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**MARRIAGE AND MATRIMONIAL PROPERTY LAW IN KENYA:
RECONCILING THE KENYA CONSTITUTION (2010) AND THE TENETS
OF ISLAMIC LAW**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE
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I would also like to deeply appreciate my supervisor, Professor David Sperling, for nurturing this dissertation through our endless collaborative efforts and his mentorship role through the year and for motivating and inspiring me to venture into this topic which had not been researched before.

Declaration

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I declare that this dissertation is my original work, except where otherwise specified, and that it has not been submitted for the award of a degree in any other University.

Chapter 1 – INTRODUCTION

1.1 Background to the Study

The Republic of Kenya is characterized by ethnic and religious diversity. Individual ethnic groups have their own traditional customary laws and practices. Each of the many religious groups in Kenya, such as Christians, Muslims and Hindus, has their own laws and ways of settling personal matters related to marriage, divorce and inheritance. Among these diverse religious groups Muslims occupy a quite unique position for the provisions and tenets of Islamic law outline in great detail many specific requirements in relation to marriage, divorce and inheritance. The survey carried out by the International Religious Freedom Report in 2013 estimated that Kenya had a population of 4.3 million Muslims, that is, approximately 10% of the country's total population of 40 million people.¹

1.1.1 The pre-Colonial and Colonial Heritage

Kadhi Courts existed in what is today the Republic of Kenya even before the British colonial period and hence have a rich historical background. Kenya became a British Protectorate in the 1895, but before this, the Kenyan coast was politically controlled by the Sultan of Zanzibar. He made efforts to have the same political system that existed in Zanzibar to be used along the Kenyan Coast, hence this led to the introduction of the liwali (governors) and kadhi system of administration along the Kenyan Coast.² The British colonialist upon arrival on the Kenyan coast respected Muslim sensitivities in so far as religious practices were concerned as evident from the recognition of the Sultan's administrative and legal institutions. Due to this, the Arab officers such as the liwalis and Kadhis (Islamic Court Judges) were on the payroll of the colonial administration. The jurisdiction of these courts only applied along the 10-mile coastal strip where the majority of the Muslim population in Kenya then resided.³ The colonial government later introduced a number of changes which caused many implications for Kenyan Muslims. This

¹ <https://muslimsinfrica.wordpress.com/numbers-and-percentage-of-muslims-in-african-countries/> on 9 September 2016

² <http://life-peace.org/hab/the-case-of-kadhi-courts-in-a-secular-kenya/> on 9 September 2016

³ <http://life-peace.org/hab/the-case-of-kadhi-courts-in-a-secular-kenya/> on 9 September 2016

transformation caused the colonial government to pass executive colonial government orders to enact the Mohammedan Marriage Divorce and Succession Ordinance 1906 that institutionalized selected aspects of Muslims personal law on divorce, marriage and inheritance.⁴ The Kenya Constitution (1963) provided for the Kadhi courts. Article 66 (1) of that Constitution stated , ‘There shall be a Chief Kadhi and such number, not being less than three, of other Kadhis as may be prescribed by or under an Act of Parliament.’⁵ Article 66 (5) stated , ‘The jurisdiction of a Kadhi’s court shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.’⁶

1.1.2 – The Matrimonial Property Act (2013) and the Marriage Act (2014)

Six years ago in 2011, due to the variety of laws related to matrimonial property and the difficulty and complexity of administering those laws, the Kenyan Government decided to undertake an extensive review and reform of existing matrimonial property laws. This review culminated in the enactment by Parliament of the Matrimonial Property Act (2013) and the Marriage Act (2014). Prior to this review and reform, the Republic of Kenya had also undergone an extensive constitutional reform with the approval, by popular referendum of the Kenya Constitution 2010.

The original version of the Matrimonial Property Bill (2013) stipulated an equal share of assets for spouses in the event of termination of the marriage by divorce or other circumstances. Specifically, Section 7 of the Bill stated, “Ownership of matrimonial property vests in the spouses in equal shares irrespective of the contribution of either spouse towards its acquisition, and shall be divided equally between the spouses if they divorce or their marriage is otherwise dissolved.”⁷ This wording would have ratified an equal share of the matrimonial property between the spouses when there would be an absence of a pre-nuptial agreement. Section 7 of the Bill was later amended to read “ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided

⁴ <http://life-peace.org/hab/the-case-of-kadhi-courts-in-a-secular-kenya/> on 9 September 2016

⁵ Article 66(1) , *Kenya Constitution (Independence Constitution)*(1963)

⁶ Article 66(5), *Kenya Constitution (Independence Constitution)*(1963)

⁷ Part III, Section 7, *Matrimonial Property Bill* (2013)

between the spouses if they divorce or the marriage is otherwise dissolved.”⁸ Part III, section 6 of the Matrimonial Property Act states, ‘For the purposes of this Act, matrimonial property means the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.’⁹ Section 7 states that, ‘Ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.’¹⁰ Article 45 (3) of the Constitution of Kenya (2010) states: “Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”¹¹ To understand how these “equal rights at the time of the marriage” might apply to matrimonial property, one needs to refer to Part III, Section 7 of the Matrimonial Property Act (2013) which states that “ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or the marriage is otherwise dissolved.”¹² The contribution can be monetary or non-monetary. Division of property according to the contribution of each spouse would follow the principle of equity – each party having a right to “recover” the share it initially contributed - rather than that of equality. In the Oxford Concise English Dictionary equity is defined as, ‘the quality of being fair and impartial,’¹³ hence when this principle is applied to division of matrimonial property during divorce, the property shall be divided between the spouses in accordance with what each party has contributed to the whole of their matrimonial property, be it monetary or non-monetary.

Despite the Constitution and the Matrimonial Property Act 2013 advocating for “equal rights” during marriage and divorce and equity in the distribution of property respectively, some laws at the same time create an exception to Kenyans who profess the Muslim faith. For example, Article 20 (1) of Chapter Four – The Bill of Rights of the Constitution – states: “The Bill of Rights applies to all law and binds all State organs and all persons.”¹⁴ Within the same Chapter

⁸ Section 7, Matrimonial Property Bill (2013)

⁹ Part III, Section 6, Matrimonial Property Act (2013)

¹⁰ Part III, Section 7, Matrimonial Property Act (2013)

¹¹ Article 45 (3), Constitution of Kenya (2010)

¹² Part III, Section 7, Matrimonial Property Act (2013)

¹³ Oxford Concise English Dictionary, Oxford University Press, United Kingdom (2011) 482

¹⁴ Article 20(1), Constitution of Kenya (2010)

Four, however, Article 24 (4) states: “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.”¹⁵ Part III, Section 7 the Marriage Act (2014) states that “any provision of this Act which is inconsistent with Islamic law and practices shall not apply to persons who profess the Islamic faith.” The constitutional principles on equality do not apply to persons who profess Islam, i.e. Muslims. Part VII, Section 49 (1) of the Marriage Act 2014 states: “A marriage under this Part shall be officiated by a Kadhi, sheikh or imam as may be authorized by the Registrar and celebrated in accordance with Islamic law.”¹⁶ And Part II, Section 3 of the Matrimonial Property Act 2013 states: “A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property.”¹⁷

1.1.3 – The Tenets of the Holy Quran regarding Matrimonial Property

The Holy Quran, which Muslims abide by and refer to in all matters regarding divorce and property, states that in the case of divorce, a man’s property is divided in half if he has married his wife but she is still a virgin since the marriage was consummated.¹⁸ Verse 237 of Surah Al-Baqarah states, “And if you divorce them before you have touched them and you have already specified for them an obligation, then give half of what you specified - unless they forego the right or the one in whose hand is the marriage contract foregoes it. And to forego it is nearer to righteousness. And do not forget graciousness between you. Indeed, Allah, of whatever you do, is seeing.”¹⁹ If a man then has sexual intercourse with his wife, she then can’t claim half of the property, hence verse 237 shall not apply. The property here is being referred to be the dowry paid to the wife, which comes in various forms in Islamic marriages e.g. gold, cars, Qurans and even property. In our context, if the dowry paid is in the form of property, then as per Verse 237 of, Surah Al-Baqarah, the wife shall obtain half of the property if the husband divorces her while they have not had sexual intercourse at all.

¹⁵ Article 24(4), *Constitution of Kenya* (2010)

¹⁶ Section 49 (1), *Marriage Act* (2014)

¹⁷ Section 3, *Matrimonial Property Act* (2013)

¹⁸ The Holy Quran, Surah Al-Baqarah (2:237)

¹⁹ The Holy Quran, Surah Al-Baqarah (2:237)

1.2 Statement of the Problem

Part III, Section 7 of the Matrimonial Property Act requires that in the case of divorce the property of the married couple be divided according to contribution, and not equally on a fifty-fifty basis, whereas Islamic law requires the property of a divorced couple to be divided equally if the woman has no property of her own,²⁰ therefore going against the Constitutional principle of 'equal rights' during dissolution of marriage. There can be quite difficult circumstances in the marriage between two persons, one of whom is Muslim and the other not.

1.3 Justification of the study

This study is justified based on the legal problems that arise based on the choice of law for Muslims on divorce and allocation of property, on the basis that the Constitution, the Marriage Act (2014) and the Matrimonial Property Act provide for divorce procedures to all Kenyans, they at the same time create exceptions for Muslims. This creates confusion among judges since the Kadhi's court has jurisdiction over Islamic divorces, yet when not satisfied with the ruling of the Kadhi Court, Muslims can appeal to the High Court. The judges of the High Court who are adjudicating such appeals now face the legal quandary whether to apply Islamic law or common law in making their judgment. This paper seeks to address these exceptions that arise from the variances.

1.4 Statement of objectives, research questions and hypotheses

1. To understand the reasoning behind the exceptions created by the Constitution, the Marriage Act and the Matrimonial Property Act concerning Islamic divorces in Kenya.
2. To investigate whether these exceptions should still continue to exist within the laws of Kenya since they provide for "special" circumstances to Muslims.

²⁰ M.B. Hooker, *Indonesian Islam: Social Change Through Contemporary Fatāwā*, University of Hawaii Press, Hawaii, 2005, 152

3. To know whether the conflict of property laws has created jurisdictional problems in the administration of justice in the Kenyan courts.
4. To investigate possible ways to harmonize the exceptions in the laws so as to have a unified system of law.

1.5 Research questions

1. Are the laws on divorce concerning property that do not apply to Muslims as provided by the exceptions in the Constitution of Kenya 2010 and Matrimonial Property Act reasonable?
2. If the laws are reasonable, should the exception continue to exist?
3. Can Muslim laws on divorce be in accordance with the Constitutional principles of equality in marriage?

1.6 Hypotheses

In Islam, divorce is something that is allowed, but frowned upon in society. Muslim men during the marriage feel whatever they bring into the marriage is theirs and not of the wife, and all they are doing is looking after the wife. A Muslim wife who earns is not compelled to share her property with the husband, and she may only do so if she wishes, unlike the man who has to share his wealth and property with the wife. During divorce, men feel women do not deserve their property for they may have not contributed at all towards obtaining it, and possibly even have a scenario where the woman has more property than the man, but is not obliged to share with him and during divorce is entitled to remain with her property. This research proceeds on the assumption that division of property in between spouses in Islamic divorces causes discrimination against the husband, thereby causing social tension, whereby the husband is reluctant to obtain property for the marriage since he will lose it during divorce.

1.7 Scope and Limitations

1. Spouses in Islamic marriage, especially the husband, refusing to give an objective view of what they feel on divorce laws since they believe going against the Quran could make them be cursed.
2. Muslim women not willing to speak to me since it is not allowed in Islam to meet men who are not of your family.
3. Kadhis not willing to go against the Quranic principles on divorce hence not giving me the information I may require, and also not being able to meet them since they are very busy.

1.8 Chapter Summary

Chapter 1 in summary deals with how Islam was introduced in Kenya and due to the long history, Islamic law was incorporated into the Kenyan legal system. However, in 2010, the new promulgated constitution provided for the Bill of Rights on equality, which was to apply equally to everyone except from Muslims, who were to be governed by Islamic law in matters of divorce. Article 24 (4) states: "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."

Chapter one also provides the statement of the problem that in the case of divorce the property of the married couple should be divided according to contribution, and not equally on a fifty-fifty basis, whereas Islamic law requires the property of a divorced couple to be divided equally if the woman has no property to herself,²¹ therefore going against the Constitutional principle of 'equal rights' during dissolution of marriage. It also contains the hypothesis that distribution of property during divorce in Islam causes discrimination and finally the limitations that shall be faced during the study.

²¹ M.B. Hooker, *Indonesian Islam: Social Change Through Contemporary Fatāwā*, 152

CHAPTER 2

Theoretical framework and methodology

This paper focuses on the natural right to property. According to the Stanford Encyclopedia of Philosophy, Aristotle argued for exclusion of property because it would encourage people to attend to their own affairs. It also allows owners to display virtue by waiving this right. These theories relate to this paper from the point of view of exclusion of property from one spouse who has not contributed towards the matrimonial property and claims it during divorce, and also challenges that could be faced in the case of mixed marriages. My exploration and property allocation patterns during divorce will look into the principal of the importance of the agency and autonomy of women seeking justice and defending their rights in court and their applications of strategies to circumvent certain laws regarding matrimony. This in the Kenyan context shall mostly be dealt with from the point of allocation of property during divorce based on contribution and furthermore, how appeals from the Kadhi's Court are dealt with in the High Court. The legal rulings regarding divorce in mixed marriages are somewhat contradictory. It is not easy to find out exactly what applies. Some points in the law are clear; the property owned prior to the marriage remains the property of the person concerned. Any inheritance received by the husband or wife during the marriage is not shared, but remains the property of the person concerned. Any income earned by either person during the marriage is shared. In order to expound this matter further so as to have a better understanding, the theoretical framework shall arise from the literature review.

i) Literature review

Article 45 (3) of the Kenya Constitution supports equal rights upon divorce.²² It does not clearly state what equality is, but being a country with a Common Law system, contribution is what is looked at by the courts during allocation of property between spouses during divorce, hence in the strict sense, property is to be divided based on equity. In the book 'His, Her or Their Property', Community property in civil law jurisdictions is where property acquired during the

²² Article 45(3), *Constitution of Kenya* (2010)

marriage is owned jointly by both spouses and divided upon divorce. In Common law, contribution is what is looked at when dividing property.²³ Article 45(3) of the Constitution states that spouses have equal rights during dissolution of the marriage.²⁴ It also states that any law inconsistent with the Constitution is void. Article 40(1) states that every person has the right, either individually or in association with others, to own property.²⁵ However, the Bill of Rights on equality does not apply to Muslims on divorce as provided for in Article 24(4) of the Constitution.²⁶ Section 49 of the Marriage Act 2014 also states that any of its provisions that is inconsistent with Quranic principles do not apply to Islamic marriages.²⁷ This exception has existed ever since independence. The Commission on the Law of Marriage and Divorce came up with a report for the late president Kenyatta on non-interference of Muslim law, since the British Common Law contradicted the Quran. Section 26(4)(b) of the Kenya Constitution stated that no law shall make any provision that is discriminatory of itself but it was disqualified with respect to divorce of personal law.²⁸

Also in the case of *UMM v IMM*, The Plaintiff sought for the sharing and division of some property held in the names of her former husband the defendant.²⁹ It was held by the High Court of Busia that at the dissolution of a marriage each partner should walk away with what he/she deserves, and this will be measured according to contribution towards the property, whether it is monetary or non-monetary. The bigger the contribution, the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then, the Courts should give it effect.³⁰ To hold that Article 45(3) of the Constitution decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property. That would be oppressive to the spouse who makes the bigger contribution and that cannot be the sense of

²³ Thomas Featherston, *His, Her or Their property*, (2006) 17

²⁴ Article 45(3), *Constitution of Kenya* (2010)

²⁵ Article 40(1), *Constitution of Kenya* (2010)

²⁶ Article 24(4), *Constitution of Kenya* (2010)

²⁷ Section 49, *Marriage Act* (2014)

²⁸ Section 26(4)(b), *Kenya Constitution (Independence Constitution)* (1963)

²⁹ *UMM v IMM* [2012]eKLR

³⁰ *UMM v IMM* [2012]eKLR

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equality contemplated by Article 45(3).³¹ This shows that the judgement reached by the court was also leaning towards equity in division of property during divorce than equality. This case is of great importance since the court realized that 50:50 allocation of property during divorce would lead to many spouses relying on one of their spouse to work for them and during divorce, they obtain equal share of the property despite not breaking sweat to obtain it. The circumstances in this case was the plaintiff and defendant solemnized an Islamic marriage at Bungoma on 21st November 1990. That marriage lasted for 17 years or so. In a divorce cause taken out before the Kadhis Court, the said marriage was dissolved. In subsequent proceedings before that Court in which the Kadhi was asked to settle the issue of matrimonial property, The Kadhi ruled that in regards to the property , the court granted the defendant the plot for her send off and thereof the petitioner to immediately then transfer the said plot to her in documentation . It was however doubtful that at that time the Kadhi's Court had the jurisdiction to determine a dispute in respect to division and sharing of property on divorce. Recognizing that the Kadhi's Court had overstepped its powers, the plaintiff appealed to the High Court.

Section 2 of the Matrimonial Property Act further supports that property should be divided according to the contribution of each spouse.³² Each spouse receives their portion of the property in accordance with their contribution towards the property. Section 2 of the Act defines contribution as “monetary and non-monetary contributions and includes domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work.”³³

In the case of *Kivuitu v Kivuitu*,³⁴ it was held that the matrimonial property would be divided equally even though Mrs.Kivuitu's contributions were non-monetary. She mostly took care of the children, cooked for the family and ensured the house actually felt like home by taking care of the daily activities of the house such as the house being cleaned and the clothes being washed. In *Nderitu v Nderitu*,³⁵ the wife worked full time in a family business, but her contribution was mainly non-financial. The property acquired was registered in her husband's name. However at some point in the marriage, some property was acquired during the course of coverture. The wife

³¹ *UMM v IMM* [2012]eKLR

³² Section 2 , *Matrimonial Property Act* (2013)

³³ Section 2 , *Matrimonial Property Act* (2013)

³⁴ *Kivuitu v Kivuitu* [1991] eKLR .

³⁵ *Nderitu v Nderitu* [1997] eKLR .

went through three caesareans, and hence did not work then. The court held, “A wife must prove she contributed directly towards acquisition of assets. It is not enough for her to simply show that during the period under review, she was sitting on the husband’s back with her hands in her pocket.” The property was divided 30:70, to the wife and husband respectively.³⁶ Also in the 2012 case of UMM v IMM, the statements by the defendant was that the plaintiff made some non-monetary contribution towards the developments on the subdivided plots. The contribution made towards the improvement of the property would entitle her to a beneficial interest therein equal to the contribution she made. All these cases show that property during divorce is divided according to role the spouse played in contribution, and the contribution could either be monetary or non-monetary.

Surah Al-Baqarah of The Holy Quran deals with property disputes arising from divorce. It forbids the husband to demand anything from his wife on divorce.³⁷ Verse 231 of Surah Al-Baqarah also states that whatever a woman earns before and during the marriage remains her property while the man’s property is divided upon divorce.³⁸ Constitution’s principle of equality is violated during divorce since women are given more priority than men instead of being treated equally.

The Standard Newspaper published an article, ‘Confusion over Kenya’s matrimonial property law,’ on 9 July 2015.³⁹ According to the article, Sections 7 of the Matrimonial Property Act states ownership of matrimonial property vests upon the contribution of either spouse towards its acquisition. Article 40 of the Constitution states that every person has a right to acquire and own property.

In Sheri Breslaw’s Article of the Southern African Legal Information Institute, non-tangible contribution in a marriage arises.⁴⁰ According to Section 2 of the Matrimonial Property Act, “contribution” means non-monetary. However, non-tangible contribution in Islam is not recognized hence in an Islamic marriage, the wife could not give any form of financial

³⁶ *Nderitu v Nderitu* [1997] eKLR .

³⁷ The Holy Quran , Surah Al-Baqarah (2:241)

³⁸ The Holy Quran , Surah Al-Baqarah (2:231)

³⁹ <http://www.standardmedia.co.ke/lifestyle/article/2000168543/confusion-over-kenya-s-matrimonial-property-law> on 18 February 2016.

⁴⁰ <http://www.fwbattorneys.co.za/attorneys/sheri-breslaw/> on 18 February 2016.

contribution due to her traditional role as a housewife and hence not be entitled to the husband's property during divorce.⁴¹

However, in Islam it is justified as to why the woman should not split her property with her husband during divorce. In Kitab Al-Talaq (The Book of Divorce), Fatima bint Qais reported that her husband al-Makhzulmi divorced her and refused to pay her maintenance allowance. So she came to Allah's Messenger (may peace be upon him) and informed him, whereupon he said: There is no maintenance allowance for you, and you better go to the house of Ibn Umm Maktum and live with him for he is a blind man and you can put off your clothes in his house (i.e. you shall not face much difficulty in observing purdah there).⁴² This means that during divorce in Islam, the woman is in no way entitled to maintenance by the husband. This makes the argument of women not sharing the property they acquired during divorce reasonable, since she will depend on the same property for upkeep.

In the report of Equal and Free, a Muslim wife can acquire divorce if the husband denies conjugal rights for more than two months, or if he did not provide her with food and shelter. They also have to repay their dowry.⁴³ Islamic legal scholars argue that a woman must maintain her property during divorce, and if she has none, the husband to provide her with his.⁴⁴

Equating a wife's domestic services to monetary contribution has been a difficult matter in Islamic divorces. In the Tanzanian case of *Zawadi Abdallah V Ibrahim Iddi*,⁴⁵ it was held that a wife's domestic services could not be considered to be one of financial contribution, a similar approach to the English case of *Lloyds Bank plc V Rosset*, whereby it was held that the monetary value of the wife's work expressed as a contribution to the cost of acquiring the property was almost *de minimis*.⁴⁶ It followed that the wife was not entitled to a beneficial interest in the property. In the case of *Bi Hawa Mohamed V Ally Sefu*,⁴⁷ the respondent was married to the Applicant in Mombasa, Kenya, in accordance with Islamic Law.⁴⁸ The respondent

⁴¹ <http://www.fwbattorneys.co.za/attorneys/sheri-breslaw/> on 18 February 2016.

⁴² Sahih Bukhari, *Kitab Al-Talaq (The Book of Divorce)*, Book 9.

⁴³ Habiba Jana, *Equal and Free*, United Kingdom (2012), 16

⁴⁴ Habiba Jana, *Equal and Free*, United Kingdom (2012), 18

⁴⁵ *Zawadi Abdallah v Ibrahim Iddi*, Daresalam High Court Civil Application No. 10 Of 1980

⁴⁶ Abdulkadir Hashim, 'Journal of Muslim Minority Affairs' *Institute of Muslim Minority Affairs* (2005), 9

⁴⁷ *Bi Hawa Mohamed v Ally Sefu*, Daresalam Court of Appeal, Civil Appeal No. 9 Of 1983

⁴⁸ Abdulkadir Hashim, 'Journal of Muslim Minority Affairs', 9

had bought a house in Dares Salaam and during divorce, the wife applied for the division of matrimonial asset and her contribution towards the property being non-financial in nature e.g. taking care of the home and the children.⁴⁹ The Primary Court, and the High Court which heard the appeal from the Primary Court, held that she was not entitled to a share of the property to the effect that housework as such did not constitute a contribution under Section 144 of the Law of Marriage Act 1971. The Applicant further appealed to the Court of Appeal and the court held that a spouse's domestic services, rendered during the subsistence of the marriage, amounted to an 'effort' and are a 'contribution within the provisions of Section 114 of the Law of Marriage Act.'⁵⁰ The reasoning for this was based on the fact that in certain ways a wife may have sacrificed her own career in order to ring up the children and provide domestic services for the whole family and therefore may not have earned any money with which to acquire tangible assets. It would be unfair indeed if such a wife were to be divorced after many years of marriage without any provisions for her future.⁵¹

ii) Research design and methodology

The research will be conducted through the use of the library and internet searches. The library research will involve going through books that have explained Islamic divorce and how property is divided in such divorces. It will also involve studying publications by various legal authors on matrimonial rights and laws, contribution in marriage and property division in countries with strong Islamic Law in their systems e.g. Malaysia and Nigeria. The internet searches will involve searching for cases and online articles and publications on the topic being studied. The study will also include conducting numerous interviews with family and divorce law experts, Muslim imams, sheikhs and Kadhis. I will design appropriate questionnaires for lawyers, legal specialists and religious leaders as to be able to know their views on various aspects of this issue, which I shall then analyze.

⁴⁹ Abdulkadir Hashim, 'Journal of Muslim Minority Affairs', 10

⁵⁰ Abdulkadir Hashim, 'Journal of Muslim Minority Affairs', 11

⁵¹ Abdulkadir Hashim, 'Journal of Muslim Minority Affairs', 12

CHAPTER 3: MATRIMONIAL PROPERTY LAWS AND ISLAMIC LAW IN OTHER NATION-STATES

In order to understand more fully how Islamic Sharia law can determine the division of matrimonial property between spouses during divorce in Muslim marriages, this Chapter looks at three countries – the Philippines, Morocco and Turkey - which have incorporated Sharia law into their country's legal system and where the decisions of the Kadhi's court in relation to division of matrimonial property during divorce is considered final. Sharia law application varies from one country to another. In some countries Muslims can choose for their cases to be heard under Islamic or secular law, while in other countries Sharia law applies to Muslims only for personal status issues such as marriage, divorce and inheritance. Article 24 (4) of the Constitution of Kenya 2010 states: "The provisions on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' court to persons who profess the Muslim religion in matters relating to personal status, marriage, divorce and inheritance."⁵²

3.1. The Philippines

The Philippines legal system is considered to be unique due to its rich blend of civil law, Islamic law, indigenous law and common law. Civil law is mostly based on Roman law while Common law is considered to be Anglo-American. One of the sources of law in the Philippines is Islamic Law, and the key sources of Sharia law include the Quran, Sunnah, Ijma and Qiyas.⁵³

The Muslim population in Philippines is 10,427,319 out of 74,480,848, which is about 14% as reported by the National Commission on Muslim Filipinos.⁵⁴ Article II, section 6 of the Constitution of Philippines states that the separation of the Church and State shall be inviolable.⁵⁵ This does not mean that the religion of Islam is not recognized; quite the contrary, it is an integral part of the legal system of the country. The Code of Muslim Personal Laws (1977) is a special law promulgated under Presidential Decree No.1083, which led to the establishment of Sharia Courts in the country. Presidential Decree No.1083 (or Code of Muslim Personal

⁵² Article 24 (4), *Constitution of Kenya* (2010)

⁵³ Jainal D. Razul, *Commentaries and Jurisprudence on the Muslim Law of the Philippines* (1984) 38

⁵⁴ <http://www.islamicweb.com/begin/population.htm> on 27 February 2016

⁵⁵ Article II Section 6, *Constitution of Philippines* (1987)

Laws), established two levels of Sharia courts, the Sharia Circuit Courts⁵⁶ and the Sharia District Courts,⁵⁷ with the former being the lower court. The Sharia Circuit Courts, as stated in Article 155 of the Presidential Decree No.1083, have original and exclusive jurisdiction over marriages, recognized under this Code, betrothal or breach of contract to marry, dowry (*mahr*) disposition and distribution of property upon divorce and all cases involving disputes relative to communal properties.⁵⁸ Article 144 of Presidential Decree states that the Sharia District Courts have appellate jurisdiction over all the cases tried in the Sharia Circuit Courts.⁵⁹ The Sharia District Courts have original jurisdiction to hear cases in relation to all special civil actions for interpleader or declaratory relief wherein the parties are Muslims or the property involved belongs exclusively to Muslims. This proves that there are indeed Muslim courts in the Philippines that follow Sharia law when it comes to division of property between spouses during divorce.

Article 38 of the Code of Muslim Personal Laws provides that in the absence of any other written agreement between the spouses (either made in the marriage contract or subsequently), the couple shall be governed by the general principles of Islamic law and the Civil Code of the Philippines.⁶⁰ Article 41 of the Code of Muslim Personal Laws states that each spouse retains whatever property they brought in to the marriage, all income from employment and any income from their personal property.⁶¹ This shows that in the case of divorce, the property shall not be distributed equally, nor based on the contribution of each party to the improvement of the property of another, and each party shall be entitled to what he or she came with into the marriage. Article 43 of the Code of Muslim Personal Laws states that household property which customarily pertains is used by either spouse shall be presumed to be the property of said spouse.⁶² Spouses may choose during their marriage to be governed by absolute community of property, which mean that, were they to divorce, all property brought into the marriage and

⁵⁶ Article 155, *Code of Muslim Personal Laws of the Philippines* (1977)

⁵⁷ Article 143, *Code of Muslim Personal Laws of the Philippines* (1977)

⁵⁸ Article 155, *Code of Muslim Personal Laws of the Philippines* (1977)

⁵⁹ Article 144, *Code of Muslim Personal Laws of the Philippines* (1977)

⁶⁰ Article 38, *Code of Muslim Personal Laws of the Philippines* (1977)

⁶¹ Article 41, *Code of Muslim Personal Laws of the Philippines* (1977)

⁶² Article 43, *Code of Muslim Personal Laws of the Philippines* (1977)

acquired during the marriage would be divided equally upon dissolution as provided in Article 46 of the Code of Muslim Personal Laws.⁶³

Title VI of the Civil Code of the Philippines (1969) is titled, 'Property Relations Between Husband and Wife.' Chapter 1, Article 119 under title VI of the Civil Code of the Philippines states, 'The future spouses may in the marriage settlements agree upon absolute or relative community of property, or upon complete separation of property, or upon any other regime. In the absence of marriage settlements, the system of conjugal partnership of gains as established in this Code, shall govern the property of the spouses.'⁶⁴ Chapter 4 under title VI of the Civil Code of the Philippines states is titled, 'Conjugal Partnership of Gains. 'Article 142 of the Civil Code of the Philippines states that through conjugal partnership of gains the husband and wife place in a common fund the fruits of their separate property and the income from their work, and divide equally, upon the dissolution of the marriage or of the partnership, the net gains or benefits obtained indiscriminately by either spouse during the marriage.'⁶⁵

3.2. Morocco

Morocco is a predominantly Muslim country where the vast majority of the population is Muslim, hence the Sharia law applies to Muslims alone. Article 49 of "Title Four: Of Volitional Conditions in the Marriage Contract and their Effects" of the Moroccan Family Code (2004) (Arabic. *Mudawana*) deals with division of property during divorce in Islamic marriages and provides that property between Muslim spouses is allocated using the separate property regime, that is, where marital property acquired or owned by a married couple and dissolution of the marriage occurs through divorce, notwithstanding the marriage, remains the separate property of the spouse who acquired or to whom was gifted the item of property.⁶⁶ Specifically Article 49 states, 'Each of the two spouses has an estate separate from the other.'⁶⁷ Article 49 also allows the spouses to come up with a pre-nuptial written agreement, totally independent of the marriage contract, regarding the division and distribution of the assets acquired during marriage should

⁶³ Article 46, *Code of Muslim Personal Laws of the Philippines* (1977)

⁶⁴ Article 119, *Civil Code of the Philippines* (1949)

⁶⁵ Article 142, *Civil Code of the Philippines* (1949)

⁶⁶ <http://muslimmarriagecontract.org/laws.html#fairshare> on 23 August 2016

⁶⁷ Article 49, *The Moroccan Family Code (Moudawana)* (2004)

divorce occur.⁶⁸ The text reads: 'However, the two spouses may, under the framework of the management of assets to be acquired during the marriage, agree on their investment and distribution. This agreement is indicated in a written document separate from the marriage contract. Public notaries (Arabic. *Adul*) inform the two parties of these provisions at the time of the marriage.'⁶⁹ It is therefore clear that informing spouses of these provisions is part of the duties of the *Adul* present at the marriage. This allows for property to be divided on a fifty-fifty basis between Muslim spouses during divorce in Morocco, provided both spouses have agreed to this arrangement before they marry.⁷⁰

3.3. Turkey

Though the population of Turkey is predominantly Muslim – 97% profess the Islamic faith -, after the formation of the Republic of Turkey in 1923, the legal system underwent a number of reforms with the adoption of a new Civil and Penal Code in 1926 that removed many legal precepts based on the Sharia and moved the state towards Western legal norms. During these reforms the matrimonial property regime changed from one of separate ownership to a partial community property regime, advocating for equal division of any property acquired during marriage in cases of divorce.⁷¹ This was as a result Kemal Ataturk's vision: he promoted education for women and encouraged them to work professionally, as well as part of the European Union accession process and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁷²

Secular laws borrowed and adopted from Western nations had replaced almost every aspect of law except the Civil Law. The Islamic Sharia Law was also abolished and replaced with the Swiss Civil Law in 1926.⁷³ Officially, the adoption of the new Civil Law was seen as a way of removing Islam as an official source of law and a break with Turkey's Islamic past when, in fact, the adapted Swiss Civil law retained a number of features that were contained in Sharia Law.

⁶⁸ Article 49, *The Moroccan Family Code (Moudawana)* (2004)

⁶⁹ Article 49, *The Moroccan Family Code (Moudawana)* (2004)

⁷⁰ <http://www.hrea.org/programs/gender-equality-and-womens-empowerment/moudawana/> on 23 August 2016

⁷¹ Seval Yildirim, *Aftermath of a Revolution: A Case Study of Turkish Family Law*, 7 Pace Int'l Press, Turkey, 2005, 366³

⁷² Seval Yildirim, *Aftermath of a Revolution: A Case Study of Turkish Family Law*, 366

⁷³ Ruth Miller, *The Ottoman and Islamic Substratum of Turkey's Swiss Civil Code*, Oxford Centre for Islamic Studies, London, 2000, 336

The 1926 Civil Law has undergone a number of revision. The regime on marital property changed from one based on separate ownership to a partial community property regime, which in the case of divorce, mandates for an equal division of any property acquired during marriage.⁷⁴ Under the current civil law of 2001 where a couple enters into a marriage and does not state the property regime which shall apply to their marriage, the partial community property regime is the default state which shall be applied to such marriages in case of divorce.

The “partial community regime” identifies two types of property: communal and individual. Communal property is acquired during marriage and it therefore includes income generated by working, insurance compensation received as a result of accidents and loss of ability to work, and any revenues stemming from personal property, for example, rent. Individual property on the other hand is classified as all personal assets and property acquired before marriage, and all property and assets acquired as inheritance after marriage. According to the partial community property regime, all property acquired prior to marriage remains the exclusive property of the individual spouse, while communal property composed of assets amassed during the course of the marriage is to be divided equally in the case of divorce. Any inheritance received during marriage is also considered individual property and remains the sole property of that individual regardless of the dissolution of the marriage.⁷⁵ However, income generated by individually owned property, such as rents and interest, is pooled and considered communal property and therefore to be divided equally between the spouses in case of divorce. In sum, under a partial community property system, property acquired prior to marriage remains the individual property of each spouse and only those assets acquired during the marriage are considered to be communal, that is jointly owned. In the case of divorce, joint community property is divided between the spouses equally. Inheritances received during the marriage are treated as individual property and therefore are not subject to division.⁷⁶

Upon marriage couples may choose not to participate in the default partial community property regime. In this case, the law gives them two options: either 1) a full community property system; or 2) a complete separation of property and assets (Article 242-243 of the 2001 Civil Law). However, couples who choose not participate in the default regime (partial community property)

⁷⁴Ozsu Hans, 'Receiving the Swiss Civil Code', *Cambridge University Press* (2010), 72

⁷⁵Ozsu Hans, 'Receiving the Swiss Civil Code', 77

⁷⁶Ozsu Hans, 'Receiving the Swiss Civil Code', 81

must express so through a written agreement recognized by a court of law.⁷⁷ The full community property option (Articles 256–281 of the 2001 Civil Law) stipulates that all assets acquired, regardless of whether they were acquired prior to or after marriage, are pooled, and are considered to be the joint property of the couple, the idea being that each party acquires a one-half share in all property acquired, even if the property remains in one person's name. If the marriage is dissolved, all assets are divided equally between the two spouses. Under a full community property regime all assets and property are held in common upon and during marriage.⁷⁸

3.4. Chapter Summary

In this Chapter we have looked at the way in which three modern nation-states, the Philippines, Morocco and Turkey, have dealt with the circumstance of matrimonial property and the ownership and allocation of such property upon divorce and dissolution of a marriage. These country case studies have confirmed that the issue under study is a complex one and can be dealt with in a number of different ways. As will be seen in subsequent chapters, such international practice may be highly relevant for Kenya.

⁷⁷Ozsu Hans, 'Receiving the Swiss Civil Code', 83

⁷⁸Ozsu Hans, 'Receiving the Swiss Civil Code', 88

Chapter 4: Findings/Evidence

Interviews

The following questions were to be addressed to the interviewees who have been involved in numerous cases as lawyers and mediators in relation to Islamic divorces and allocation of property during divorce between Muslim spouses:

- How is property divided between Muslim spouses during divorce, and also how does this allocation take place in the case of polygamous marriages?
- Do cases that have been reviewed in the High Court and Court of Appeal from the Kadhi's Court have any binding effect on the Kadhi's Court?
- In the case of mixed marriages between Muslims and non-Muslims, what law applies during divorce hence eventually determining how the property shall be divided between the spouses?

4.1 Distribution of property during divorce

a) Imam Sheikh Mohammed Swalihu, Head Imam of Jamia Mosque, Nairobi.

Date of interview - 4 November, 2016

Venue : Jamia Mosque, Nairobi

In order to determine how property shall be divided between the spouses during divorce in Islam, one first has to determine who owns the property, how did the contribution towards the property occur and also whether the marriage is polygamous or not. If the husband acquired the property individually, then the property is his and not of his wife.⁷⁹ However, in case the property is the matrimonial home, during divorce the husband has to let the wife live in the home in which they lived together before the divorce during a prescribed period when reconciliation might still be

⁷⁹ Interview with Imam Sheikh Mohammed Swalihu on 4 November 2016

39 possible. If after the prescribed waiting period, the husband fails to take his wife back, then the wife is definitively divorced and she must leave the matrimonial home immediately.⁸⁰

If the property is belongs to the wife, it is hers. A husband cannot force his wife, even if she is working and earning a salary, to helping him financially with such expenses as paying school fees, electricity bill and treating the family and children on a weekend. In Muslim society and marriages, these expenses are the responsibility of the husband, not of the wife. If the wife personally feels like helping the husband, she may do so out of good-will, but she is in no way obliged to do so.⁸¹

If the property was acquired through equal contributions from the husband and the wife, then it should be divided equally between the spouses during divorce. If one of the spouses contributed more than the other, be it the husband or wife, then the property shall be divided according to the respective contributions made by the spouses.⁸² Property during divorce is hence divided according to one's contribution in Kenya.

5 According to Verse 237 of , Surah Al-Baqarah states, 'And if you divorce them before you have touched them and you have already specified for them an obligation, then give half of what you specified - unless they forego the right or the one in whose hand is the marriage contract foregoes it. And to forego it is nearer to righteousness. And do not forget graciousness between you. Indeed Allah, of whatever you do, is seeing.'⁸³ The Imam clarified this verse by stating that it only applies to couples who have married, but have had no sexual intercourse at all during the marriage. In such a situation then, when the couple want to divorce, the dowry (Arabic. *Mahr*) is what shall be divided between the spouses, whereby the dowry paid to the wife shall be divided into half, and the husband obtains half of what he had given to her. If the *mahr* was paid in the form of property, then the property itself is divided in half, even though the wife made no contribution at all towards acquiring that property. The wife may choose to return the whole dowry if she opts to do so, but it is not compulsory. The husband on the other hand may also opt

⁸⁰ Interview with Imam Sheikh Mohammed Swalihu on 4 November 2016

⁸¹ Interview with Imam Sheikh Mohammed Swalihu on 4 November 2016

⁸² Interview with Imam Sheikh Mohammed Swalihu on 4 November 2016

⁸³ The Holy Quran , Surah Al-Baqarah (2:237)

to allow the wife to keep the whole dowry and hence not claim the half to which he is entitled by law, but this is also optional for him to do so.⁸⁴

b) Dr. Abdulkadir Hashim - LL.D (Doctor of Laws), University of the Western Cape, South Africa, LL.M (Master of Laws); The London School of Economics

Date of Interview – 11th November 2016

Venue: Ali & Co. Advocates – Jamia Plaza

Dr Hashim stated that the classical position in Islamic law is that it is quiet on matters of how property is to be allocated during divorce. This issue is not discussed as much in the classical school of Islamic law and hence the position which is usually taken by followers of this school is that: The basic principle and starting point of Islamic law is that each of the spouses has their own property and hence during divorce each spouse should leave with their respective property, unless the property is matrimonial property jointly acquired by the spouses.⁸⁵ Matrimonial property under Part III, Section 6 of the Matrimonial Property Act (2013) of Kenya means the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. If the title to a matrimonial home has the names of both spouses, then the property shall be divided equally.

4.2 Appeals to the High Court and Court of Appeal from Kadhi's Court.

Imam Sheikh Mohammed Swalihu

When cases of property allocation during divorce are appealed from the Kadhi's Court to the High Court or Court of Appeal, they are no longer considered as to be cases determined by Islamic law and so common law jurisdiction applies.⁸⁶ This is so, not just for divorce and property distribution cases, but for all cases that are appealed from the Kadhi's Court to higher courts. He gave an example with inheritance cases whereby the Quran stipulates how the

⁸⁴ Interview with Imam Sheikh Mohammed Swalihu on 4 November 2016

⁸⁵ Interview with Dr Abdulkadir Hashim on 11 November 2016

⁸⁶ Interview with Imam Sheikh Mohammed Swalihu on 4 November 2016

property is to be divided when the owner dies, and since one of the parties, especially women, may not be happy with how the Quran stipulates the division, they appeal the Kadhi's Court decision to the High Court. In such an instance, Islamic law no longer applies in the high court. It is therefore clear that the Kadhi's Court has its own original jurisdiction in Islamic matters that have been stipulated in the constitution, and hence decisions made in the High Court and Court of Appeal on appeals from the Kadhi's court are never binding on the Kadhi's Court, the reason being that the Kadhi's Court is an Islamic Court and hence only Islamic laws apply, and the decisions from the superior courts do not use Islamic law, hence you cannot bind an Islamic Court to non-Islamic decisions. Muslims are strongly discouraged from appealing to the higher courts, as by so doing they reject Islamic law and the principles that guide one to live an Islamic life, which is a very serious sin in Islam.⁸⁷

Dr. Abdulkadir Hashim

On cases that are appealed from Kadhi's Court to the High Court and further to the Court of Appeal, Dr Hashim stated that the decisions are indeed binding on the Kadhi's Court since they are higher courts, and higher courts decisions are binding on the lower courts.⁸⁸

4.3 Mixed marriages and divorce

Imam Sheikh Mohammed Swalihu

During divorce, Islamic law applies if the husband is Muslim since he is entitled under Islamic law to marry a non-Muslim and hence it is considered to be an Islamic marriage. The problem may arise when the wife refuses to be governed by Islamic law despite her marriage being recognized as a Muslim marriage and referring the case to the High Court. When this occurs, civil and common law shall apply since Islamic law only applies in the Kadhi's Court. When a Muslim woman marries a non-Muslim, the marriage is not considered an Islamic marriage for it is not allowed to marry a non-Muslim under Islamic Sharia law.⁸⁹ It is permissible for a Muslim man to marry a non-Muslim woman if she is Christian or Jewish, but it is not permissible for him to marry a non-Muslim woman who follows any religion other than

⁸⁷ Interview with Imam Sheikh Mohammed Swalihu on 4 November 2016

⁸⁸ Interview with Dr Abdulkadir Hashim on 11 November 2016

⁸⁹ Interview with Imam Sheikh Mohammed Swalihu on 4 November 2016

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these two. The evidence for that is the verse 5 in Sura al-Maa'idah which Allah says, 'This day [all] good foods have been made lawful, and the food of those who were given the Scripture is lawful for you and your food is lawful for them. And [lawful in marriage are] chaste women from among the believers and chaste women from among those who were given the Scripture before you, when you have given them their due compensation, desiring chastity, not unlawful sexual intercourse or taking [secret] lovers.'⁹⁰ Chaste women from the believers and chaste women from those who were given the Scripture" means, free woman among those whom have been given the Scripture, namely the Jews and Christians who believe in what is in the Torah (Arabic. *Tawraat* (Torah) and the Gospel (Arabic. *Injeel*).⁹¹

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It is not permissible for a Muslim woman to marry a non-Muslim from any other religion, whether from among the Jews or Christians, or any other religion. The evidence for this is in verse 221 in which Allah says in Sura Al-Baqarah, 'And do not marry polytheistic women until they believe. And a believing slave woman is better than a polytheist, even though she might please you. And do not marry polytheistic men [to your women] until they believe. And a believing slave is better than a polytheist, even though he might please you.'⁹²

Dr. Abdulkadir Hashim

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In the case of mixed marriages between a Muslim man and a non-Muslim, for example, a Christian or Jew, the Kadhi's Court gives an option to both parties to give their submissions. If the non-Muslim wife accepts to give her submissions to the Kadhi's Court, then she shall be subject to Islamic Sharia law. If she refuses then the case is referred to the High Court.⁹³ Section 5 of the Kenya's Kadhi's Court Act (2010) states, 'A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.'⁹⁴

⁹⁰ The Holy Quran , Sura al-Maa'idah (5:5)

⁹¹ Interview with Imam Sheikh Mohammed Swalihu on 4 November 2016

⁹² The Holy Quran , Sura Al-Baqarah (2:221)

⁹³ Interview with Dr Abdulkadir Hashim on 11 November 2016

⁹⁴ Section 5 , *Kadhi's Court Act* (2012)

4.4 Pre-marriage contracts

Imam Sheikh Mohammed Swalihu

Many countries have been adopting pre-marriage contracts on how property is to be divided in the case of Islamic marriages, but this is not required or stipulated under Islamic law. It has emerged as a result of women being denied property on the basis they did not make any financial contributions and hence not being entitled to any portion of the property during divorce. This problem has been identified in many Islamic countries and as a result the Muslim scholars in various countries in the world have begun to encourage pre-marriage contracts to be created regarding how property is to be divided in case of divorce. In some way such contracts help to resolve the problem propertyless women face of finding themselves with nothing after being divorced despite having made numerous non-financial contribution to the marriage such as taking care of the husband, children and the home on a daily basis by shopping, cooking, cleaning etc.⁹⁵

Dr. Abdulkadir Hashim

He discussed the issue of non-financial contribution in Islam, and that the classical school of Islamic law does not recognize non-financial contribution in Islamic marriages, hence according to this principal during divorce, a spouse cannot claim the property of the other spouse if they did not contribute financially towards the property.⁹⁶ That is why many developed Muslim countries such as Philippines, Morocco, Turkey and Malaysia are incorporating pre-marriage contracts into marriages whereby parties agree that in case of a divorce, the property is to be divided equally between the spouses, hence allowing for spouses, especially women who contribute non-financially by taking care of the home and family, not to be in a disadvantaged position during divorce.⁹⁷ The pre-marriage contracts accepting equal distribution of property represent an emerging practical innovation to compensate for the fact that classical Islamic law only recognizes financial contributions of property as a means of entitlement to property during divorce.⁹⁸ The Kadhi's Courts in Kenya have begun to implement the equal distribution of

⁹⁵ Interview with Imam Sheikh Mohammed Swalihu on 4 November 2016

⁹⁶ Interview with Dr Abdulkadir Hashim on 11 November 2016

⁹⁷ Interview with Dr Abdulkadir Hashim on 11 November 2016

⁹⁸ Interview with Dr Abdulkadir Hashim on 11 November 2016

property during divorce. In a case in which Dr Abdulkadir represented the wife in the Kadhi's court, the court ordered for equal distribution of property between the properties. The case was *Amina Hassan Mohammed v Yussuf Adan Abdulla*,⁹⁹ whereby the issue was in relation to a matrimonial property with a joint ventured acquisition by both parties whereby the wife (plaintiff) claimed an equitable share and interest in the matrimonial house. Dr. Abdulkadir stated that they relied on the Section 58(2)(1)(a) of the Malaysian Islamic Family Law Enactment Act(2003) whereby matrimonial property is defined as , 'Property jointly acquired husband and the wife , whether directly or indirectly through joint or sole efforts , during the subsistence of marriage in accordance with conditions stipulated by the rule of law.'¹⁰⁰ The Kadhi did indeed rely on this section and ruled that the property in dispute was indeed matrimonial property. The Kadhi also recognized the non-financial contribution of the plaintiff in her capacity as a sole effort provider in venturing for the family needs and extending a helping hand to her husband for the betterment of the family in addition to being a housewife. It is hence correct to state that indeed the Kadhi Courts in Kenya are looking to solutions adopted in other Muslim countries and incorporating the precedents set in those countries into Kenyan cases.

4.5 Chapter summary

From this chapter, it becomes clear that there are two school of thoughts in Islam, the traditional and conservative one as is the position taken by Imam Swalih and the new school of thought that looks at Islamic teachings and incorporates those teachings to solve modern day issues facing Muslims all over the world, hence that is why Imam Swalih strongly opposes for pre-marriage contracts while Dr Hashim embraces it with both hands open.

⁹⁹ *Amina Hassan Mohammed v Yussuf Adan Abdulla* (Unreported on Eklr)

¹⁰⁰ Section 58(2)(1)(a), *Malaysian Islamic Family Law Enactment Act(2003)*

Chapter 5: Discussion

Information gathered from a review of relevant literature interviews with local Kenya Muslim scholars, and insights into how other Muslim countries and countries with significant Muslim populations distribute property during divorce has brought to the fore many different ideas regarding how best to understand the challenge of reconciling the tenets of Islamic law regarding property distribution at the time of divorce with common law and international law principles of equity and gender equality.

In Islam, a woman is not entitled to maintenance once she has been finally divorced.¹⁰¹ Put in another way, according to Islamic law once a man decides that he no longer wants to reconcile with the wife, he is not obliged to maintain his wife. As a result, during divorce a man can never claim a portion of his wife's property, the rationale for this being that once divorced she will depend on this very property for her maintenance and upkeep.

When divorce occurs between Muslims married according to Islamic law, the property is divided between the spouses in accordance with what they contributed. This aspect of Islamic law is fully in accord with what is prescribed in Part III, Section 7 of the Matrimonial Property Act (2013) which states that "ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or the marriage is otherwise dissolved."¹⁰² Thus, division of property in accordance with the contribution of each spouse is based on the principle of equity rather than that of equality.

The only time Islamic law might advocate that the property be divided equally is when the property is owned jointly by the spouses, that is, the names of the husband and wife both appear on the title of the property. In this case, Islamic law considers the property to be "matrimonial property". This feature of Islamic law relates closely to the text of Part III, Section 6 of the Matrimonial Property Act, whereby matrimonial property is defined as "...the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other

¹⁰¹ A man can "divorce" his wife once or twice and afterwards be reconciled with her, but should he divorce her a third time, the divorce is considered to be final and irreparable

¹⁰² Part III, Section 7, *Matrimonial Property Act* (2013)

immovable and movable property jointly owned and acquired during the subsistence of the marriage.”¹⁰³

When considering contribution towards matrimonial property, one can differentiate between monetary or non-monetary contribution. Interestingly, there is an emerging trend in Islamic law that recognizes the non-monetary contribution of the wife by virtue of the work she does looking after and taking care of the whole family. In this case, as a way of recognizing the non-monetary contribution of the wife, matrimonial property may be divided equally between spouses even though the wife did not contribute to that property financially.¹⁰⁴

The division of opinion among Muslim scholars regarding division of property upon divorce relates to a great extent to how one defines and views the concept of “contribution”. The classical school of Islamic law advocates for property to be divided between the spouses based on their financial or monetary contribution, not recognizing the concept or reality of a possible non-financial contribution, especially by the wife.

The idea of property being divided equally between spouses is an emerging trend in Islamic law not only in Kenya, but in a majority of Muslim countries globally. This trend is surely the result of a growing perception in the Muslim world of women’s rights together with an evident appreciation for their non-monetary contribution to marriage. The tenets of classical Islamic law still hold and merit the highest respect among Muslim jurists and scholars. This has led to an emerging jurisprudence in Islamic countries whereby spouses enter a contract before the marriage agreeing how their property is to be divided in case of divorce; most of such contracts provide for the property to be divided on a fifty-fifty basis. The rift between the new younger generation of Muslim scholars and those of the classical school still persists, since the latter argue that pre-marriage contracts are not provided for in Islamic law and such contracts go against Islamic law. For the scholars of classical school whatever has been provided for in Islamic law is not only adequate but just. Even though the law may not appear to be equitable, it is only Allah who understands why the law is as it is and it is for us to follow, not question or

¹⁰³ Part III, Section 6, *Matrimonial Property Act* (2013)

¹⁰⁴ This recently transpired in the 2015 case of *Amina Hassan Mohammed v Yussuf Adan Abdulla* in the Kadhi’s court where the court held that the property was indeed matrimonial property and also the non-financial contribution of the plaintiff of taking care of the family and the property entitles her to claim the property. Based on these grounds, the Kadhi’s court held that the property is to be divided equally between the spouses

modify. The new generation of Muslim scholars, cognizant of the non-financial contribution of wives, are searching for a way of protecting a divorced wife from being left with nothing to sustain her. Thus, the present trend in developed Muslim countries is for Muslim spouses to agree between themselves and enter into a contract before marriage regarding how their property is to be divided in the case of divorce. Such contracts, of course, are fully recognized under common law and so become a way of reconciling the tenets of Islamic law with common law and, indeed, with the Bill of Rights of the Kenya Constitution 2010.

The division between Muslim scholars of the classical school of Islam and the newer younger generation of Muslim scholars is a real one. One of the main issues faced during the study was the reluctance, if not hostility, of Muslim scholars of the classical school in their opposition to the ideas and thinking of the current generation of Muslim scholars, including lawyers. As a result, the two groups were contending with each other, wanting the study to recommend their ideas. The study seeks rather to be objective, without taking sides, rather simply recording what is actually happening in the application of Islamic law to marriage throughout the modern Muslim world. A key challenge faced and not successfully overcome was getting to interview the Chief Kadhi of Kenya, who was always away or occupied in his work.

Chapter 6: Conclusion and Recommendations

This paper has addressed the research questions asked in chapter I which are:

1. Are the laws on divorce concerning property that do not apply to Muslims justified?
2. If the laws are justified, should the exception continue to exist?
3. Can Muslim laws on divorce be in accordance with the Constitutional principles of equality in marriage?

This paper has addressed the history of how the exemptions of the Bill of Rights in the 2010 Constitution came to apply to Muslims in Kenya, and how property is to be divided during Islamic divorces. Part III, Section 7 of the Matrimonial Property Act (2013) which states that “ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or the marriage is otherwise dissolved.”¹⁰⁵ The contribution can be monetary or non-monetary. Part II, Section 3 of the Matrimonial Property Act 2013 states: “A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property.” Article 24 (4) of the Constitution of Kenya states: “The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhi’s’, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.” Due to the mentioned laws, allocation of property during divorce in Islamic marriages has led to the matrimonial property to be divided equally between the spouses, a diversion from the classical school of Islamic law where property was to be divided based on the financial contribution of the spouses, and non-financial contribution being recognized as null and void. The Kadhi’s Court has recognized this emerging problem since wives play a major role in non-financial contribution of the property e.g. taking care of the children , husband and also ensuring the property is in good condition throughout. The court has thus realized that women tend to end up with no property during divorce since their contribution is non-financial, and it tries to remedy this through fifty-fifty allocation of the property. The study recommends the following:

¹⁰⁵ Part III, Section 7 , *Matrimonial Property Act* (2013)

- The Kadhis' Courts in Kenya should consider adopting and recommending pre-marriage contracts regarding how matrimonial property is to be divided between spouses, should they divorce. This can be on a fifty-fifty basis or on the percentage the parties agree so. The existence of such contracts will create a basis for uniformity and predictability on how the Kadhi's court shall rule during divorce and avoids the court from giving different decisions for similar cases. This system has worked well in many countries that follow Islamic law such as the Philippines, Turkey, Morocco and Malaysia.
- The present disagreement and wrangling between the classical school of Muslim scholars and modern Muslim scholars who are coping with reconciling Islamic and common law can be mollified by conducting seminars and symposiums where they can discuss, debate and exchange ideas so as to move reach a forward on Islamic matters on the same page.
- There is no need to revise the text of the Kenya Constitution 2010, in particular **Article 24 (4)** which **states**: "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." **This** is because for one to be considered a Muslim, they have to adhere to the Islamic teachings and laws as provided in the Quran, Hadiths and Sunnah. This Article recognizes that Islamic law has its own procedures at to how divorce is to be handled and how the property is to be divided between the spouses. Practical solutions to reconciling the tenets of Islamic law and common law are already being adopted by those Muslims who so wish within the Muslim world.

Appendices

Appendix 1: List of cases

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Zawadi Abdallah v Ibrahim Iddi, Dare Salam High Court Civil Application No. 10 Of 1980

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Constitution of Kenya (2010)

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The National Land Policy (2009)

The Marriage Act (2014)

Kadhi's Court Act (2012)

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