statute indicates that it is only used when strictly necessary and does not set clear standards of specific circumstances where the equality of Muslims could be limited in personal law.

The jurisprudence on the use of the constitutional Article on the limitation of the right to equality is mainly on the inheritance of children born of an unmarried Muslim or interreligious couple.<sup>15</sup> Islamic inheritance laws prohibit an 'illegitimate child' and non-Muslims to inherit from a Muslim. Kadhi's Courts have referred to the constitutional limitation of equality to apply this Islamic rule.<sup>16</sup> This is with the effect of disinheriting a child or its non-Muslim mother, thereby treating them unequally and discriminating them based on religion and how they were born, in or out of wedlock. The limitation could possibly be used to enable other features of Islamic law that place Muslim women in a position where they could be treated unequally. The Quran allows for the marriage of a man to multiple women under polygamy.<sup>17</sup> Islamic law enables a husband to unilaterally divorce his wife.<sup>18</sup> Furthermore, in succession, a female heir is entitled to half the portion of her male

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<sup>12</sup> Hirsch, S, Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court. *Law & Society Review*, 1998, 125-156.

<sup>13</sup> Hamid Khan, *Islamic Law: Practitioner's Guide*, 2013.

<sup>14</sup> What is the Rule of Law? | The World Justice Project. 2016. Available at: <http://worldjusticeproject.org/what-rule-law>

<sup>15</sup> *In re Estate of CCBH (Deceased)* [2017] eKLR.

<sup>16</sup> *Aisha Brek v Aisha Mohamed Nzawa & another* [2020] eKLR.

<sup>17</sup> Quran 4:3.

<sup>18</sup> *Sahih al-Bukhari*, vol. 8, book 80, no. 755.

counterparts.<sup>19</sup> This application is not exhaustive and is ultimately assumed because the Constitution does not set a clear scope of where the limitation of equality applies.

Considering the nature of the application of Islamic law, the exclusion of Muslims from enjoying a fundamental right without a clear and definitive scope places the minority and marginalized Muslim women in a very vulnerable position. Neutral laws applying to the exclusion of a minority without their specific protection and considering their unique position essentializes the dominant group.<sup>20</sup> A lack of female judges and practitioners in the Kadhis' courts accentuates the problem and shows a disregard of the Muslim woman's perspective and protection in the justice system.

## 1.2 Statement of problem

The constitutional provision, Article 24(4), limits the right to equality to the 'extent strictly necessary' for Muslims in the application of Islamic law. However, the uncertainty in what 'the extent strictly necessary' means, in absence of a definition, creates a lacuna in the law. The intersectionality of identity for Muslim Kenyans influences their interaction with gender equality rights. Since Islamic law is not codified, Kadhis apply their perspective and understanding of Islamic law.

The lack of definitive scope in the constitutional provision creates an allowance for patriarchal application of Islamic law that goes against the spirit of the Quran. In my study, I shall explore the question of whether the Constitution, in failing to provide for a scope to the limitation of the right to equality for Muslims under Article 24 of the Constitution, hinders access to justice for Muslim women in Kadhis' Courts.

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<sup>19</sup> Quran 4:11.

<sup>20</sup> Jadeed M, Inheritance rights of Muslim women, University of Nairobi, Kenya, 55.

### 1.3 Research objectives

1. To examine what ‘the extent strictly necessary’ as used in Article 24 (4) of the Constitution of Kenya means.
2. To establish whether the concept of equality and human rights are recognised in Islamic law and whether they are implemented in Kadhi’s courts.
3. To propose an alternative wording of the constitutional Article that limits the right to equality for Muslims so as to promote Muslim women’s rights in Kenya.

### 1.4 Research questions

1. (a) What is the meaning of ‘the extent strictly necessary’ as used in Article 24(4) of the Constitution of Kenya?  
(b) Why is this exclusionary limitation necessary for Muslims?
2. (a) Do human rights exist in Islamic law?  
(b) Is International Human Rights Law compatible with Islamic law?
3. Is the limitation of the right to equality evidently disadvantageous to Muslim women?

### 1.5 Hypothesis

The lack of codification of Islamic law makes its application susceptible to patriarchal and customary influences on the detriment of Muslim women. This problem is further accentuated by the lack of female judges and other court practitioners, illustrating a gender imbalance in the very structure of the courts. The provision on the limitation to equality is as a result of legal pluralism and it allows the application of the law to Muslims in a way that considers the intersectionality of their identity.

The argument is that the lack of a definitive scope to which Islamic principles the limitation on equality applies to, the lack of recognition of Muslim women as a marginalized minority, leaves them vulnerable to discrimination.

Scholars have theorized on gender equality under Islam and have called for the interpretation of Quranic principles in a holistic way to support the protection of the right in light of current international standards. Applying these developments in the face of discriminatory exclusion would enhance access to justice by prompting the equal protection of Muslim women in the law and increasing development through an extension of their freedoms.

### **1.6 Justification**

Muslim women are a minority and marginalized group in Kenya. Their identity intersects their nationality, religion and customs and this affects how laws apply to them. Typically, as Kenyan citizens, they are entitled to the protection of the state against discrimination based on their gender and religion. However, their religious identity subjects Muslim women to principles that contradict the secular notion of equality. The Constitution provides for limits of the right to equality in lieu of this but does not specify a scope for its application.

Furthermore, Muslim women's customary identity and social norms subject them to patriarchal gender norms that could discourage them to take legal action against an infringement of their rights. Kadhis' Courts are heavily male dominated. Practitioners and adjudicators employed under the Kadhis' Courts are perpetrators of unfair patriarchal norms in the shadow of Islamic law. Since Muslim women are removed from the scope of application of the constitutional right of equality, which is the basis of the rule of law and enables access to justice, it is important to grant them special and positive protection of their rights to mitigate their disadvantages. This would grant better protection of Muslim women's rights even within the purview of discriminatory religious principles.

Lawmakers would benefit from this study because my arguments can identify the legitimate application of the limitation of the right to equality, to specific Islamic principles. Kadhis could

source a framework for the interpretation and application of human rights. Lastly, this study could help advance some arguments for the application of affirmative action in the Kadhis' Court.

## 1.7 Theoretical framework

### 1.7.1 Legal pluralism

#### **Definition**

Legal pluralism is frequently used to describe the coexistence of two or more legal regimes within a given temporal and spatial setting. Griffith demarcates a weak form of legal pluralism also known as Juristic Pluralism, being the co-existence of several legal orders within a social group that does not belong to the same system.<sup>21</sup> In my dissertation's case, this would be the application of both secular law and Islamic Law to Muslim women.

Furthermore, he gives a juridical dimension of legal pluralism where it is allowed by provisions of law, which spell out specific procedures for a specific group which is recognized by law. This is illustrated in statutory Kenyan law where Muslim women are excluded in the application of secular law, which provides for the application of Islamic law in personal matters. Thus, in this case, there are different rules for different situations but only one rule for a given actor. This is to mean, there are secular laws and Islamic laws but only one of them can apply to a Muslim person in personal law. Kadhis' Courts would be characterized as formal recognition of the exclusive jurisdiction of a non-state justice system in a defined area.<sup>22</sup>

Empirical legal pluralism, another dimension of legal pluralism, is where in the case of a dispute, an individual is presented with multiple legal norms to choose from.<sup>23</sup> To elaborate, an actor can refer to more than one set of norms and resort to more than one legal institution.<sup>24</sup> In this case,

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<sup>21</sup> Griffiths, J, What is legal pluralism? *The Journal of Legal Pluralism and Unofficial Law*, 1986,39.

<sup>22</sup> Forsyth, M. "A Typology of Relationships between State- and Non-state Justice Systems," *Journal of Legal Pluralism and Unofficial Law* 56: 2007, 67–113.

<sup>23</sup> Griffiths, J, (1986). What is legal pluralism? *The Journal of Legal Pluralism and Unofficial Law*, 18(24), 50.

<sup>24</sup> Muslims have the choice on whether to be subjected to the jurisdiction of the court of their choosing.

Muslims in Kenya have a choice on whether to be subjected to the jurisdiction of the Kadhis' Courts or secular courts.

Juridical legal pluralism attempts to determine the powers and competencies of alternative dispute resolution to increase access to justice according to the identity that the subjects of the court subscribe to. However, empirical legal pluralism may create obstacles for those seeking access to justice. This is in the way of creating impunity where conflicting parties cannot agree on where to take their dispute.<sup>25</sup> This pluralism features forum shopping where one can make strategic choices among several forums to get one that is most likely to render a positive decision. This is particularly a problem where formal and non-formal norms contradict each other as in the case of equality for Muslims.

### **1.7.2 How the concept of Pluralism is related to my study.**

Religious authorities or leaders frequently resolve conflicts in contexts of different formalities. Muslims in Kenya turn to Islamic courts to resolve a variety of disputes, particularly those involving family law and inheritance. Islamic law is applied in different ways depending on the state. Islam's tenets are incorporated into state law to regulate issues of family law and personal status in many secular states with sizable Muslim populations. Some relationships between religious leaders are unofficial yet firmly ingrained. Several states give residents the option to choose between civil or religious marriage and family law systems.<sup>26</sup>

The idea of a uniform application of the law is challenged by robust legal pluralism, as is the state's claim to a monopoly on the right to adjudicate legal disputes. It permits participants to choose dispute resolution forums based on convenience, effectiveness, legality, jurisdiction, cost, and the capacity of the state and nonstate systems to issue legally binding judgments and penalize people who opt for other methods. This dynamic results in an ongoing conflict for legitimacy, resources, and power between state and nonstate justice actors. Beyond their adjudicative function, non-state

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<sup>25</sup> Helbling J, Kalin W, Nobirabo P, Access to justice, impunity and legal pluralism in Kenya, the Journal of legal pluralism and unofficial law, 347-367.

<sup>26</sup> UNDP, *Informal Justice Systems: Charting a course for human rights-based engagement*. New York: United Nations Development Programme, 2012. <https://gsdrc.org/topic-guides/safety-security-and-justice/themes/legal-pluralism/#undp-2012>

justice institutions may even act as "state-building spoilers" and contribute to a resurgence of warfare.<sup>27</sup> Therefore, the theory will help to analyse the adverse effects of a multiplicity of laws on Muslim women.

## 1.8 Literature review

The current literature shows a debate on the issue of human rights under Islamic laws. A report by the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) has pinpointed the discriminatory nature of religious and customary laws.<sup>28</sup> They cite that the multiplicity of legal systems and exclusion from statutory provisions is in itself discriminatory. Additionally, the report recommends amendments to religious law and vouches for the appointment of a female Kadhi.<sup>29</sup>

In the context of legal pluralism, authors have analysed the human rights spectrum under Islamic law.<sup>30</sup> In understanding the intersectionality of the identities of Muslims, they theorize on the protection of equality based in Islam. They understand Islamic law as an entirely different legal regime that recognizes human rights and is capable of legal reform and contextual interpretation to mitigate the conflict with modern ideas of egalitarianism.<sup>31</sup>

### 1.8.1 Gender issues in Islam

Doctor Moza Ally, in her thesis regarding the inheritance rights of Muslim women, conducts a critical analysis of equality in Islam from the perspective of Muslim Feminism. She does this by presenting a holistic reading of the Quran; That is their context, grammar and totality of their

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<sup>27</sup> Menkhaus Ken, Governance without Government in Somalia: Spoilers, State Building, and the Politics of Coping. *International Security*, 2007, 3 (3): 74–106.

<sup>28</sup> Committee on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of Kenya, 2017.

<sup>29</sup> Committee on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of Kenya, 2017, 2.

<sup>30</sup> Jadeed M, Inheritance rights of Muslim women, University of Nairobi, Kenya, 55.

<sup>31</sup> Musawah, AWAPSA, Joint report on Article 16, Muslim family law and Muslim women's rights in Kenya, 2017.

message.<sup>32</sup> Double movement, described as analysing the rationality of the Quran in the past and the contextual differences of the present, and unreading Gender from the Quran.<sup>33</sup> Her thesis argues that gender equality is recognized in the Quran and its protection is warranted from the interpretation of the Quran.

Additionally, she analyses equality through the lens of Multiculturalism. There is a discussion on the intersection of identities and how Muslim women essentially derive their definition of self from their religion.<sup>34</sup> Requiring them to assimilate into dominant or secular perspectives that are intolerant of their values would be patriarchal and imperialist.<sup>35</sup>

Multiculturalism requires that the unique interests of each significant group are reflected in societal structures and special minority legal provisions would ensure that they enjoy the same treatment in law as other nationals.<sup>36</sup> She argues that rules that are neutral to the interests of different groups in society are unjust because they essentialize the dominant section of the group.<sup>37</sup> Lastly, she proposes that the principle of equality means substantive equality especially in calling for plural justice in a multicultural society.<sup>38</sup> This is to treat like cases alike and different cases differently.<sup>39</sup>

The law must address the unique multiple discrimination of Muslim women because they are not situated identically to other women. I say unique because of the intersection of their identities of their religion, nationality, and culture, all simultaneously imposing on their legal status. Their uniqueness as a demographic is clear because of the detailed system of Islamic law that they are subject to. CEDAW posited that parties must move beyond a formal obligation of equal treatment of women with men to meet their obligations under the convention. The Committee expressed regret on how the states have limited their focus on formal equality (de jure) instead of a practical

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<sup>32</sup> Wadud A, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective*, 2nd edition, Oxford. University Press, 1999.

<sup>33</sup> Jadeed M, *Inheritance rights of Muslim women*, 57-66.

<sup>34</sup> Kymlicka W, *Multicultural Citizenship: A liberal theory of Minority Rights*, Clarendon Press, 1996.

<sup>35</sup> Al Hibri A, *Is Western Patriarchal Feminism Good for the Third World Minority Women?*, Princeton University Press, 1999, 44.

<sup>36</sup> Anaya J, *The capacity of international law to advance Ethnic or Nationality Rights Claims Essays*, 1989, 842.

<sup>37</sup> Jadeed M, *Inheritance rights of Muslim women*, 23.

<sup>38</sup> Al-Adl A, *Concept of Gender Equality in Islam, Substantive Equality of Men and Women*, 2006.

<sup>39</sup> Jaggar A, *Sexual Difference and Sexual Equality, Living in Contradictions: Controversies in Feminist Social Ethics*, 1st edition, Westview Press 1994, 20.

one (de facto).<sup>40</sup> This is to mean, on paper and statute equality is catered for, yet in practical sense, the implementation is neglected.

### **1.8.2 Musawah ('equality' in Arabic)<sup>41</sup>**

Musawah, a global organization for equality and justice in the Muslim family, together with Advocacy for Women in Peace and Security Africa (AWAPSA) have submitted a report for consideration by CEDAW committee review.<sup>42</sup> Musawah asserts that in the twenty-first century, there cannot be justice without equality and argues that Quranic principles enable the egalitarian formulation of family laws.<sup>43</sup>

The report examines Kenyan laws and practices that enforce de jure and de facto discrimination against Muslim women.<sup>44</sup> Lived realities are provided for in the report illustrating the particular effects of inequality in marriages including polygamy and a wife's inability to consent to her husband marrying other wives, and the exercise of unilateral divorce by the husband.

They provide a justification for reform according to Musawah in specified areas of contention where they analyse Quranic principles in defence of gender equality.

Furthermore, they make recommendations based on these reforms to CEDAW.

### **1.8.3 On gender rights as applied in the Kadhis Courts**

Susan Hirsch, in her book *Pronouncing and Persevering*, studies the way gender influences the dynamics of dispute resolution.<sup>45</sup> The book describes how Swahili women in Malindi approach marital disputes in the Kadhis' Courts. She eloquently outlines the economic decline and political marginalization of the Swahili people.<sup>46</sup> She notes the domination of men in the Kadhi's courts and how this has important implications for the way women's voices are heard. It is argued that

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<sup>40</sup> CEDAW, General Recommendation 28, 2010.

<sup>41</sup> <https://www.musawah.org/>

<sup>42</sup> Musawah, AWAPSA, Joint report on Article 16, Muslim family law and Muslim women's rights in Kenya, 2017

<sup>43</sup> Musawah, AWAPSA, Joint report on Article 16, 43.

<sup>44</sup> Musawah, Joint report on Article 16, 2017.

<sup>45</sup> Hirsch S, *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court*, Chicago, 1998.

<sup>46</sup> Hirsch S, *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court*, Chicago, 1998, 11.

women may face discrimination in divorce or custody where their rights are constricted by conservative interpretations of the Islamic law that prioritize male authority and control. Additionally, she analyses the effect of the intersectionality of identity for Kenyan Muslims and how they affect their interactions in the court.

Islamic law recognises the rights of women in certain areas of family law, like the right to initiate divorce, custody of children and the right to inherit property but this can be limited by cultural and social norms not necessarily in line with Islamic law.<sup>47</sup>

#### 1.8.4 Access to justice

Wanyonyi, in his dissertation, ‘Examining the role of the Kadhi’s courts in creating access to justice for Muslim women’, the right to access is theorized as an end product of the rule of law.<sup>48</sup> The World Justice Project posits that rule of law is a system where the law is clear, publicized, stable, and just; is applied evenly and protects the security of core human rights.<sup>49</sup> Going by this definition, where the rule of law is observed, there is equality before the law and equal protection of laws.<sup>50</sup>

He analyses the definition of access to justice according to the United Nations Development Programme where the right is defined as the ability of people to seek and obtain a remedy in conformity with human rights standards.<sup>51</sup> In light of this, the Kadhi’s court has been classified as a decision-making institution founded on ethical, emotional, political or practical criteria.<sup>52</sup> He also looks at access to justice according to Socio-legal studies, enabling us to view it from the right

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<sup>47</sup> Hirsch S, Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court,

<sup>48</sup> Caplen, A., and McIlroy, D. (2001). “Speaking Up” – Defending and Delivering Access to Justice Today.

<sup>49</sup> What is the Rule of Law? | The World Justice Project. 2016. What is the Rule of Law? | The World Justice Project; The World Justice Project® (WJP) is an independent, multidisciplinary organization working to create knowledge, build awareness, and stimulate action to advance the rule of law worldwide. [ONLINE] Available at: <http://worldjusticeproject.org/what-rule-law>.

<sup>50</sup> Wanyonyi K, Kadhis courts in Kenya Towards enhancing Access to Justice for Muslim Women, Lund University,2016.

<sup>51</sup> UNDP, Programming for Justice: Access for All. Bangkok: United Nations Development Programme, 2005.

<sup>52</sup> Sterling S, Moore W, Weber’s Analysis of Legal Rationalization: A Critique and Constructive Modification. Sociological Forum. Vol. 2(1), 67-89, 73.

bearer where unmet legal needs arise from groups of people being unable to benefit from existing legal solutions.<sup>53</sup>

The scope of his study is limited to the accessibility of the Kadhi's court as a competent avenue to have one's case heard. He does not cover whether those who access these systems get fair and just results.<sup>54</sup>

### **1.8.5 Limitation of rights under Article 24 in the Constitution of Kenya**

There has been a critical analysis of Article 24 of the Constitution by Syekonyo Maingi.<sup>55</sup>

Though she does not provide much on Article 24(4) specifically, the paper provides context on the legitimacy of the limitation of rights that is relevant to the question of potential unfairness.

She analyses the international standards applied in looking at whether a limitation is excessive or not. The General dicta applying to all limitations of rights require that; the limitation must be provided by law, the measure must have the purpose of protecting one or more needs and that it should be necessary.<sup>56</sup> The Constitution echoes this concept of 'necessity' while protecting the interests of Islam. The constitutional provision further states that the limitation is only to the extent that is justifiable based on equality.<sup>57</sup> What happens in the Muslim women case, the situation where equality is limited in itself?

An example of 'claw back' clauses in the Independence Constitution is given to illustrate the potential abuse of limitation clauses and end up taking more rights than protecting them.<sup>58</sup> It gave judges a wide berth and they have the task of interpreting the limitations to protect human rights, to which they adopted a very restrictive approach to the detriment of Kenyan citizens. She gives

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<sup>53</sup> Morris, P, Social Needs and Legal Action, Law in society series,501.

<sup>54</sup> Wanyonyi K, Kadhis courts in Kenya Towards enhancing Access to Justice for Muslim Women, Lund university,2016.

<sup>55</sup> Maingi S, A critical analysis of article 24 on the limitation of rights and fundamental freedoms under the constitution of Kenya 2010, Strathmore University Law School, Nairobi, Kenya, 2017.

<sup>56</sup> Louise Doswald-Beck, Human Rights in Times of Conflict and Terrorism, Oxford University Press,2011, 71

<sup>57</sup> Article 24, The Constitution of Kenya, 2010.

<sup>58</sup> J Mutakha-Kangu ' The theory and design of limitation of fundamental rights and freedoms' The Law Society of Kenya Journal 1, (2008) ,411.

an instance where the court dismissed an applicant on the technical ground that he did not identify which constitutional provision had been contravened.<sup>59</sup>

### **1.8.7 Expected Contribution to existing Literature.**

There has been work analysing the application of the limitation to rights in general. My study will specifically focus on Article 24(4) of the Constitution and how the generality of standards under it perpetuates the discrimination of women in Kadhis courts. As provided for in Article 24(2) of the Constitution, a statute will not be construed to limit a right unless it is clear and specific, furthermore, such a legislation will not be valid unless it expresses the intention, nature and scope of the limitation.<sup>60</sup> I hope to specify that standards need to be created in the application of the statute. These standards need to be specific and sensitive to the nature of Islam and the multiculturalism of its Kenyan subjects.

## **1.9 Methodology**

The research undertaken in this study would be qualitative in nature with the main sources of data being secondary sources including journal articles, books, book chapters, reports, and other internet resources. Moreover, primary materials like case law will be used in the study. In general, I anticipate using a deductive approach to reach my conclusions, in which I will try to support my hypothesis with the answers to the research questions.

To carry out my proposed research, I need to analyse the provision of the Constitution in limiting the equality of Muslim women. I shall carry out a critical analysis of the phrase, ‘to the extent strictly necessary’ to try and discover the specific standards it was meant to be applied to. Furthermore, I shall conduct an institutional analysis of the Kadhi’s court to question whether the lack of defined scope relates to an uncontrolled application of patriarchal norms and the exclusion of Muslim women in the scope of fundamental human rights.

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<sup>59</sup> Koigi wa Wamwere v Attorney General Miscellaneous application NC. Number 574/90.

<sup>60</sup> Article 24(2), The Constitution of Kenya 2010.

Islam has been viewed as patriarchal and unfair towards women by virtue of certain laws like polygamy, and unilateral divorce. A doctrinal analysis of equality in Islamic law would help analyse the possibility of re-interpretation of the law to ensure the inclusion of Muslim women in the protection of rights according to international standards. Under this, I will also examine the shift in preference of international standards to substantive equality and how this fits into the argument posed under equality in Islam.

Muslim feminist theories of equality contribute largely to the discussion, and I will conduct a philosophical analysis to apply the theories in creating standards and a scope for the limitation of equality.

### **1.10 Chapter breakdown**

Chapter One forms the first chapter of this study. It details, among others, the research objectives, conceptual framework and the justification of the study and thus sets the foundation for the subsequent chapters.

Chapter Two will analyse the meaning of ‘the extent strictly necessary’ where I will conduct a contextual and historical analysis of the statute. After that, I investigate the features of Islamic Law that require the limitation of equality.

Chapter Three discusses the relationship between the two conflicting regimes of law, International human rights and Islamic law. While looking into the origins and development of International Human Rights Law, and its contradictions with religious laws, the chapter questions whether human rights are truly universal. The discourse focuses whether universal rights should be adjusted to the needs of different cultures of the world or if it should be the other way around.

Chapter Four investigates whether the limitation of equality in applying Islamic law is disadvantageous and discriminatory to Muslim women in the practical sense. Issues to do with inheritance and matrimonial property law as applied in the Kadhis Court are discussed. Furthermore, perspectives on the appointment of female Kadhis in Kenya are explored to pinpoint the status quo of gender politics in the Muslim community.

Chapter Five concludes and summarizes the findings of the discussion. Furthermore, the viability of different solutions to the issue of gender equality as provided for in Kenyan laws in relation to Muslim women is examined.



## **CHAPTER TWO**

### **An interpretation of the constitutional Article 24(4) in limiting the right to Equality.**

#### **2.1 Introduction**

This chapter aims to comprehensively discuss the provision of the limitations of rights under Article 24 of the Constitution. With the focus on Article 24(4), the goal of the chapter is to conduct a contextual analysis of the purpose, nature and scope and of the limitation of the right to equality for Muslims in the Constitution. This will be done by studying the constitutional Article as a whole and taking a look at the requirements needed for a limitation to be valid. Furthermore, the chapter looks at how a Kenyan court has used and interpreted the constitutional limitation. International Human Rights Law standards are also evaluated in regard to the limitation of rights.

As shall be discussed, both constitutional and international law place an importance on the aim of a limitation of a right in the Constitution to indicate its legitimacy. If the aim of a limitation of a right is specified, the limitation is acceptable to apply. For that reason, a section will look at the features of Islamic Law that might necessitate the limitation of the right to equality to pinpoint the aim of the limitation.

#### **2.2 A contextual analysis of Article 24(4)**

Human rights can be legally enforced and people are protected against their violations because they are entitlements of all human beings no matter their economic standing, race, tribe, religion, politics, ideologies, and whatever other factors of differentiation.

Article 27 of the Constitution provides that;

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.*
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*

However, Article 24, which is the subject of this chapter, focuses on the specific restrictions included in the Bill of Rights. They are referred to as "limited rights," which implies that they may be restricted under specific conditions, as stated in the pertinent Article (24) of the Kenyan Constitution of 2010.

The provision states;

**24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-**

- (a) the nature of the right or fundamental freedom;**
- (b) the importance of the purpose of the limitation;**
- (c) the nature and extent of the limitation;**
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.<sup>61</sup>**

This section of the Constitution places a requirement that when a right is limited, it should be done so based on human dignity, equality, and freedom. This creates a contradiction. When it comes to limiting the right to equality under subsection (4) of the same Article. How is the principle of equality going to be used as a basis for limiting the right to equality?

The constitutional Article continues, emphasis added;

**(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom-**

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<sup>61</sup> Article 24, The Constitution of Kenya, 2010.

*(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;*

*(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and*

*c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.*

*(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.*

These provisions are specifically meant for human rights limitations that are enacted and amended after the effective date of application. It begs the question as to whether the limitations that are already in effect, such as the one limiting equality, do not have to comply with the requirements of clarity and specificity in the nature and extent of the limitation.

The Article continues in clause (4) as follows;

***(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.<sup>62</sup>***

Although the nature of its application is mentioned, that is, it applies in matters of personal law, this is not enough detail to indicate the scope. The Kadhi's Courts already have limited jurisdiction in adjudicating solely on the personal matters listed in the Article.<sup>63</sup>

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<sup>62</sup> Article 24, The Constitution of Kenya, 2010.

<sup>63</sup> Article 169, The Constitution of Kenya, 2010

It is apparent that an entire court system throughout the country is applying a limitation of a fundamental right within an already limited jurisdiction of subject matter. The mere mention of the personal status laws applying to Muslims is insufficient in dictating the scope of the limitation. There needs to be more specificity and clarity on what it is about these wide personal laws that can allow one person to be treated less than equal to another. The wording of the Article leads to questions on what it is about Islamic personal law that is considered necessary enough to limit equality.

The next part discusses a case that interprets the provision on the limitation. This is done in view of the surrounding provisions of Article 24 of the Constitution.

### **2.3 Judicial Interpretation**

#### ***CKC & another (Suing through their mother and next friend JWN) v ANC.*<sup>64</sup>**

The case is about a man who had lived and died as a Muslim and who was subsequently buried according to Islamic rites. He was living with a non-Muslim woman as despite not having contracted a marriage under Islamic Law. The two had two children together. The deceased did not have his own property but was set to inherit 9.21% of his father's property. The 'wife' had brought a case on appeal to the High Court. This happened after a decision was made in the Kadhis Court that concluded that the appellants were not entitled to the estate since they were non-Muslims. She argued that this Islamic rule was discriminatory and that Islamic laws do not apply to her since she was not a Muslim. The High Court Judge invoked Article 24(4) of the Constitution in her decision,

“The court appreciates the zealous submissions on behalf of the applicants. Indeed, referring to any child as illegitimate in this day and age appears to be outrageous. However, as long as the estate herein belongs to a deceased Muslim and as long as Article 24(4)

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<sup>64</sup> [2019] eKLR

remains in our Constitution and further as long as section 2(3) remains in the Law of Succession Act, the court's hands are tied.”<sup>65</sup>

The appellants were dissatisfied with the judgment, prompting them to file this appeal. They contended, among other reasons, that the judge's decision was flawed in several respects. Specifically, they argued that the judge incorrectly determined their status as legitimate children of the deceased and their entitlement to inherit from his estate. Additionally, they asserted that the judge's ruling constituted discrimination based on religion, contravening Article 27 of the Constitution. Moreover, they criticized the judge for neglecting to uphold fundamental rights and freedoms and for failing to declare the Islamic law in question as inconsistent with the Constitution, rendering it null and void. <sup>66</sup>

The Court of Appeal judge contended that the issue in question was the interpretation and application of Article 24(4) in view of Article 27. Another aspect under consideration is whether offspring born to a Muslim father and a non-Muslim mother, who were not formally wedded, have the right to inherit their deceased father's estate.

The Judge details;

*A reading of Article 24(4) together with Article 170(5) of the Constitution shows strict conditions that must be satisfied before a person can invoke Islamic law to derogate from or limit the right to equality and freedom from discrimination. First, the derogation must be “only to the extent strictly necessary”.*

*Second, the derogation must relate to matters of personal status, marriage, divorce and inheritance. Third, the persons involved must be persons who profess the Muslim faith. Fourth, as regards jurisdiction of the Kadhi's court, all the parties to the dispute must profess the Muslim faith and submit to the jurisdiction of the Kadhi's court.*<sup>67</sup>

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<sup>65</sup> *CKC & another (Suing through their mother and next friend JWN) v ANC, 2019, eKLR.*

<sup>66</sup> *CKC v ANC, 2019, eKLR.*

<sup>67</sup> *CKC v ANC, 2019, eKLR.*

When all the specified stringent criteria are met, the Constitution permits the utilization of Islamic law, notwithstanding potential perceptions of discrimination.<sup>68</sup> The court made a decision based on the fact that, since the appellants were non-Muslims, the Islamic law did not apply to them. Additionally, they did not submit to the Kadhi's courts' jurisdiction, so the appeal was allowed.

The learned judge in interpreting the constitutional provisions related to Article 259 emphasized the importance of promoting the Constitution's purposes, values, and principles, which include advancing the rule of law, human rights, and fundamental freedoms enshrined in the Bill of Rights.<sup>69</sup> This interpretation aligns with Article 10, which outlines the notional values and principles of governance binding all state organs and persons when applying or interpreting the Constitution, laws, or public policies.<sup>70</sup> These values include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of marginalized groups.

Furthermore, the judge considered Article 169 and Article 170(5) of the Constitution, which establish the Kadhi's court as a subordinate court in Kenya with jurisdiction limited to Muslim law matters related to personal status, marriage, divorce, or inheritance.<sup>71</sup> The judge also referred to the Kadhi's Court Act, which reiterates the jurisdiction of the Kadhi's Court, and the Law of Succession Act, which exempts Muslims from its provisions regarding succession, subject to certain qualifications.

While providing a wholesome interpretation on the Article based on its surrounding statutes, the case shows how the Article has been previously used in courts. It is important that it was mentioned that they did not know the Islamic sect that the deceased subscribed to. This will be relevant in the next chapter in discussing the difficulty of codifying Islamic Law.

Furthermore, this case was decided in favour of the appellants only for the reason that they were non-Muslims. The question therefore is, how can we protect women who are Muslims when a constitutional Article provides that they are less than equal?

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<sup>68</sup> *CKC v ANC, 2019, eKLR.*

<sup>69</sup> Article 259, The Constitution of Kenya, 2010.

<sup>70</sup> Article 10, The Constitution of Kenya, 2010.

<sup>71</sup> Article 169, 170(5), The Constitution of Kenya, 2010.

## 2.4 International Law standards

Article 2(5) of the Kenyan Constitution stipulates that any treaty or convention ratified by Kenya becomes part of Kenyan law, meaning that Kenya is bound by those treaty rights under International Law.<sup>72</sup> This indicates that Kenya has consented to the terms of the treaties and the government is required to abide by them. Internationally, the standards for the limitations of rights echo the legitimacy of the limitation, acquired from a specified aim, nature and scope of the limitation that is in Article 24.<sup>73</sup>

The international human rights treaties that Kenya has ratified and signed contain some requirements to be met before limiting a human right. On the basis of provisions such as Article 19 of the International Covenant on Civil and Political Rights protecting the right to freedom of expression (other examples include Articles 18, 21, and 22), human rights courts and treaty bodies have developed a test to establish whether a measure limiting a non-absolute right is legitimate.<sup>74</sup>

The following questions must be asked:

- Is there a legal basis for the measure limiting the right?
- Does the limitation on the right pursue a legitimate aim such as respect of the rights or reputations of others, the protection of national security, the maintenance of public order or public health or morals?
- If so, is the limitation necessary to achieve the legitimate aim, and is the extent of the limitation proportionate in pursuit of the identified legitimate aim? The existence and effectiveness of procedural safeguards will be a key aspect of the assessment whether the limitation of the right is proportionate.
- Does the restriction respect the principle of equality? Is it non-discriminatory? Measures that limit rights in a discriminatory way will fail the test of proportionality. Therefore, the

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<sup>72</sup> Article 2(5), The Constitution of Kenya, 2010.

<sup>73</sup> Article 24(1), The Constitution of Kenya, 2010.

<sup>74</sup> Article 19, International Covenant on Civil and Political Rights, 1966, 2200A, (XXI).

question of discrimination is generally considered one aspect of the necessity and proportionality test.

Only if all these questions can be answered in the affirmative in a specific case will a restriction on a non-absolute right be permissible under International Human Rights Law. While there is a legal basis for the limitation, which is to allow the application of Islamic law, Article 24(4) fails to specify the aim of the limitation of equality as demanded by international standards. An adherence to the principle of equality is also given importance. In this case, equality itself is limited. To my mind, that indicates the importance of equality. Consequently, it is my opinion that the limitation of equality deserves special restrictions.

#### **2.4.1 Derogation, Limitation, and the Principle of Proportionality**

The derogation and limitation of rights are special measures invoked in International Law to accommodate both individual rights as recognised in international covenants and the interests of states to ensure public order and national security in times of crises.<sup>75</sup> Although the two words are often used interchangeably, for purposes of the interpretation of ‘the extent strictly necessary’, there is an important distinction.

Derogation measures are temporary deviations that limit or detract from the rights provided by human rights instruments.<sup>76</sup> These allow states to suspend certain individual rights under exceptional circumstances. These circumstances are often understood in international instruments as those threatening the security of a nation, public emergencies or times of war.<sup>77</sup> In derogating a right, states have to comply with substantive requirements that generally involve the following: the existence of an emergency; proportionality of measures; conformity with other international law obligations; non-discrimination; and observance of non-derogable rights.<sup>78</sup>

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<sup>75</sup> Securing public order could imply the allowing of many social, philosophical, and religious traditions to ensure the peaceful and effective functioning of society. El Zeidy M, *The ECHR and States of Emergency: Article 15 – A Domestic Power of Derogation from Human Rights Obligations*, *San Diego International Law Journal* 277, 278 (2003)

<sup>76</sup> Tolera M, *Absence of a derogation clause under the African Charter and the Position of the African Commission*, Vol 4 No 2 (2014): *Bahir Dar University Journal of Law*, 2014, 229, 231.

<sup>77</sup> Fernandez G, *Within The Margin Of Error: Derogations, Limitations, & The Advancement Of Human Rights*, *Philippine law journal*, 2019, —([PDF](#)) [Within the Margin of Error: Derogations, Limitations, and the Advancement of Human Rights](#)

<sup>78</sup> Fernandez G, *Within The Margin Of Error*,

What is of interest is the proportionality of measures; the measure must be proportional and should be only “to the extent strictly required” by the circumstances.<sup>79</sup> This fundamental standard for assessing the validity and legality of the derogation. The principle of proportionality calls for a detailed analysis and explanation of every action done in reaction to an emergency. I observe that this resonates with the wording of Article 24(4) of the Constitution.

In contrast with derogation measures, limitation clauses constitute justifiable restrictions on the exercise of certain rights guaranteed by human rights instruments in ordinary circumstances. These clauses were created to "meet specific objectives to a specific extent and for certain democratically justifiable purposes," making them "conceptually narrower than derogation."<sup>80</sup>

Limitation clauses seek to balance the various shared, interdependent, and often competing rights. Limitations are restrictions put in place to uphold morality and public order and to achieve this, they must be based on principles deriving expansively from multiple traditions. As a result, laws need to represent a variety of social perspectives as opposed to just one faith or culture. This view resonates more with the aim of limiting equality for Muslims.

Interestingly, limitations also imply an element of proportionality. This concerns the relationship between the interests at stake, such that there needs to be a proportional application of the limitation of the in relation to the best interests of the subject the limitation applies to. Proportionality mandates that a reasonable balance should be achieved between the interests served by the measure and the interests that are harmed by introducing it. Therefore, restrictions must be applied only for the purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.<sup>81</sup>

The reason I find the distinction between the two relevant and important is because, while aligning with the aims and objectives of a limitation, Article 24(4) is worded like a derogation. Limitations

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<sup>79</sup> Human Rights Committee, General Comment No. 29: Derogations during State of Emergency Article 4, 2001, 4,5

<sup>80</sup> Aoláin, Special Rapporteur, Report on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism on the Human Rights Challenge of States of Emergency in the Context of Countering Terrorism, A/HRC/37/52 2018, 8.

<sup>81</sup> Human Rights Committee, pg 22

are narrower and demand specificity of aims and pinpointed objectives. They apply in ordinary situations over a long period of time compared to derogations. Because of the longevity of application, limitations call for a specified scope of the exact points where a limitation would be applied.

These safeguards are particularly essential because the jurisprudence on special measures of the limitation and derogation of rights under international human rights has been observed to be inconsistent and divergent thereby producing problems of interpretation and giving rise to considerable abuse.<sup>82</sup> The legal supervision of states resorting to special measures is of “primary importance as grave human rights violations often occur in this context and states may use the power as a pretext for [restricting rights] or to a larger extent than is justified.”<sup>83</sup>

To get a better understanding of the aim of the limitation of equality under the Kenyan Constitution, I shall investigate the parts of Islamic law that might necessitate a limitation of such a fundamental human right in the next part.

## **2.5 Features of Islamic Law that require that equality is limited.**

Islam places the most responsibility on the man in the family, especially financially. Men are seen as providers and protectors of women in the religion.<sup>84</sup> We can see this reflected in how Islamic personal laws are structured, observing how a financial advantage granted to men in Islamic Law because of this. All the laws are explained and have interpretations that give plausible justifications for what has been provided for in the primary sources of Islamic law. All these interpretations form Islamic law as a whole. When Islamic jurists differ on interpretations, the people who follow their perspective collectively form a school of thought, commonly known as sects within the religion. Examples are Shia and Sunni Muslims, amongst others.

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<sup>82</sup> Sheeran S, Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics, Michigan Journal of International Law, (2013) 493

<sup>83</sup> Sheeran S, Reconceptualising States of Emergency under International Human Rights Law: 518

<sup>84</sup> “Men are the caretakers of women, as n over women and tasked with supporting them financially. And righteous women are devoutly obedient and, when alone, protective of what Allah has entrusted them with”, The Holy Quran, 4:34

The school of thought that a subject of Islamic law subscribes to determines what type of rules apply. The following section will outline a general overview of personal laws in application under the jurisdiction of the Kadhis Court and within the scope of the limitation of equality in question.

### 2.5.1 Inheritance

Allah says;

*Allah thus commands you concerning your children: the share of the male is like that of two females. If (the heirs of the deceased are) more than two daughters, they shall have two-thirds of the inheritance; and if there is only one daughter, then she shall have half the inheritance.*<sup>85</sup>

The first general inheritance rule states that the male heir's share should be double that of the female heir. Islamic justice requires that a woman's portion of inheritance be less than a man's since Islamic law relieves women of many financial burdens related to family life while placing higher financial obligations on males.

This contrasts the Law of Succession Act where Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried.<sup>86</sup> Notably, Under Section 2 of the Succession Act, Muslims are excluded from the application of the Act and the section provides for the application of Muslim law instead. Any laws that would normally apply would be obsolete if they are to be inconsistent with Islamic law<sup>87</sup>

Another relevant issue is that Islamic law prohibits a non-Muslim from inheriting a Muslim's estate.<sup>88</sup> It also prohibits an illegitimate child from inheriting from a Muslim father.<sup>89</sup> This showcases the discrimination of a person in terms of religion and the way that they were born.

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<sup>85</sup> 4:11 Quran

<sup>86</sup> Section 38, Law of Succession Act, 1981.

<sup>87</sup> Section 2, Law of Succession Act, 1981.

<sup>88</sup> *CKC & another (Suing through their mother and next friend JWN) v ANC*, (2019), eKLR.

<sup>89</sup> *CKC & another v ANC*, (2019), eKLR

## 2.5.2 Polygamy

Polygamy is mentioned in the Quran in only one verse:

*And if ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; But if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice.*<sup>90</sup>

According to the great Egyptian theologian of the nineteenth century, Imam Mohamad Abdou, polygamy, while allowed in the Quran, is a concession to necessary social conditions that was given with great reluctance.<sup>91</sup> This is because polygamy is only allowed when the husband can provide equal care for all his wives and to give each her rights with impartiality and justice.<sup>92</sup> However, polygamy is misused by men and is perceived as an absolute right and a privilege rather than being conditional to the maintenance of justice. Some classical jurists, like Imam Shafi, interpret the last portion of the verse to mean that polygamy should be restricted.<sup>93</sup>

Apart from in Islamic marriages, polygamy is legally recognized as a customary marriage in the Marriage Act.<sup>94</sup> It is worth noting that in the Independence Constitution, Section 82 allowed derogation from the right to equality and freedom from discrimination in issues of adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. That derogation was allowed for all communities in Kenya. However, in the new Constitution, Article 24(4) has narrowed down the subjection of the limitation of equality only to Muslims. Yet customary law ceases to apply if its application is repugnant to justice.<sup>95</sup>

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<sup>90</sup> Ali Y, The Holy Qu'ran: Text, Translation and Commentary, 1983, Surah 4, verse 3.

<sup>91</sup> Ali Engineer A, The Rights of Women in Islam, , 1992, 157-58.

<sup>92</sup> Ali Y, The Holy Qu'ran: Text, Translation and Commentary, Sura 4, verse 3 (1983)

<sup>93</sup> Kidwai M, Women Under Different Social and Religious Laws: Buddhism, Judaism, Christianity, Islam.

<sup>94</sup> A marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous. Section 6(3), Marriage Act, No. 4 of 2014.

<sup>95</sup> Section 3(2) Judicature Act, 2012.

In the context of polygamy, why is it that Muslims need the limitation of a foundational human right to allow polygamy in Islam but the same is not required in customary law?

### 2.5.3 Divorce

Divorce is allowed in Islam and can be initiated by both men and women. However, Islam encourages reconciliation between spouses rather than severance of their marriage.<sup>96</sup> The Divorce system in Islam is complex with different procedures for divorce if done by a husband and a wife. Women can institute claims of divorce through a concept known as *Khuluu*. The right of a woman to *Khuluu* is based on her sacrifice of part or all of her dowry to her husband to get a divorce.<sup>97</sup> She could also request a divorce from her husband if she fears cruelty from him or desertion.<sup>98</sup>

Men can unilaterally divorce their wives under *Talaaq*, which is the husband's right to divorce his wife by making a pronouncement that the marriage is dissolved.<sup>99</sup> The husband utters a single pronouncement of divorce and then must abstain from sexual relations with his wife for a period of three months, known as the period of *Iddah*.<sup>100</sup> This period meant for reconciliation, ensuring that the woman is not pregnant and ensuring clarity in paternity issues that would arise with the dissolution of the marriage. Should they reconcile, the couple can return to the marriage three times after this pronouncement is repeatedly made three times. After the third time, going back to the marriage is prohibited.

A different type of *Talaaq* depicts a man simultaneously making three pronouncements of divorce. While a period of *Iddah* is still required, the possibility of remarrying the same person and reconciling is stifled from the intense declaration. Although prevalent in Islamic societies, Scholars

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<sup>96</sup> 'If you fear a breach between the two, appoint an arbitrator from his people and an arbitrator from her people. If they both want to set things right, Allah will bring about reconciliation between them. Allah knows all, is well aware of everything.' The Holy Quran, Chapter 4 verse 35

<sup>97</sup> Ali Y, The Holy Qu'ran: Text, Translation and Commentary, Sura 2, verse 22(1983).

<sup>98</sup> Doi, Shari'ah: The Islamic Law,

<sup>99</sup> Talaaq comes from the root tallaqa meaning to release a human being from any obligation incumbent upon him. Mashhour, A. Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt. *Human Rights Quarterly*, 2005, 562–596. <http://www.jstor.org/stable/20069797>

<sup>100</sup> Iddah means a period of waiting for the woman from remarriage after the death of her husband or after her divorce from her husband. Doi, Shari'ah: The Islamic Law, 198,200.

have argued that this type of divorce has no basis in the Quran and Sunnah.<sup>101</sup> This type of talaq could be argued to put women in a subordinate position to men and treat them unequally.

Meanwhile, Article 45 (3) of the Kenyan Constitution guarantees equality rights during the dissolution of a marriage.<sup>102</sup>

## 2.6 Conclusion

This section has analysed Article 24(4) in view of its surrounding statutes in whole. These statutes include the Constitutional establishment of the Kadhis court in the Constitution, specifications of the court's jurisdiction, and provisional guidelines on how to interpret the Constitution. Judicial interpretations as well as international standards that limit human rights were also examined. In this discussion, there is an argument that there is a contradiction in the wording of the Constitution; that the limitation of rights should be based on equality yet equality itself is the human right being limited. Furthermore, the statute has fallen short of clearly specifying the scope of its application and what the limitation aims to achieve. I have differentiated between a derogation and a limitation in International Law and questioned which one would be a better fit in defining what is needed for this particular limitation to be legitimate. Finally, I have looked into Islamic Law in attempts to discover which of its features would necessitate the limitation of equality.



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<sup>101</sup> Mashhour, A, Islamic Law and Gender Equality, 562–596. <http://www.jstor.org/stable/20069797>

<sup>102</sup> Article 45(3), The Constitution of Kenya, 2010.

## **CHAPTER THREE**

### **The relationship between Human rights and Islamic law.**

#### **3.1 Introduction**

There is a general perception that Islam, like other religions and cultures, instigates outdated traditions that are contrary to fundamental understandings of democracy. An instance is where concepts of polygamy across different cultures raise questions as to whether women are truly accorded their right to be treated equally to men in marriage. Secularism has allowed these traditions to continue in spite of significant developments in International Human Rights Law. States with a diverse cultural and religious population have gravitated towards secular democracies which enforce human rights regardless of religious or cultural affiliations of its citizens.

Kenya, being such a state, allows the application of personal Islamic law to the citizens that profess the Islamic faith.<sup>103</sup> The challenge arises in reconciling secular laws with religious laws. A conflict of laws between the two regimes could arise, an example being egalitarian laws in the face of patriarchal cultures and norms. This chapter will analyse questions of human rights within Islam.

Islamic law is a complex legal system with an organized method of creating laws. In addition to the primary sources of the Quran and Hadith (generally considered divine revelations), secondary sources provide human interpretations of the divine word. The established human interpretations are argued to have formed a larger part of Islamic law as we know it today.

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<sup>103</sup> Article 24(4), The Constitution of Kenya, 2010

Muslim feminists question this development of Islamic law, arguing that human interpretations of the holy scripture were naturally inclined to biases prevalent in the patriarchal society at the time.<sup>104</sup> In Muslim feminist's view, a reinterpretation of Islamic law to fit the current modern context could be a solution to reconciling the conflict of laws. This is more of the liberalist perception of Islam. On the other side, conservative Muslims argue that Islam was a pioneer of human rights in the past, when the divine law was being brought down to earth. They cite women's rights within Islam that they deem to have been revolutionary and express that these rights are sufficient for Muslims regardless of the temporal context. Most scholars of Islam subscribe to either the two sides and this influences the possibility to adapt Islam to the modern context.

In a different perspective, the question of whether rights are truly universal, transcending cultural and societal contexts, remains a subject of debate. The following section explores the tension between cultural relativism and the universality of human rights, tracing the evolution of International Human Rights Law and the challenges posed by differing cultural perspectives.

### **3.2 International Human Rights Law and Islamic law**

The origins of the Human Rights Law regime has often been attributed to Western origins. Notably, the European Enlightenment is thought to have wielded significant influence in shaping contemporary perceptions of human rights.<sup>105</sup> During this period, Europeans fostered new norms and ideologies that challenged prevailing power structures at the time, such as monarchies and religious institutions. A paradigm shift towards a new social order, grounded in principles of equality and freedom derived from human rationality, began to emerge.<sup>106</sup>

While many contemporary notions of international human rights are traced back to Western thought, it is acknowledged by some scholars that certain cultural and traditional values predate the fundamental principles of human rights.<sup>107</sup> Concepts such as justice, fairness, freedom of

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<sup>104</sup> Jadeed M, *Inheritance rights of Muslim women*, University of Nairobi, Kenya, 55.

<sup>105</sup> Saeed A, *Human Rights and Islam: An Introduction to Key Debates between Islamic Law*, United Kingdom, 2018, 27.

<sup>106</sup> An-Na'im A, "The Rights of Women and International Law in the Muslim Context", *Whittier Law Review* 9 1988, 495.

<sup>107</sup> Shaheen Sardar Ali, *Conceptualising Islamic Law: CEDAW and Women's Human Rights in Plural Legal Settings: A Comparative Analysis of Application of CEDAW in*

conscience, religious tolerance, and the safeguarding of life and property have been integral to the philosophies of major religions. Nonetheless, there has been a secularization of Western society, which is mirrored in International Human Rights Law. The shift away from religious underpinnings in international law is purportedly aimed at fostering inclusivity and facilitating universal application.<sup>108</sup>

The establishment of the United Nations marked a formal and international recognition of human rights following the devastation of the World Wars. Through documents like the Universal Declaration of Human Rights, the concept of the universality of human rights was introduced.<sup>109</sup> The notion of universality asserts that human rights are inherent to all individuals by virtue of their humanity. It suggests that human rights transcend specific cultural or societal contexts, serving as a guiding principle applicable to all nations and cultures and rooted in the shared ideals of human dignity and equality. To uphold the universality of human rights, the language of such documents had to maintain neutrality, devoid of theological or cultural references.<sup>110</sup>

However, not all embrace the universality of human rights. Stemming from their Western origins, some argue that human rights are culturally biased and may not universally apply. Islam serves as a prominent example, with perceived contradictions to core human rights values such as equality. Islam, with over a billion adherents worldwide and a rich legacy spanning centuries, is seen by some scholars as presenting a ‘clash of civilizations’ due to disparities between Islamic law (Shari'ah) and International Human Rights Law.<sup>111</sup> Differences between the two regimes of law are exacerbated by the secular nature of international law juxtaposed with the theocentric perspective of Islamic law.

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Bangladesh, India and Pakistan, 21.

<sup>108</sup> Hevener N, *International Law and the Status of Women*, Boulder, CO: Westview Press, 1983, 4.

<sup>109</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 29 January 2024]

<sup>110</sup> Hevener N, *International Law and the Status of Women*, 16.

<sup>111</sup> The clash between Islamic law and International Human Rights Law stems from differing principles and interpretations regarding fundamental rights and governance. Islamic law, grounded in religious teachings, governs various aspects of life based on Sharia principles, often emphasizing communal values and obligations. In contrast, International Human Rights Law enshrines universal rights and freedoms applicable to all individuals, regardless of religion or culture. Tensions arise when certain provisions of Islamic law appear to conflict with international human rights standards, particularly in areas such as gender equality, freedom of religion, expression, and the rights of minorities. Huntington S, *The Clash of Civilizations and the Remaking of World Order*, New York, NY: Simon & Schuster, 1996.

Given the Western ideal of Human rights, imposing these concepts on non-Western cultures can be viewed as cultural imperialism.<sup>112</sup> For instance, certain Muslim critics contend that imposing Western ideals of rights on Muslims not only overlooks Islam's distinct concept of rights, freedoms, and duties but also encroaches upon religious freedom by prioritizing Western ideals over Muslim practices. In other words, human rights are not necessarily universal. Such a position is usually described as “culturally relativist”.<sup>113</sup>

### **3.3 Reformist vs Revivalist, perspectives on the modern-day development of Islamic Law**

As a result of the confrontation with modernity which colonialism had forced upon them, most Islamic regions at the end of the 19th century witnessed the emergence of modernization movements. These movements' shared concern was to assert Islam in the face of the dominance of Western civilization, while reconciling it with the exigencies of technological and political progress.

In the discourse surrounding the compatibility of Islamic law with secular human rights frameworks, two distinct approaches have emerged: reformist and revivalist. These approaches offer contrasting perspectives on how Islamic legal principles intersect with and respond to the principles of secular human rights law. This section contributes to a deeper understanding of the complexities inherent in reconciling religious principles with universal human rights norms in contemporary legal and political contexts.

The revivalist approach to reconciling Islamic law with international law stems from the belief that Islam is not merely a set of personal beliefs and rituals but a comprehensive ideology that encompasses both personal and public life.<sup>114</sup> They advocate for the reinstatement of Islamic law,

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<sup>112</sup> Saeed A, Human Rights and Islam: An Introduction to Key Debates between Islamic Law, United Kingdom, 2018, 38.

<sup>113</sup> Saeed A, Human Rights and Islam,38.

<sup>114</sup> Al-Banna H, The New Renaissance, in ISLAM IN TRANSITION: MUSLIM PERSPECTIVES, 1982, 78.

viewing it as a proven system with inherent religious legitimacy and the authority to reestablish the connection enjoyed by the Prophet and his earliest followers.<sup>115</sup>

One example of revivalist ideology is found in Wahhabi teachings, which advocate for strict literalism and reject reinterpretation of the Qur'an.<sup>116</sup> They express hostility toward intellectualism and mysticism within Islam, aiming to uphold a pure adherence to the Qur'anic text as the sole source of authority. In summary, the revivalist approach endeavours to reconcile Islamic law with contemporary challenges by advocating for the reinstatement of Islamic legal systems and resisting perceived non-Islamic influences, particularly those of the West.

Reformist approaches within Islam seek to harmonize Islamic law with international law by embracing the entirety of the Islamic tradition while advocating for an Islamic political and social order.<sup>117</sup> These reformists, often considered the mainstream of Islam, do not merely pay lip service to fundamental principles but instead emphasize a comprehensive adherence to Islamic teachings. Central to their ideology is the belief that Islam serves as the primary, if not exclusive, source of their ethical and political values.

Rather than outright rejecting liberal and democratic constitutional principles, reformists view them as compatible with Islamic teachings. Their perspective is rooted in presenting an "Islamic" social model as a superior alternative to the perceived shortcomings of the modern "Western" social order.<sup>118</sup> Despite this assertion, reformists do not dismiss the value of liberal and democratic ideals; rather, they seek to integrate them within an Islamic framework.

In essence, reformist approaches endeavour to bridge the gap between Islamic law and international law by promoting an understanding of Islamic principles that can coexist with modern legal systems. By acknowledging the value of both Islamic tradition and contemporary legal norms, reformists strive to reconcile the apparent tensions between the two, ultimately aiming to create a cohesive societal framework that respects both Islamic values and international standards of human rights and governance.

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<sup>115</sup> Khan H, *Nothing Is Written: Fundamentalism, Revivalism, Reformism And The Fate Of Islamic Law*, 2002, 305.

<sup>116</sup> Khan H, *Nothing is written*, 307.

<sup>117</sup> Khan H, *Nothing is written*, 312.

<sup>118</sup> An-Na'im A, *Toward an Islamic Reformation: Civil Liberties, Human Rights, And International Law (Contemporary Issues in The Middle East)*, 1996, 34.

### 3.4 Reformist understanding of Islamic Jurisprudence in light of the right to equality.

In Islam, *Sharia* is considered God's complete guidance revealed to Prophet Muhammad(p.b.u.h), encompassing all aspects of life. *Fiqh*, on the other hand, refers to the human effort to interpret and derive legal rulings from Islam's sacred sources—the Quran and the Sunna (the Prophet's practices found in his sayings). Fiqh is the equivalent of Islamic jurisprudence.<sup>119</sup> While Sharia is regarded as sacred, universal, and unchanging, Fiqh is the human attempt to understand and apply Sharia, making it subject to change and interpretation.<sup>120</sup>

It's crucial to distinguish between Sharia and Fiqh: Sharia is divine and eternal, while Fiqh is a human construct, prone to evolution and adaptation over time. Unfortunately, confusion often arises when people mistakenly equate Fiqh with Sharia. Sometimes, there's a deliberate attempt to portray certain interpretations of Fiqh as mandated by Sharia, thereby suggesting divine and unquestionable authority.<sup>121</sup> As a result, the lines become blurred, and many Muslims consider these concepts final and even oppose the idea of possibly changing them.

It is imperative to note that scholars often differed and disagreed with each other on matters of interpretation. These disagreements had a positive result of injecting Islamic laws with the degree of flexibility necessary for a religion which proclaimed itself suitable for all times, all people and all societies.<sup>122</sup> Over time, numerous schools of thought regarding Islamic legal interpretation, emerged to cater to specific communities and their cultural norms, customs, and traditions.<sup>123</sup>

Muslim Feminists recognize that this development of law was heavily influenced by the patriarchal values prevalent in those societies. As a result, the participation of women in public life was discouraged in later communities, unlike during the time of the Prophet Muhammad (P.b.u.h)<sup>124</sup>

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<sup>120</sup> Muhammad Hashim Kamali, "Sources, Nature, and Objectives of Shari'ah," *Islamic Quarterly* 33, no. 4, 1989, 21.

<sup>121</sup> Mir-Hosseini Z, *Muslim Women's Quest for Equality: Between Islamic Law and Feminism*, 2010, 32.

<sup>122</sup> Warren C, "Lifting the Veil: Women and Islamic Law", *Cardozo Journal of Law & Gender*, 2009, 42.

<sup>123</sup> Mahmassani S, *Muqaddima Fi Ihya' 'Ulum Al-Shari'ah*, 67-69.

<sup>124</sup> Al-Hibri A, "Islam, Law and Custom: Redefining Muslim Women's Rights." *American University International Law Review*, 1997, 25.

This shift led to Islamic legal interpretation primarily becoming the domain of men, with the judiciary as a whole being predominantly male dominated. Consequently, women's perspectives and voices were marginalized and largely disregarded in this sphere, leading to a significant reduction in their influence and participation.<sup>125</sup>

Very few major schools of thought remain viable today. These include the Hanafi, Maliki (established by Imam Malik referred to above), Shafi'i, Hanbali and Ja'fari schools. Almost all Muslim countries have formally adopted the interpretations of one of these schools as the primary basis of their family laws.<sup>126</sup>

Recognising the history of Shariah law in respect of the marginalization of women's voices in its development is important in understanding the perceptions of Islam today.

### **3.6 Women's rights within Islam**

The emergence of Islam in the early Seventh Century Common Era marked a pivotal moment in the history of women's rights, particularly within the context of pre-modern societies where discrimination against women was pervasive. In the cultural milieu of West Arabian society, where Islam originated, deeply entrenched attitudes of female inferiority prevailed. These attitudes manifested in practices such as female infanticide, unequal inheritance rights, and polygyny.<sup>127</sup> The Qur'an, as the foundational text of Islam, engaged directly with this cultural landscape.

Majority of Muslims believe that the Holy Book initiated a transformative discourse on women's rights. While introducing significant reforms that challenged prevailing norms, such as affirming the dignity and value of women and granting them certain legal rights, Islam did not entirely eradicate the discriminatory practices entrenched in society at the time.

The Prophet (P.b.u.h) was very emphatic in enjoining upon Muslims so that they are kind to the women. In his Farewell Pilgrimage before his death, he directed those present, and through them

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<sup>125</sup> Al-Hibri A, Islam custom and the law, 32.

<sup>126</sup> Syria, Egypt and Jordan have adopted the Hanafi school of jurisprudence, while Morocco, Algeria and Kuwait have adopted the Maliki school. Al Hibri A, Islam custom and the law, 33.

<sup>127</sup> Doi, A, Women in Shari'ah, Islamic Law, 4th Ed, Kula Lumpur, 1992.

all those Muslim whoever to came later, to be courteous and kind towards women. He said: “Fear Allah regarding women. Verily you have married them with the trust of Allah and made their bodies lawful with the word of Allah. You have got (rights) over them, and they have got (rights) over you in respect of their food and clothing according to your means”.<sup>128</sup>

The Quran declares women's religious equality with men, both in regard to their obligation to pray and lead virtuous lives their and in the equality of rewards and punishments at the final judgment day.<sup>129</sup> Allah says, “Whoever does good, whether male or female, and is a believer, We will surely bless them with a good life, and We will certainly reward them according to the best of their deeds.”<sup>130</sup>

In Islam, women are granted equal rights to education, as declared by Prophet Muhammad (peace be upon him) when he said that the pursuit of knowledge is incumbent on every Muslim, male and female.<sup>131</sup> The Prophet emphasized the importance of treating mothers with utmost respect, highlighting their significant role in familial relationships.<sup>132</sup>

Furthermore, women are entitled to just and equitable treatment from their parents, and they have the right to accept or reject marriage proposals, with their consent being essential for the validity of the marriage contract.<sup>133</sup> Marriage in Islam is based on mutual peace, love, and compassion, with both spouses sharing responsibilities and making decisions after consultation.<sup>134</sup>

Islam also acknowledges women's rights in economic matters, granting them equal rights to contract, enterprise, and ownership.<sup>135</sup> Women are entitled to inheritance, a share of the deceased kin's property, based on their degree of relationship and the number of heirs.<sup>136</sup> If she commits any offense, her penalty is no less or more than that of a man in a similar case. If she is wronged or

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<sup>128</sup> Doi, A, Women in Shari'ah,12.

<sup>129</sup> Esposito, John L. “Women’s Rights In Islam.” *Islamic Studies*, Vol. 14, No. 2, 1975,105 *Jstor*, <http://www.jstor.org/stable/20846947> . Accessed 1 Feb. 2024.

<sup>130</sup> Surah Al-Nahl, Ayah 57, The Holy Quran.

<sup>131</sup>“Seeking knowledge is an obligation upon every Muslim.” Sunan Ibn Mājah, 224.

<sup>132</sup> Abu Huraira reported that a person said: Allah's Messenger, who amongst the people is most deserving of my good treatment? He said: Your mother, again your mother, again your mother, then your father, then your nearest relatives according to the order (of nearness). Abu Hureira, Book 32 Virtues, good manners and joining the ties of relationship, Hadith Number 6181.

<sup>133</sup> Badawi J, Gender equity in Islam, IDM Publications, South Africa, Basic Principles,2015, 16.

<sup>134</sup> Badawi J, Gender equity in Islam,16.

<sup>135</sup> Marzouqi I, Human rights in Islamic law, 2nd Edition, United Arab Emirates,220.

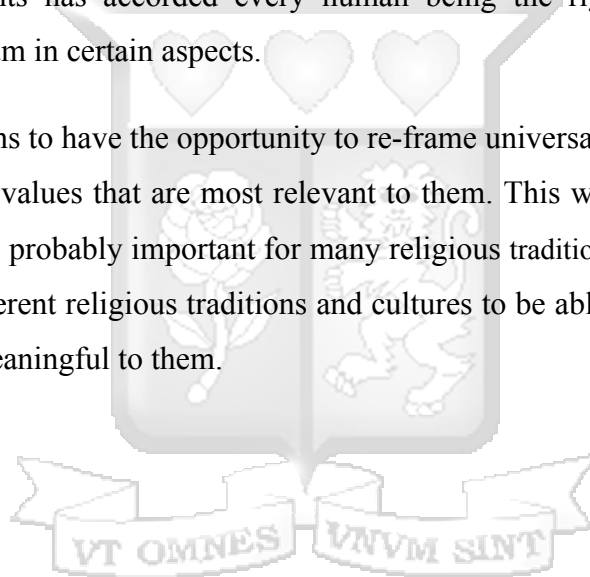
<sup>136</sup> Marzouqi I, Human rights in Islamic law, 215.

harmed, she gets due compensation equal to what a man in her position would get.<sup>137</sup> They are exempt from financial liabilities and entitled to maintenance and provision by their husbands or family members.<sup>138</sup>

### 3.7 Conclusion

Revivalists find sufficiency in women's rights as provided for in Islam.<sup>139</sup> However, it needs to be acknowledged that although women were given better status at the time of the Prophet (p.b.u.h) the modern context is very different. Without any development of the Islamic law, we would still be applying rules that were contextually relevant in the past. The reality now is that the advent of international human rights has accorded every human being the right to equality, and this contradicts what is in Islam in certain aspects.

It is important for Muslims to have the opportunity to re-frame universal rights in such a way that reflects the contexts and values that are most relevant to them. This way of conceptualising the human rights discourse is probably important for many religious traditions, not just for Islam. It is crucial for people of different religious traditions and cultures to be able to conceptualise human rights in ways that are meaningful to them.



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<sup>137</sup> [https://www.ohio.edu/orgs/muslimst/downloads/brochures/Status\\_of\\_Women\\_in\\_Islam.pdf](https://www.ohio.edu/orgs/muslimst/downloads/brochures/Status_of_Women_in_Islam.pdf)

<sup>138</sup> Marzouqi I, Human rights in Islamic law, 211.

<sup>139</sup> Refer to section on revivalist and reformists.

## **CHAPTER FOUR**

### **Perspectives and realities regarding Muslim women in Kenya.**

#### **4.1 Introduction**

While some Kenyan Muslim women view Kadhi's courts as vital spaces for asserting their rights within marriage and family matters, the reality reveals a nuanced picture. This exploration delves into different perspectives, highlighting both the perceived potential for justice and the limitations encountered in areas like matrimonial property, inheritance, and adherence to international frameworks like in under the Convention on the Elimination of All Forms of Discrimination Against Women. Through specific examples and data, the interplay of Islamic law, cultural practices, and legal inconsistencies that shape the experiences of Muslim women navigating courts is examined. This analysis aims to shed light on the complexities women face in their pursuit of equality within the Kenyan legal system.

#### **4.2 Is the limitation of equality evidently disadvantageous to Kenyan women?**

Muslim women's perspectives on the right to equality within Kadhi's courts are rooted in their experiences within the context of different parts of personal law. One key aspect of Muslim women's perspectives is the recognition of Kadhi's courts as spaces where their voices can be heard, and their rights as guaranteed by Islamic law can be enforced. These courts are viewed as vital mechanisms for women to resist oppression experienced within marriages and domestic circumstances, particularly in societies characterized by male dominance. The argument put forth is that Kadhi's courts provide Muslim women with the opportunity to challenge negative cultural practices and customs that undermine their rights, while also serving as a platform for the protection and enforcement of those rights.<sup>140</sup> This goes a long way in enhancing access to justice to Kenyan Muslim women within the different legal regime of Islamic law.

The notion that Kadhi's courts in Kenya have proven relatively helpful to Muslim women has some support. Since the 1970s, more Muslim women have taken their marital complaints to Kadhi's

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<sup>140</sup> Constitution Of Kenya Review Commission, Report of The Constitution of Kenya Review Commission, 2002, 56.

courts and it is proven that the majority of women won their cases against their husbands.<sup>141</sup> However, these statistics are outdated and might not show a true representation of the realities today.

It's crucial to note, however, that these perspectives do not necessarily imply a simplistic view of Islamic law as inherently supportive of gender equality. Rather, they reflect a complex understanding of the potential within Islamic legal frameworks to address and rectify injustices faced by women.<sup>142</sup> Additionally, there are debates within Muslim communities regarding the extent to which patriarchal conditions are rooted in cultural practices versus interpretations of Islamic teachings.

#### **4.2.1 Matrimonial Property rights in the Kadhis courts**

In the regime of matrimonial property law in Kenya, the promise of equality in marriage and property rights is limited in scope and is not applied across all types of marriages, especially since the Constitution, the 2014 Marriage Act, 1981 Law of Succession Act, and 2013 Matrimonial Property Act explicitly exclude Muslim marriages.<sup>143</sup>

In Kadhi's courts, the division of matrimonial property and decisions regarding maintenance and child custody are not governed by a clear set of rules but are influenced by various factors, including the Islamic school followed by the Kadhi, ethnic and cultural traditions, and personal considerations.<sup>144</sup> This lack of standardized guidelines means that outcomes in such cases often depend on negotiations between the spouses and the Kadhi, rather than adherence to specific legal principles. A lack of uniformity of law could be a barrier to access of justice.

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<sup>141</sup>Hirsch S, Pronouncing and Preserving, 125

<sup>142</sup> Mutua A, Gender Equality and Women's Solidarity across Religious, Ethnic, and Class Differences in the Kenyan Constitutional Review Process, 13 Wm. & Mary J. Women & L. 12006, 90 <https://scholarship.law.wm.edu/wmjowl/vol13/iss1/2>

<sup>143</sup> Refer to footnote 8-10, Article 24(4), Constitution of Kenya, 2010, Section 3(4) of the Marriage Act, 2014, Section 2(3), The Law of Succession Act, 1981.

<sup>144</sup> Hamid Khan, "Islamic Law: Practitioner's Guide," July 2013, <https://namati.org/resources/practitioners-guide-to-islamic-law/>

In cases reported by Human Rights Watch, Muslim women who had their matrimonial matters heard by Kadhis shared experiences where they felt disadvantaged in terms of property division, maintenance, and child custody.<sup>145</sup> Despite finalizing their divorces, these women claimed to have lost all their property, and their suits for maintenance and child custody remained unresolved.

An illustrative example from 2018 involved Halima G, a 21-year-old mother, who refused to comply with a Kadhi's order to return her dowry of 60,000 Kenya shillings (\$558) and two cows. Halima expressed her refusal to reconcile with her husband and questioned the fairness of returning the dowry to her husband's family while she bore the responsibility of raising their son alone. Despite her objections, the Kadhi denied her request to retrieve her personal belongings and threatened her with arrest if she did not repay the dowry. Halima ultimately resorted to borrowing money from a friend to make the payment and sought assistance from FIDA-Kenya in Mombasa to suspend the arrest warrant.<sup>146</sup>

#### **4.2.2 Inheritance rights of Muslim women**

There is evidence that in Kenya, the persistence of tribal customs continues to perpetuate the exclusion of women from inheritance rights, particularly within Muslim communities. The intertwining of custom with Islam creates a syncretic practice that further marginalizes women's stipulated succession rights.<sup>147</sup> Strong tribal inheritance norms often override Islamic legal principles, leading to the displacement of women's rights to inheritance, particularly concerning land and livestock.<sup>148</sup>

Different tribal communities leverage their customs to exclude women, such as widows, daughters, sisters, and mothers of the deceased, from inheriting property. On a 1993 – 1995 survey of Kenyan women's inheritance experiences, it is noted that most communities also follow their customary laws to distribute inheritance.<sup>149</sup> In Kisumu, among the Luos, and in Kajiado, among the Maasai, districts in the former Nyanza and Rift Valley provinces respectively, for example, women do not

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<sup>145</sup> Human Rights Watch telephone interviews with Halima G., Sofia K., Fatuma M., and Noreen K., May 2, 2020.

<sup>146</sup> Human Rights Watch telephone interviews with Halima G., Sofia K., Fatuma M., and Noreen K., May 2, 2020.

<sup>147</sup> Jadeed M, Inheritance rights of Muslim women,124

<sup>148</sup> Jadeed M, Inheritance rights of Muslim women,194

<sup>149</sup> Kameri-Mbote P, Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences, *Law and Politics in Africa, Asia and Latin America*, 2002, 373, 382

inherit land or livestock. Instead, they acquire household goods and user rights over the land and the animals. In Murang'a District (among the Kikuyu) in the central region, women only inherit land as trustees on behalf of their children.<sup>150</sup> By contrast, in Mombasa town where there is a relatively high Muslim population, the respondents indicated that Muslim women's inheritance practices conform to the Quran and have less influence from customs and norms.

Even when women do receive their decreed inheritance, numerous barriers hinder their enjoyment of these rights. These barriers include expensive and protracted court processes, geographically distant courts, difficulties enforcing decisions, partial or undervalued estates, and the wrongful application of inheritance laws.<sup>151</sup>

#### 4.2.3 CEDAW perspective

Kenya ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Constitution stipulates that any treaty and convention ratified by Kenya will form part of the laws of Kenya.<sup>152</sup> CEDAW's position on Kenya's laws regarding marriage, family relations, and their dissolution is critical of the economic consequences that disproportionately affect women. The preservation of multiple legal systems itself in Kenya is deemed discriminatory against women by CEDAW.<sup>153</sup> Specifically, CEDAW expresses concern over the legal framework's treatment of Muslim women and women in customary marriages.

The convention highlights that exemptions under Article 45 of the Constitution and Article 49(3) of the Marriage Act of 2014 discriminate against Muslim women.<sup>154</sup> This discrimination is evident through the explicit exemption of Kadhi courts from constitutional equality provisions and the

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<sup>150</sup> Kameri-Mbote P, Gender Dimensions of Law, Colonialism and Inheritance in East Africa,394-396

<sup>151</sup> Jadeed M, Inheritance rights of Muslim women, 8

<sup>152</sup> Article 2(6) The Constitution of Kenya, 2010

<sup>153</sup> Committee on the Elimination of Discrimination against Women, 2017, Concluding observations on the eighth periodic report of Kenya, Adopted by the Committee at its sixty-eighth session , 2017, United Nations.

<sup>154</sup> CEDAW, Concluding observations on the eighth periodic report of Kenya,2017, <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsglff%2FiazrVw%2BcyfdY9GxZ4lcZk4Zj9HgI6TVsf%2BQ9n6i7r4qBJ69oRfnmCUTeU1f5aVZPYvxaeZtFZDQhrlrE16IUrYdGxwGM97cDbCBR63>

prohibition of women from serving as Kadhis<sup>155</sup> Additionally, CEDAW criticizes the legalization of polygamy in Kenya, which it views as violating non-discrimination provisions in both the Constitution and the Convention.<sup>156</sup>

CEDAW's stance on Kenya's legal framework regarding marriage, family relations, and dissolution reflects a universalist perspective that prioritizes gender equality principles over cultural relativism. While CEDAW's intentions are rooted in promoting women's rights and eliminating discrimination, its approach may be perceived as insensitive to the cultural realities within Kenya.

Kenya, like many countries, is characterized by rich cultural diversity, with various ethnic groups practicing distinct customs and traditions, including in matters of marriage and family relations. Secularism, as an overarching principle, is intended to accommodate these diverse cultural features within a unified legal framework. However, CEDAW's emphasis on gender equality may clash with certain cultural practices, such as those related to marriage, inheritance, and family structures, which may be deeply entrenched in tradition and religion.

Cultural relativism posits that cultural practices and values should be understood within the context of the specific culture in which they occur, rather than judged against universal standards.<sup>157</sup> Proponents of cultural relativism argue that what may be considered discriminatory or unjust from an external perspective may be accepted or even valued within a particular cultural context.

In the case of Kenya, CEDAW's criticism of legal provisions that exempt certain communities, such as Muslims and those in customary marriages, from gender equality provisions may be seen as disregarding the cultural and religious autonomy of these communities. Additionally, the prohibition of polygamy, a practice accepted in some cultures, may be viewed as imposing external norms on diverse cultural practices.

The tension between CEDAW's universalist approach and cultural relativism underscores broader debates about the balance between human rights principles and cultural autonomy. Seemingly,

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<sup>155</sup>CEDAW, Concluding observations on the eighth periodic report of Kenya,2017.

<sup>156</sup> CEDAW, Concluding observations on the eighth periodic report of Kenya,2017.

<sup>157</sup> Saeed A, Human Rights and Islam: An Introduction to Key Debates between Islamic Law, United Kingdom, 2018, 20.

CEDAW is insensitive to the cultural realities of Kenyans. Yet, the committee additionally recommends the appointment of female judges in the Kadhis Court. The next section delves into the perspectives of the Kenyan society in this regard. The aim is to answer the question of whether reforms towards equality for Muslims are possible in Kenya.

### **4.3 The Absence of Women in the Kadhi Courts: A Barrier to Equality for Kenyan Muslim Women**

The Kenyan legal system recognizes the Kadhi Courts as a parallel judicial structure specifically handling matters of family law and personal status for Muslims. The stark absence of women judges within these courts raises serious concerns about its potential to undermine the equality and justice for Muslim women.<sup>158</sup>

Article 27 (8) of the Constitution provides for affirmative action where the State is obligated to take legislative and other measures to ensure that no more than two-thirds of the members of elective or appointive bodies are of the same gender.<sup>159</sup> Despite constitutional provisions advocating for affirmative action to address historical imbalances, the composition of Kadhis' Courts in Kenya remains notably skewed, especially in terms of gender representation. It should be noted that Article 170 of the Constitution, which provides for the appointment of Kadhis, does not specify their gender.<sup>160</sup>

Women seeking redress in matters related to marriage, divorce, child custody, or inheritance might feel intimidated or uncomfortable presenting their cases before an all-male panel. Moreover, complexities surrounding domestic violence, sexual abuse, and harmful traditional practices within certain communities often require a nuanced understanding of gender dynamics. Maryam Azwer, for example, highlighted the absence of a woman in the Kadhis court system in Sri Lanka and the failure of ensuring fair hearings.<sup>161</sup> She studied the case of a woman named Zainab who applied for a divorce from her abusive husband and waited for years to get a solution as she could not

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<sup>158</sup> Committee on the Elimination of Discrimination against Women, 2017

<sup>159</sup> Article 27(8), The Constitution of Kenya, 2010

<sup>160</sup> Article 170, The Constitution of Kenya, 2010

<sup>161</sup> Tellenbach, S. Fair trial guarantees in criminal proceedings under Islamic, Afghan Constitutional and International Law. 2004. Available online: [http://www.zaoerv.de/64\\_2004/vol64.cf](http://www.zaoerv.de/64_2004/vol64.cf)

discuss with a male Kadhi about her husband's physical and psychological tortures.<sup>162</sup> These complications can discourage Muslim women from seeking legal recourse altogether, perpetuating a cycle of silence and injustice. It is interesting to note that in some Kenyan cultures, silence itself is encouraged for women facing injustices. It is generally considered immoral and shameful for women to air out their family business in court or initiate proceedings.<sup>163</sup>

Lastly, one of the primary concerns emanating from the lack of female Kadhis is the limited representation and perspective in legal decision-making. The absence of women in these authoritative roles perpetuates an imbalance in the interpretation and application of Islamic jurisprudence. This gender disparity within the Kadhis court reinforces patriarchal norms, as decisions are made predominantly by men, potentially neglecting the diverse experiences and concerns of Muslim women.

#### **4.3.1 Perspectives on female Kadhis in Kenya.**

The debate over the appointment of female Kadhis in Kenya has had divergent perspectives emerging from various sectors of society. This discourse gained momentum following an article by the newspaper The Standard questioning the appropriateness of appointing a female Kadhi.<sup>164</sup> In July 2021, Garissa Township Member of Parliament, Hon. Aden Duale, a prominent figure in the Muslim community of northern Kenya, expressed strong opposition to such appointments during a public address. His comments sparked a heated debate within Muslim social circles, reflecting the influence he wields among the populace.

The roots of this controversy can be traced back to Chief Justice Willy Mutunga's tenure at the judiciary, from 2011 to 2015. Known for his advocacy of equality and human rights, Chief Justice Mutunga openly supported the appointment of women as Kadhis.<sup>165</sup> However, his stance put him in direct conflict with the National Muslim Leaders Forum (NAMLEF) and the Supreme Council

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<sup>162</sup> Azwer, M, Urgent Need for Sri Lankan Muslim Marriage Law Reform, 2018. Available online: <http://www.thesundayleader.lk/2011/12/18/time-to-change/>

<sup>163</sup> Jadeed M, Inheritance rights of Muslim women, University of Nairobi, Kenya, 179

<sup>164</sup> Sanga B, Jumbe I, Justice: Is the time ripe to appoint female Kadhis, The Standard, 2022. <https://www.standardmedia.co.ke/counties/article/2001416233/justice-is-time-ripe-to-appoint-female-kadhis>

<sup>165</sup> Sanga B, Justice: Is the time ripe to appoint female Kadhis, The Standard, 2022.

of Kenya Muslims (SUPKEM). These organizations vehemently opposed the idea of appointing female Kadhis, using Friday sermons at mosques as a platform to reinforce their position based on Islamic jurisprudence.

More influential Islamic organizations, including KEMNAC, Jamia Mosque Nairobi, and the Council of Imams and Preachers of Kenya (CIPK), have written to the Judicial Service Commission (JSC) opposing the appointment of women as Kadhis.<sup>166</sup> Their objections are grounded in the interpretation of Islamic law and tradition. In his thesis investigating the Kadhis Courts role in enhancing access to justice, Kevin Wanyonyi interviewed some Kadhis, only one supported the idea of a female Kadhi while the rest disapproved.<sup>167</sup> According to these Kadhis, in Kenya, a woman cannot be Kadhi. One Kadhi explained that, in Kenya Kadhis perform both legal and religious duties, some of which a woman cannot preside over.<sup>168</sup>

The perspective opposing the appointment of women as Kadhis in Kenya, as articulated by figures like Duale, draws on Islamic scriptures and traditional interpretations to argue against such appointments. According to their view, there is a perceived absence of explicit Quranic verses or Hadiths supporting the appointment of women to leadership roles, including that of Kadhi. A Hadith that cautions against a nation prospering under the rule of women is often cited as a direct prohibition.<sup>169</sup> Additionally, verses such as 4:34, which indicate men's authority over women, and the two-women-equals-one-man ratio in inheritance and testimonial laws, are presented as evidence that women are not considered equal to men in Islamic jurisprudence.<sup>170</sup> The historical absence of women in judicial roles, coupled with Hadiths suggesting women's alleged deficiencies in intellect and religiosity, reinforces the argument against appointing women as Kadhis. This

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<sup>166</sup> Konyuk T, The Female Kadhis Controversy The Elephant - African analysis, opinion and investigation. <https://www.theelephant.info/analysis/2021/11/12/the-female-kadhis-controversy/>

<sup>167</sup> Wanyonyi K, Kadhis courts in Kenya Towards enhancing Access to Justice for Muslim Women, Lund University, 2016,70

<sup>168</sup> Wanyonyi K, Kadhis courts in Kenya Towards enhancing Access to Justice for Muslim Women, 70.

<sup>169</sup> It is reported that the messenger of Allah (p.b.u.h), upon hearing the appointment of Chosroes' daughter as the Persian ruler, said, "Never shall a folk prosper who have appointed a woman to rule them" (Al-Bukhari: 4163, Tirmidhi, Fitan, 75: Nas ai, Qudat: 8 and Ahmad v. 43, 51, 38 and 47)

<sup>170</sup> "Men are the protectors and maintainers of women because Allah has made one of them excel over the other, and because they spend out of their possessions (to support them). Thus, righteous women are obedient and guard the rights of men in their absence under Allah's protection. As for women of whom you fear rebellion, admonish them, and remain apart from them in beds, and beat them. Then if they obey you, do not seek ways to harm them. Allah is Exalted, Great". (The Quran, 4:34)

perspective aligns with traditional gender roles, emphasizing women's obedience to husbands and their limited presence in public and authoritative spaces.

The only notable entity that has publicly supported the appointment of women Kadhis is Muslims for Human Rights (MUHURI), led by Khelef Khalifa.<sup>171</sup> Khalifa emphasizes that those opposing the appointment often cite past Islamic scholars rather than directly referencing the Quran, suggesting a divergence between traditional interpretations and the foundational Islamic text. This concept reflects the earlier discussion in the chapter on the patriarchal development of Islamic jurisprudence.

The argument extends beyond the borders of Kenya, with Khalifa pointing to other Islamic countries like Pakistan, Sudan, Malaysia, Lebanon, and Palestine, where women serve as Kadhis. In these countries women play in administering Sharia, beyond the limited scope of marriage, divorce, and inheritance that is traditionally associated with the role in Kenya. Supporters of female Kadhis draw inspiration from the recent appointment of Martha Koome as Chief Justice, seeking to challenge gender norms within the judiciary. Khalifa contends that women, if given the opportunity, could bring an enlightened perspective to address women's issues within the framework of Islamic law.<sup>172</sup>

The debate also touches on the discriminatory nature of denying women the opportunity to serve as Kadhis, with Khalifa pointing out that such restrictions are not explicitly outlined in the Quran. He emphasizes that women might find it more comfortable expressing certain issues in front of fellow women, highlighting the potential for a more empathetic and understanding approach to justice. Ensuring fair hearings is essential in Islamic judiciary including marriage and divorce law, the Prophet (peace be upon him) himself appointed his wives such as Aisha (R.A) to listen to women who made complaints against their husbands as well as complaints about family disputes.<sup>173</sup> Moreover, multiple women in the history of Islam assumed leadership roles which they gained from their qualifications.<sup>174</sup>

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<sup>171</sup> Konyuk T, The Female Kadhis Controversy, The Elephant

<sup>172</sup> Konyuk T, The Female Kadhis Controversy the Elephant

<sup>173</sup> Ramzy M, Ghavifekr S, Women Quazi in a Minority Context: An overview of Sri Lankan Experience, *Societies* **2019**, 9(1), 13. <https://doi.org/10.3390/soc9010013>

<sup>174</sup> Ramzy M, Ghavifekr S, Women Quazi in a Minority Context, 15.

## 4.4 Conclusion

The position of the Kenyan Muslim community on female Kadhis reveal their stance on gender politics within Islam. Majority of Islamic leaders lean towards a resistance of reformist approach of Islamic law, positing that there must be strict adherence to Islamic law without secular, modern influences. The limitation of the right to equality to the extent strictly necessary for Muslim showcases the general position of keeping Islamic law away from the tenets of secular laws. Only a minority support a reformation of Islamic law to accommodate modern egalitarian notions, which seems to be the ultimate solution of this discourse.



## **CHAPTER FIVE**

### **5.1 Findings and Conclusions**

#### **5.1.1 Findings on why the limitation to the right to equality is limited for Muslims in the Constitution.**

The constitutional limitation of the right to equality may be attributed to the pluralism that is in existence in Kenya. It is true that Kenya is a secular state which separates the state from religion. However, owing to the religious and cultural diversity of the Kenyan population, the government needed to allow the application of different regimes of law for instance, customary law and Islamic law in personal matters.

The Kadhis Courts were established to allow the adjudication of personal Islamic law, a move aimed at securing the access to justice for Muslims within Islamic law. The two regimes of law, secular and Islamic law, both apply to the same legal subject, while presenting a conflict of laws. The paper has focused on the controversial nature of the right to equality in Islam and how this contradicts secular egalitarian provisions. The differences of Islamic law in applying equality are recognised and legislations had to find a way to enable the application of both of the legal regimes. While Islamic law focuses on equity, placing more financial and social responsibility on the man.

Therefore, it became necessary to put exclusionary laws in place to enable Islamic law to apply to Muslim citizens in spite of differing secular perceptions of law.

#### **5.1.2 Findings on the relationship between human rights and Islamic law.**

The clash between Western-rooted human rights principles and Islamic legal traditions underscores the challenges inherent in reconciling religious principles with universal human rights norms. Two distinct approaches have emerged: the revivalist and reformist perspectives.

While the revivalist approach emphasizes the religious legitimacy of Islamic law, the reformist perspective acknowledges the value of both Islamic tradition and contemporary legal norms. By promoting a nuanced understanding of Islamic principles, reformists aim to bridge the gap between Islamic law and international law, ultimately striving to create a cohesive societal framework that

respects both Islamic values and international standards of human rights and governance. This seems to be the most plausible solution to reconciling equality in human rights and Islamic law.

Majority of voices representing Islamic law in Kenya are against changes done to Islamic law. Reformation in Kenya is also compounded by the fact that Islamic law is not codifiable because of multiple schools of law existing within the Islamic law. This indicates pluralism even within the Islamic law regime.

## **5.2 CEDAW Recommendations**

CEDAW recognizes that the constitutional exemption of the Kadhis court from equality provisions is discriminatory against women, they add that the problem is compounded by the lack of female Kadhis in Kenya. While CEDAW is the international authority overseeing the implementation of the right to equality by its signatories, its suggestions might not be the best suited to Kenya. The committee's critique of the existence of the multiple laws in Kenya as being discriminatory is a clear indication of their lack of understanding of the needs of the diverse cultural and religious landscape of Kenya.<sup>175</sup> The same insensitivity is seen in the committee's critique of the legalization of polygamy. They recommend that the state should repeal or amend discriminatory provisions under religious law, codify Muslim law in a manner consistent with equality, and appoint female Kadhis.

There are some issues with implementing CEDAW'S recommendations. Firstly, Islamic law is difficult to codify because Islamic law is not a monolithic system; it encompasses a diverse array of interpretations and schools of thought. Codifying such a diverse and complex legal tradition into a single code would be challenging and may not accurately reflect the rich diversity within Islamic legal thought. Furthermore, codification could have the opposite effect of making Islamic

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<sup>175</sup> Committee on the Elimination of Discrimination against Women, 2017, Concluding observations on the eighth periodic report of Kenya, Adopted by the Committee at its sixty-eighth session (23 October–17 November 2017), United Nations.

law more rigid. Codification may restrict flexibility and reform and hinder the ability of Islamic law to address new challenges and circumstances effectively.

While the appointment of female Kadhis could be a good solution to mitigate discrimination of women in the Kadhis Courts, we have observed the Kenyan perspective to be very resistant to the idea. Most Muslim authorities in Kenya are against the changing of traditional Islamic norms with only few being open to reformism. More Islamic Feminist activism could bring awareness and let the female Muslim voice be heard. This would be possible if more women are educated in Islamic law.

### 5.2.1 Recommended use of alternative language

A subcommittee of the National Constitutional Conference, commonly referred to as the Palacina Group laboured on the wording of the draft Constitution in limiting the right to equality for Muslims.<sup>176</sup> This group was convened in response to the 2002 election campaign in Kenya. The Palacina Group, which included scholars, NGOs, religious leaders, and others, aimed to study the Draft Constitution. Within the larger group, it focused on gender issues, producing a report that outlined a plan of action to ensure the consideration and retention of gender provisions in the final Constitution.

This subcommittee's work evolved into a full-fledged constitutional campaign called "Safeguarding the Gains of Women in the Draft Constitution." Eventually, the Federation of Women Lawyers of Kenya (FIDA) was identified as the organization best suited to advocate for women's rights in the constitutional process. FIDA, a civil society organization founded in 1985, primarily consists of women lawyers and law students dedicated to increasing access to justice for women and improving their legal status in Kenya.<sup>177</sup>

The Palacina group reviewed the draft Constitutions provision in limiting the right to equality to the extent strictly necessary for Muslims. The coalition further believed that it had to rephrase or

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<sup>176</sup>Mutua A, Foreword, *Eyes on the Prize: The Quest for a Human Rights, State in Kenya*, in Makau Mutua & Willy Mutunga, *Eyes on The Prize*, 14-15.

<sup>177</sup> Mutua A, *Gender Equality and Women's Solidarity across Religious, Ethnic, and Class Differences in the Kenyan Constitutional Review Process*, 13 *Wm. & Mary J. Women & L.*, 2006, 99. <https://scholarship.law.wm.edu/wmjowl/vol13/iss1/2>

eliminate the limitation on equality to strengthen the equality principle in the Draft. The following is the alternative they suggested.

There are established Kadhis Courts, the office of Chief Kadhi, office of Senior Kadhi and the office of Kadhi to apply Islamic law to persons who profess the Muslim faith in relation to personal status, marriage, divorce and inheritance, consistent with the ends of social justice and equality in fact.<sup>178</sup>

By eliminating the restriction on equality and introducing the concept of "equality in fact" in the context of Islamic personal law, the language sought to reconcile the differing perspectives on women's rights and religious autonomy.

This alternative language acknowledged the unique cultural and religious considerations within Islamic law while promoting the overarching principles of social justice and equality. It provided room for adherence to Islamic personal law principles while encouraging Kadhis to interpret them with social justice and equality in mind. Furthermore, by introducing the notion of "equality in fact," the language aimed to move beyond formal equality and consider substantive equality in the application of Islamic law.

While this approach did not ultimately receive endorsement from the Muslim community, it represented an attempt to address the complexities of women's rights within the framework of Islamic law. Similar alternative language could serve as a valuable tool for fostering dialogue and collaboration between different religious and cultural communities. This would ultimately promote greater inclusivity and understanding in the pursuit of gender equality.

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<sup>178</sup> Mutua A, *Gender Equality and Women's Solidarity across Religious, Ethnic, and Class Differences in the Kenyan Constitutional Review Process*, 100.

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