RECONCILIATION OF THE PRINCIPLE OF THE BEST INTEREST OF THE CHILD AND FREEDOM OF RELIGION UNDER ISLAMIC MARRIAGES.

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,

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Contents

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DECLARATION:

I, STEPHANIE BRENDA WANJIRU MUNENE, 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.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

[Ms.Mukami Wangai]

Abstract

The concept of marriage in Kenya is one that has impelled discussions both locally and globally consistently over a period of time. This has led to the adoption of the Marriage Act 2014 with guidelines that govern marriages in Kenya. This study thus intends to evaluate the various stipulations of Kenya's 2010 constitutional framework in offering guidelines on the restriction of freedom of religion. The freedom of religion is embodied in Article 32 of the Constitution of Kenya vis-a vis the global legitimate instruments that have been ratified to form part of the law safeguarding human rights. It looks into the attainment and protection of the best interest principle of the minor in accordance with exercising one's freedom of religion in marriage practices. The study pays close attention to Islamic marriage laws in Kenya that pose a threat to the principle of the best interests of the minor. It analyses the influence of section 49(3) of the Marriage Act and how it opens the floodgates that expose children who practice Islam to early marriages, which prevents the attainment of the principle of best interest of the child. The study reveals that section 49(3) of the Marriage Act is unconstitutional.

LIST OF CASES

Domestic Cases

Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others (2015) eKLR

International Cases

Corporation of the Presiding Bishop v Amos (1987), The Supreme Court of the United States

Employment Division of Oregon V Smith (1990), The Supreme Court of the United States

Hyde v Hyde and Woodmansee (1866), Court of Probate and Divorce

Kokkinakas v Greece (1993), European Court of Human Rights (ECtHR)

Newton Cantwell v State of Connecticut (1940), The Supreme Court of the United States

Wisconsin v Yoder (1972), The Supreme Court of the United States

LEGAL INSTRUMENTS:

Cap 150 Marriage Act

Chapter 151 African Christian and Divorce Act

Chapter 157 Hindu Marriage and Divorce Act

Chapter 155 Mohammedan Marriage and Divorce Registration Act

Children Act (Act No 8 of 2012)

Constitution of Kenya 2010

Convention on the Elimination of All Forms of Discrimination against Women

International Covenant on Civil and Political Rights (1966)

Judicature Act (Act No. 14 of 1977)

Marriage Act (Act No. 4 of 2014)

The United Nations Convention of the Rights of the Child (1989)

Universal Declaration of Human Rights (1948)

LIST OF ABBREVIATIONS

CEDAW- Convention on the Elimination of Discrimination against Women

ECtHR- European Courts of Human Rights

ICCPR- International Covenant on Civil and Political Rights

ICESCR- International Covenant on Economic, Social and Cultural Rights

UDHR- Universal Declaration of Human Rights

UNCRC- United Nation Convention on the Rights of the Child

CHAPTER 1: INTRODUCTION

1.0 Introduction

The acknowledgment and safeguarding of human rights has become the overwhelming focus of the globe and all states or government consider human rights as a popular matter.[1] This notwithstanding, it starts a discussion on which rights should be safeguarded and in which way consequently resulting in a permissible criteria for the restriction of rights.[2] This is because there is need a to lessen conflict within the society by restricting the rights of one person if their actions are detrimental to the rights of another person.

The thought behind limitation is that a right can be enhanced as an issue of importance and not a rigid point. A right is a basis in pragmatic thinking and not the end of a further discussion consequently no motive for barely describing the extent of interest safeguarded as a right.[3] Consequently, the effectiveness of a right maybe maximized or minimized subject to its worth (utility or happiness); it is the worth of the right that is maximized or minimized and not the right.[4]

The Constitution has a limitation clause that is seen to set out the conditions to which limitable rights will be evaluated. The Constitution of Kenya clearly identifies the limitations of rights under Article 24. It goes ahead to outline the rights that are not contingent to limitations which incorporate; freedom of ill treatment or punishment, the guarantee of impartiality during legal proceedings, right to order of habeas corpus and freedom from bondage.[5]

This dissertation is aimed at expounding on the distinct features of freedom of religion that is engrained in the charter of rights in our constitution and in what context it can be limited.

1.1 Background to the Problem:

Religious and cultural traditions have shaped and continue to shape modern culture in profound and diverse ways. The Republic of Kenya is a legally plural state that is constituted by various ethnic and religious groups. These religious groups include Christians, Muslims,

[1] Zhipheng He, 'The Derogation of Human Rights: Reasons, Purpose and Limits' (2003)
[2] Odhiambo Brian Patrick, 'The Limitation of Rights under the Kenyan Constitution' Published LLM Thesis, University of Pretoria, Pretoria, 2015, 2.
[3] Odhiambo Brian Patrick, 'The Limitation of Rights Under the Kenyan Constitution' Published LLM Thesis, University of Pretoria, Pretoria, 2015, 2.
[4] Odhiambo Brian Patrick, 'The Limitation of rights under the Kenyan Constitution' Published LLM, University of Pretoria, Pretoria, 2015, 2.
[5] Article 25, Constitution of Kenya (2010)

Hindus, among many others. Each of these groups has its own customary law which dates back from pre-colonial times that guides them in resolving private grievances relating to marriage, annulment and succession. These laws include article 2(4) of the Constitution of Kenya, which appreciates customary legislation, section 6 of the Marriage Act that recognizes the different kinds of marriage among many others.

It is evident that Muslims do occupy a distinctive position in Kenya relying on the International Religious Freedom Report for 2013; the percentage of Muslims in Kenya is 10% of the general populace.[6] Then the need for laws to depict their values and guide their norms. In relation to marriage we can see how the law has evolved in order to guide Islamic marriages. The Marriage Ordinance 1902, was used as law that governed all residents and was not limited to any race or religion.[7] Muslims could marry under that Ordinance but there was no evidence of registration until 1906 when the Mohammed Marriage and Divorce Registration Ordinance was enacted.[8] The ordinance mainly provided for registration of Islamic Marriage and Divorce and basically procedural law and not substantive law. Currently Islamic Marriages are presided over by the Marriage Act of 2014, Part VII.[9]

However, with the various laws in place to guide Islamic Marriages, tension arises in the accomplishment of best interest of the minor and the Islamic cultural practices. This is seen in various sections of the law that the paper seeks to discuss. First, the law does recognize customary legislation as being part and parcel of the laws in Kenya by merit of section 3(2) of the Judicature Act.[10] Article 45(4) of the Constitution of Kenya proceeds to articulate that, parliament shall recognize whichever marriage that has been conducted under any traditional or religious manner provided those marriages are in agreement with the Constitution.[11] Thus, it is clear that a marriage conducted under customary law in Kenya will be deemed as valid.

[6] https://muslimsinafrica.wordpress.com/numbers-and-percentage-of-muslims-in-african-countries/ on February 13, 2018
[7] Kenya Legal Resource, Historical Developments of Family Laws in Kenya, 2011 http://www.kenyalawresourcecenter.org/2011/07/historical-development-of-family-laws.html
[8] Chapter 155, Mohammedan Marriage and Divorce Registration Act.
[9] Part VII, Marriage Act (2014).
[10] Section 3(2), Judicature Act (1967).
[11] Article 45(4), Constitution of Kenya (2010).

Section 49(3) of the Marriage Act says whichever stipulation not aligned with Islamic law and practices shall not be applicable to any individual who ascribes to Islamic faith.[12] The effect of the above provision is to accord Islamic Law, a high and prominent position with regard to the Marriage Act. Thus, a Muslim is free to celebrate an Islamic marriage bearing in mind it adheres to the tenets of Islamic law. A Muslim who is of rational thinking and is an adolescent (presumed to have been achieved once reaching 13 years of age, unless the contrary is proved) is said to have the met the requirements of marriage.[13] However a child according to the Constitution of Kenya is any individual who is yet to reach the age of 18 years.[14] This is likewise reassured by the Children's Act which proceeds to define early marriages as any union or inhabitancy with a minor.[15] Section 14 of the Children's Act ensures all children are safeguarded from detrimental cultural practices, which include early marriages.[16] This then raises a question on whether the attainment of the principle of the best interests of the minor is possible in regard to section 49(3) of the Marriage Act.

The term best interest of a child in the Convention on the Rights of the Child is seen to broadly mean the well being of the child.[17] Article 53(d) of the Constitution of Kenya furthers the principle of the best interest of the child as it articulates that all children are to be shielded from exploitation, negligence or any detrimental ethnic acts.[18] One may be tempted to say that section 49(3) of the Marriage Act can be validated on the basis of religious freedom. But it is safe to say that there is need to balance religious freedom and the principle of the best interests of the child. Thus, if a religious or a traditional practice is deemed unlawful by the Constitution one cannot validate it on the basis of religious freedom. This is also brought out in article 25 of the Constitution of Kenya, where the law states the rights and freedoms that cannot be restricted and religious freedom is not one of them.[19]

[12] Section 49(3), Marriage Act (Act No.4 of 2014).
[13] Patrick Kiage, Family Law in Kenya; Marriage, Divorce and Children, LawAfrica, 2016.
[14] Article 260, Constitution of Kenya (2010).
[15] Section 2, Children Act (No 8 of 2001).
[16] Section 14, Children Act (No. 8 of 2001)
[17] Article 3, Convention on the Rights of the Child, 20th November 1989.
[18] Article 53(d), Constitution of Kenya (2010).
[19] Article 35, Constitution of Kenya (2010).

Outside the constitutional context, some guidance on what can be considered legitimate in the interference of freedom of religion may be derived from international human rights law.[20] In the International Covenant on Civil and Political Rights, article 18 denies any kind of restriction on the liberty of free-thinking or conscience or on liberty to have and embrace a religion of an individual's liking.[21] However, it goes ahead under article 18 (3) to state, the limitations on the liberty of manifestation of a religion or conviction are allowed if the restraints are directed by the law and are important to safeguard the community's well-being, ethics and other essential rights and freedom.[22] It is clear that the ICCPR does actually aim to safeguard the most essential rights and freedom; and the principle of the best interests of the minor is a critical right.

This paper seeks to challenge the legality of section 49(3) of the Marriage Act.

1.2 Statement of the Problem:

The Marriage Act stipulates that any provision conflicting with Sharia law and customs is not applicable to individuals who ascribe to the Muslim religion.[23] This will therefore mean that the usual prerequisites for a lawful marriage are compromised since the Marriage Act accords Islamic law a higher and prominent position compared to other marriages celebrated in accordance to the Marriage Act.[24] One of the requirements for marriage is that one should be over the age of 18 years according to the Constitution and the Marriage Act.[25] However, this section compromises the standard of the well being of the child since in the Islam culture, a child can marry as long as they have reached the period of adolescence and are of sound mind. The ambiguity between the various provisions of the law gives room to the exposure of minors to cruel cultural activities that leave them miserable.

1.3 Objectives of the Study

1. To scrutinize whether there exists a relationship between the Marriage Act section 49(3) and the principle of the best interest of the child.

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[20] Freedom of religion, https://www.alrc.gov.au/publications/justifications-limits-freedom-religion 28th February 2018.
[21] CCPR, General Comment 22 on Article 18 of the 11CPR on the Right to Freedom of thought, Conscience and Religion, 30 July 1993.
[22] Article 18 (3), International Covenant on Civil and Political Rights, adopted on 19th December 1966.
[23] Section 49(3), Marriage Act (Act No. 4 of 2014).
[24] Section 49(3), Marriage Act (Act No.4 of 2014).
[25] Section 2, Marriage Act (Act No. 4 of 2014).

2. To assess whether the best interest of the child is attained when section 49(3) of the Marriage Act is retained.
3. To investigate the inconsistency that exists between Section 49(3) of the Marriage Act and Section 2 of the Children Act read together with article 53 of the Constitution of Kenya regarding Islamic children marriages.
4. To examine whether Article 32 of the Constitution of Kenya does validate the existence of Section 49(3) of the Marriage Act.

1.4 Hypothesis:

1. The retention of section 49(3) of the Marriage Act and article 32(4) of the Constitution of Kenya will prevent the achievement of the best interest of the child.
2. Section 49(3) of the Marriage Act and article 32(4) of the Constitution of Kenya are inconsistent with article 53(1d) (2) of the Constitution of Kenya and section 2 of the Children Act

1.5 Research questions:

1. Is there a legal problem that arises on the choice of law between the Constitution of Kenya and Islamic personal law when conducting an Islamic marriage involving minors?
2. Is section 49(3) of the Marriage Act consistent with the principle of the best interest of the child?
3. Does religious freedom as elaborated in article 32 of the Constitution of Kenya validate the existence of section 49(3) of the Marriage Act when conducting an Islamic marriage involving minors?
4. Can guidance be derived from international law regarding child marriages as it is seen to constitute part of the domestic laws in Kenya?

1.6 Justification of the Study:

This dissertation is necessary founded on the legitimate issues that emerge on the decision of legislation in regards to the Islamic law on children marriages relying on the Marriage Act and the principle of the best interest of the child. It brings about confusion as to whether a Muslim child getting into an Islamic marriage taking into consideration religious freedom will indeed contract a valid marriage under the Kenyan laws.

The study will guarantee that the standard of the well being of the minor is upheld no matter the existence of contradictory laws. This is because the dignity of the child should be preserved.

2.0 Literature Review

This section assesses literature relevant to the research problem. It will also discuss the books that were relevant in guiding this study.

2.1 Marriage.

In the instance of *Hyde v Hyde* nuptial was characterized as the volitional joining for life of one male and one female, to the barring of all others.[26] This description has however been seen to evolve over time in order to accommodate the various changes taking place. It is now defined as the willful joining between a male and a female whether in a monogamous or polygamous union.[27] The marriage can only take place and be recognized once the parties contracting the marriage have attained the age of majority. The age of majority is perceived to be when one reaches the full age, which is considered as 18 years and as a result stops to be under any disability.[28]

It is an important institution as it denotes the start of a person's separation from the parental unit, regardless of whether generations keep on being socially and financially interdependent. While for the community overall, it joins numerous persons from various families and represents the fabrication of a production and consumption unit as well for the trade of goods and services.[29]

Traditionally we see that the context of marriage was affected by culture and religion mainly. This exposed children to early marriage that were seen to affect the growth of the child negatively. The law however has evolved to lay down norms to be applied when dealing with marriage with an aim to guarantee the best interests of the minor is upheld. It has dealt with issues of age, consent, equality within marriage, among many other things that the paper will seek to expound on.

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[26] Hyde v Hyde (1866), Court of Probate and Divorce
[27] Section 3 Marriage Act (2014).
[28] Section 2, Age of Majority Act (2012).
[29] Agnes R. Quisumbing, Household decisions Gender and Development: A Synthesis of Recent Research, International Food Policy Research Institute, Washington D C, 2003.

2.2 Religious Freedom

Each individual has the liberty to free thinking, conscience and religion and political societies ought to endeavor to advance respect for this right and to assure its universal and effective acknowledgement and compliance.[30] Such a provision reflects a commitment that is comprehensively shared today regardless of whether it's respected and wrongly comprehended, to safeguarding the freedom of religion.[31] In the account of *Employment Division v Smith* religious freedom was seen to mean the liberty to accept and confess whatever religious doctrine one wishes.[32]

Religion is observed as an individual experience.[33] It is also for numerous people; religious activity gets significance in a large proportion from participation in a larger religious community in that a community represents an ongoing tradition of shared beliefs.[34] Freedom on the other hand is a concept of human rights. In relation to religion, freedom can be seen to be the ability of religious communities to oversee and arrange themselves, to decide on religious matters and also to create their own gauge for membership and administration without government intervention.[35]

It is seen as to refer to the prevailing literature on the subject matter.

Patrick Kiage, 'Family Law in Kenya; Marriage Divorce and Children' - Chapter 3 of the book talks about the different kinds of marriages in Kenya and their requirements for the marriage to be valid. It recognizes Islamic marriages and sets out the essentials and formalities for contracting a valid marriage. The book leaves a gap as it does indeed recognize children can marry and does not go further to discuss the matter.[36]

Dr. Peter Onyango, 'African Customary Law System: An Introduction' -Chapter 5 sets out the constitutional analysis of customary law in Kenya. It compares the old

[30] Article 18, Universal Declaration of Human Rights, 10 December 1948.
[31] Garnett W, Religious Liberty, Church Autonomy and The Structure of Freedom, Notre Dame Law School, Legal Studies Paper No. 10-10, 2010, 226
[32] Employment Division of Oregon v Smith (1990), The Supreme Court of the United States
[33] Wisconsin v Jonas Yoder (1972), The Supreme Court of the United States
[34] Corporation of the Presiding Bishop v Amos (1987), The Supreme Court of the United States
[35] Garnett W, Religious Liberty, Church Autonomy and The Structure of Freedom, Notre Dame Law School, Legal Studies Paper No. 10-10, 2010, 228.
[36] Kiage Patrick, Family Law in Kenya; Marriage, Divorce and Children, LawAfrica, Nairobi, 2016.

Constitution to the current Constitution of 2010. It proceeds to show the acknowledgment of customary law in the Judicature Act of 1967.[37]

The UN Refugee Agency, 'UNHCR Guidelines on Determining the Best Interest of the Child'- Chapter one talks about the best interests principles, the framework under international law that governs the principle such as the CRC. It fails to recognize that indeed harmful cultural practices exist such as early marriages that put the best interest of the child at risk of being compromised.[38]

An article by Thomas Hammarberg on 'The Principle of the Best Interest of the Child- What it means and what it demands from adults' – It talks about that the notion that the community should regard the best interests of the child as its seen as vital in all cultures. This is because; minors do embody the survival of the family, the land and mankind at large.[39]

Daniel Moeckli 'International Human Rights law'- it sheds light on religious freedom and how it can be limited. [40]

3.0 Research design

3.1 Research Methodology:

The study will be conducted mainly by qualitative analysis, which will primarily make use of secondary data such as statutes, scholarly works and case law. This will entail examining the work of others authors on issues relating to principle of best interests of the child and religious freedom. Newspaper articles, journals, reports and press release concerning child marriages will also be used.

3.2 Scope and Limitation:

Spouses in Islamic marriage may not be willing to give an impartial opinion of what they feel on early marriages because of their strong Islamic beliefs.

[37] Dr. Onyango Peter, African Customary Law System: An introduction, LawAfrica, Nairobi, 2013.
[38] The Un Refugee Agency, 'UNHCR Guidelines on Determining the Best Interest of the Child,' May 2008.
[39] Commissioner For Human Rights, Council of Europe, Thomas Hammarberg, The Principle of the Best Interest of the Child- What It Means and What It Demands From Adults, 30 May 2008.
[40] Moeckli Daniel, Sangeeta Shah, David Harris, Sandesh Sivakumaran, International Human Rights Law, Oxford University Press, Oxford, 2010

3.3 Chapter Breakdown:

This dissertation is partitioned into six chapters as follows:

Chapter one will cover the outline and background to the research. The outline of the research elaborates on the importance of human rights in the world today while the background of the research pays close attention to Islamic religion in Kenya and how its has evolved over time. It goes ahead to provide the statement of the problem, which is that, the best interest of the child is not achieved when Islamic marriages are conducted. This is because Islamic marriages gives room for the exposure of children to cruel ethnic practices that leaves them helpless. Lastly, it also includes the aims of the study and the method of research used while carrying out the study.

Chapter two will emphasis on examining the historical background of Islamic marriage law in Kenya. It will give a brief and general overview on marriage laws in Kenya.

Chapter three will analyze in detail the Marriage Act, the Children Act and the Constitution of Kenya. The study will pay close attention to Islamic marriages and the right to religious freedom. It will show how the best interest of the child in relation to Islamic marriage can be achieved. The chapter will aim to do that by showing how religious freedom can be limited if it interferes with a fundamental right or freedom.

Chapter four will analyse the nature of the principle of the best interest of a child relying on international law and how it has evolved over time. It will aim at looking if we can derive guidance from international law with regards to children laws.

Chapter five will also do a cultural comparative analysis with different religions recognized in Kenya with an aim to show that there is discrimination present if section 49(3) of the Marriage act is retained.

Chapter six shall provide a conclusion and recommendation based on the dissertation with a plan to feature whether the various aims of the study have been met and to what degree. In addition to that, it will act as a definitive synopsis of all the chapters of the paper.

CHAPTER 2: THEMATIC THEORETICAL REVIEW

2.1 Historical treatment of marriage law regimes in Kenya.

The historical background of marriage law in Kenya is segmented into three: before colonization, the colonial phase and the post colonization period.[41] Before colonization, indigenous groups had their own conventions, traditions and customary law directing the procedures and institutions regulating family and marriage. This was done by providing various procedures that were to be followed in the conduct and finalization of marriage. This also included the settlement of conflict and dissolutions.

The colonial government was seen to enact legislation prerequisites and religious systems and imported marriage laws that set apart indigenous conventional practices during the colonial period.[42] Indian and British Acts were seen to be first introduced in Kenya in 1897 when the East African order in council was proclaimed.[43] This meant that indigenous governance structures were to be used to enforce the common law of England in the East African Protectorate.[44] The order in council is seen to have had next to no application to the indigenous people. The commissioner-issued regulations were used to determine cases between indigenous people in the local courts. The 1897 Act required that issues affecting the penal status of non-Islamic locals be determined by customary legislation to the extent to which the said law would be applicable and Islamic law would apply to Mohammedan locals.[45] In relation to Christians, English and common law was seen to be applicable. The customary laws would be applicable to the extent that it was not abhorrent to morality.

It is from 1897 that a clear contrast between the Christian locals, non-Islamic locals and Islamic locals could be seen. In 1902 an order was passed which required that all cases both criminal and civil to which the locals were a party to, the courts were to conform to customary law to the extent to which it was pertinent and not contrary to justice and morality.[46] Under the 1902 orders in council the commissioner was given power to make laws in the protectorate. Among the laws

[41]Nancy Baraza, Kenya Law Reform Commission, 'Family law Reform in Kenya: An Overview' Presentation at Heinrich Boll Foundation Gender Forum in Nairobi, 30 April 2009, 3.
[42]Nancy Baraza, Kenya Law Reform Commission, 'Family Law Reform in Kenya: An Overview,' 3.
[43]Nancy Baraza, Kenya Law Reform Commission, 'Family Law Reform in Kenya: An Overview,' 3.
[44]Nancy Baraza, Kenya Law Reform Commission, 'Family Law Reform in Kenya: An Overview,' 3.
[45]Nancy Baraza, Kenya Law Reform Commission, 'Family Law Reform in Kenya: An Overview,' 3.
[46]Nancy Baraza, Kenya Law Reform Commission, 'Family Law Reform in Kenya: An Overview,' 3.

was the 1902 Marriage Ordinance. The Marriage Ordinance 1902 was used as law that governed all resident and was not limited to any race or religion.[47] Muslims could marry under the Ordinance but there was no evidence of registration until 1904 when the Mohammed Marriage and Divorce Registration Ordinance was enacted.[48]

Before the 2010 Constitution, marriage and divorce in Kenya was presided over by four diverse legal regimes. This included: Hindu Marriage and Divorce Act (Chapter 157) that guided members of the Hindu community; African Customary law that was based on the diverse traditional groups; Mohammedan Marriage and Divorce Act (Chapter 156) which guided members of the Muslim community: Marriage Act (Chapter 150) and the African Christian and Divorce Act (Chapter 151) which was used to regulate individuals who decided to wed under statutory law irrespective of their conventional or religious background.[49] The problem with the above laws were the numerous legal regimes which meant that an individual's rights and obligation with regards to marriage and annulment could only be resolved by making reference to the framework under which the marriage was made.[50] The Marriage Bill, 2007 was an endeavor to apprehend the preceding worried in the marriage law system in the state.[51] The salient features of the said bill were the integration of marriage laws to minimize the multifaceted nature, impulsiveness and ineffectiveness prompted by the array of legislations on the matter.[52]

2.1.1. History of Islam in Kenya.

In the early nineteenth century the establishment of the Sultanate of Zanzibar was evident, this led to the utilization of Islamic law along the East African coast. Kadhi courts were setup in significant towns of the Sultanate along the East African Coast.[53] However, the British

[47] Kenya Legal Resource, Historical Development of Family Laws in Kenya, 2011 http://www.kenyalawresourcecenter.org/2011/07/historical-development-of-family-laws.html
[48] Mohammedan Marriage and Divorce Registration Act, Chapter 155.
[49] Nancy Baraza, Kenya Law Reform Commission, 'Family Law Reforms in Kenya: An Overview,' 4.
[50] Nancy Baraza, Kenya Law Reform Commission, 'Family Law Reforms in Kenya: An Overview,' 4.
[51] Nancy Baraza, Kenya Law Reform Commission, 'Family Law Reforms in Kenya: An Overview,' 5.
[52] Nancy Baraza, Kenya Law Reform Commission, 'Family Law Reforms in Kenya: An Overview,' 5.
[53] Shamil Jeppie, Ebrahim Moosa, Richard Roberts, *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post- Colonial Challenges,* Amsterdam University Press, Amsterdam, 2010.

Protectorate was established along the Kenyan Coast in 1890 and this resulted to the reduction of the jurisdiction of Kadhi courts and the function Muslim law.[54]

Concession was to be given to the Imperial British East Africa Company by Sultan Barghash bin Said in May of the year 1887, to oversee the ten-mile coast strip of Kenya and Zanzibar for a period of 50 years under the power of the Sultan of Zanzibar.[55] The concession provided all authority to the company to enact legislation for the administration of districts and to set up official courtrooms. In addition to this, the concession allowed the company to oversee the appointment of the judges for the courts of justice subject the Sultan's approval, and specified that the Sultan nominate all Kadhis. The administrative officers exercised jurisdiction over the Sultan's subjects by virtue of the authority delegated to them under the concession.

Regarding religious matters and a way of honoring the Sultan and his subjects, the British government embraced a non-interference policy. The Sultan and the company agreed between May 1897 and August 1899 that brought about the conceding on concessions for the company to govern parts of the Sultan's territories.[56] The dominions of the Sultan were necessitated to be governed according to Islamic law. An acquisition of the company was prompted by the financial crisis in the year 1897, by the British government to mitigate it from the financial burden.[57] This in turn led to the Sultan entering a new agreement with the British Administration, whereby they would be entrusted to appoint officers directly. The British government progressively exerted its influence on the administrative and legal structures and assumed direct control of jurisdictions, in which the ten-mile coastal strip of Kenya was affected.

With the 1897 order in council, there was broad power which gave permission to the chief native court presided over by the British judicial officers who practiced overall administration over all junior native courts within the Protectorate region, Kadhi courts encompassed.[58] One of the policy objectives was to ensure that Kadhi courts would remain inside its colonial control. This

[54] Shamil Jeppie, Ebrahim Moosa, Richard Roberts, *Muslim Family Law in Sub- Saharan Africa: Colonial Legacies and Post- Colonial Challenges,* Amsterdam University Press, Amsterdam, 2010
[55]Shamil Jeppie, Ebrahim Moosa, Richard Roberts, *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post- Colonial Challenges,* Amsterdam University Press, Amsterdam, 2010
[56] Shamil Jeppi, Ebrahim Moosa, Richard Roberts, *Muslim Family Law in Sub-Saharan African: Colonies Legacies and Post- Colonial Challenges,* Amsterdam University Press, Amsterdam, 2010
[57] Shamil Jeppi, Ebrahim Moosa, Richard Roberts, *Muslim Family Law in Sub-Saharan Africa: Colonies Legacies and Post- Colonial Challenges,* Amsterdam University Press, Amsterdam, 2010
[58] Shamil Jeppi, Ebrahim Moosa, Richard Roberts, *Muslim Family Law in Sub-Saharan Africa: Colonies Legacies and Post Colonial Challenges,* Amsterdam University Press, Amsterdam, 2010

approach succeeded to some extent in bureaucratizing Kadhi courts and conveying them under the colonial judiciary framework. An appeal system was taken up with an aim to ensure that full control over the Kadhi was adopted, whereby cases from the Kadhi courts were passed through the chief Kadhi, thereafter it could proceed to the high court. This materialized during the colonial period. Islam law was to govern matters relating to criminal, civil and personal status, which all persons who ascribed to Muslim faith would adhere to as highlighted in Article 3 of the East African Order in council of 1897.[59] However, this was not achieved as it was seen to omit Muslims who resided in Kenya from being under the jurisdiction of Islamic law courts to the extent that to criminal law was concerned. As a result of this, personal complaints only were restricted to be conducted according to Islamic law.

After independence, the Constitution, which was promulgated in year 1963, was seen to acknowledge Kadhi courts alongside the convention judicial system.[60] Article 66(1) to (5) was seen to stipulate the establishment of Kadhi courts in the Constitution.[61] As stated in Article 66(1), there was a need for a chief Kadhi who was to be accompanied by other Kadhis' and the minimum requirement of the other Kadhi's being three, as may be provided for by an Act of Parliament.[62] The Kadhi's court jurisdiction as detailed in Article 66(5) was seen to encompass the resolving of queries of Muslim law, concerning private status, marriage and annulment or succession in which all the members to the claim proclaim the Muslim faith.[63] Kadhi courts were seen to upsurge in number from the initial three courts as parliament established and spread more of them to other regions in the country.[64] This was enabled with the passage of the Quadis' Courts Act 1967 which saw the establishments of two courts in all the seven provinces of Kenya.[65]

[59] Article 3, East African Order in Council of 1897.
[60] Wanyonyi K, 'The Kadhis' Courts in Kenya: Towards Enhancing Access to Justice for Muslim Women' Published LLM Thesis, Lund University, Sweden, 2016, 16.
[61] Wanyonyi K, 'The Kadhis' Courts in Kenya: Towards Enhancing Access to Justice for Muslim Women' Published LLM Thesis, Lund University, Sweden 2016, 16.
[62] Article 66(1), Constitution of the Republic of Kenya (1963).
[63] Article 66(5), Constitution of the Republic of Kenya (19630).
[64] Wanyonyi K, 'The Kadhis' Courts in Kenya: Towards Enhancing Access to Justice for Muslim Women' Published LLM Thesis, Lund University, Sweden, 2016, 16.
[65] Wanyonyi K, 'The Kadhis' Courts in Kenya: Towards Enhancing Access to Justice for Muslim Women' Published LLM Thesis, Lund University, Sweden, 2016, 16.

2.1.2 The Codification and Unification

Kadhis' courts are seen to appreciate the acknowledgement of the lawful structure in Kenya it however, did not come easily. In the course of the constitutional review process that kept going more that two decades, Kadhi courts was one of the most debated matters. Following many years of constitutional dispensation in Kenya, starting in the early 1990s, Kenyans voted in favour of the new constitution that was promulgated on the 27th August 2010. After the passing of the 2010 Constitution, the position of the Kadhis' Courts was strengthened in the new Constitution and in addition to that, parliament passed laws setting up a Kadhis' Court in every one of the forty-seven regions in Kenya. The Kadhis' courts are lead by the Chief Kadhi and are viewed as lower courts alongside the Magistrates court. The Constitution specifies the requirements for one to be qualified as a Kadhi is:

a) One must be a Muslim
b) They must have an understanding of Muslim law relevant to any sects of Muslims as qualifies the individual, in the assessment of the Judicial Service Commission, to hold a Kadhi's court.[66]

The Marriage Act of No 4 of 2014 now guides marriage and divorce in Kenya. It was a demonstration of parliament to correct and solidify the different laws identifying marriage and divorce.[67] Part VII of the said act deals with marriages under Islamic law and it clearly states that that part of the act will only be applicable to people who declare the Islam faith.[68]

2.2 The Present Differential Treatment of Islamic Marriages under the Marriage Act

There exists a present differential treatment for Islamic marriages. It is clearly seen as section 49(3) accords Islamic marriages a higher and prominent position compared to other marriages recognized in the Marriage Act. One of the conditions relating to capacity while contracting and celebrating an Islamic marriage is that the parties must have reached the age of puberty.[69]

[66] Article 170(2), Constitution of Kenya (2010).
[67] Part 1, The Marriage Act (Act No 4 of 2014).
[68] Section 48, The Marriage Act, (Act No 4 of 2014).
[69] Kenya Legal Resource, Marriage under Islamic Law ; http://www.kenyalawresourcecenter.org/2011/07/marriage-under-islamic-law.html

Puberty is the age that comes before the age of maturity, and it commences for males at 14 while for females at 12 years.[70]

Section 49(3) of the Marriage Act reads as follows, that any requirement that is stated by the act and is seen to be conflicting with Islamic law and practices shall not be applied to any person who professes Islamic faith.[71] One of the provisions in the Marriage Act is that the minimum age to contract a valid marriage is the person should have reached the age of eighteen years.[72] This provision is inconsistent with the Islamic tradition and thus shall not be considered when contracting an Islamic marriage. The section opens the floodgates to the breach of the principle of the best interest of the child as it leads to early marriages, which is one of the most harmful practices.

One may argue that each and every individual has a right to freedom of conscience, religion, thought, belief and opinion as stated in the Constitution of Kenya.[73] However religious freedom is a limitable right under the Constitution of Kenya as per article 25. The limitation in this case is justified as it is viewed as necessary and legitimate for the sake of furthering the principle of the well being of the minor. The practice of early marriages in order to further one religious freedom and beliefs denies the child room for growth and development, which is a necessary condition of human wellbeing and should be prohibited.

[70] https://www.ohchr.org/Documents/Issues/Youth/Yamassee-Moors.pdf
[71] Section 49(3), The Marriage Act (Act No 4 of 2014).
[72] Section 4, The Marriage Act (Act No 4 of 2014).
[73] Article 32, Constitution of Kenya (2010).

CHAPTER 3: THE LEGAL FRAMEWORK OF MARRIAGE

3.1. The Different Legal Regimes Governing Marriage in Kenya and Religious Freedom.

3.1 Introduction

The privilege to marry an individual of the opposite sex is the bedrock of harmonious relations between interpersonal relationships and the community at large. The definition of marriage is one that is seen to vary around the world not only between cultures but also between religions. Marriage in Kenya is, the discretionary joining of a male and female whether in a monogamous or polygamous union and that is registered in conformity with the Marriage Act.[74] This is further supported by the Constitution that stipulates for the right of every full-grown being to wed any individual of the opposite sex of his or her choice relying on his or her free consent.[75]

We see that previous to the 2010 Constitution of Kenya and the Marriage Act, marriages in Kenya were governed by four different laws namely: the African customary laws which applied to Kenyans of African descent, the Mohammedan Marriage and Divorce Act which governed Islamic marriages, Hindu Marriage and Divorce Act which governed Hindu marriages and lastly the Marriage Act and the African Christian Marriage and Divorce Act which governed any individual who married under legal law.[76] There was need to consolidate family laws this is because different laws had different requirements for valid marriages and divorce.[77] The Commission on Marriage and Divorce Law in Kenya saw it fit to suggest an unchanging, exhaustive law of marriage and divorce to apply to all individuals in Kenya and to supersede the prevailing laws.[78] With that in mind a new Marriage Act was adopted in 2014, which amended and consolidated the various laws identifying to marriage and divorce.[79]

There are various types of marriages that are acknowledged and celebrated in Kenya currently. The marriages stipulated in the Marriage Act which may be registered once commemorated include: a Christian marriage celebrated in conformity with the rituals of a Christian denomination, a civil marriage, a marriage in line with the customary rites which relate to any of

[74] Section 3(1), Marriage Act (Act No 4 of 2014).
[75] Article 45(2), Constitution of Kenya (2010).
[76] Nancy Baraza, Kenya Law Reform Commission, 'Family Law Reforms in Kenya: An Overview,' 4.
[77] Republic of Kenya, Report of the Commission on the Law of Marriage and Divorce, 1968,1.
[78] Republic of Kenya, Report of the Commission on the Law of Marriage and Divorce, 1968,1.
[79] Part 1, Marriage Act (Act No 4 of 2014).

the communities in Kenya, a Hindu marriage that is honoring the Hindu rites and ceremonies and an Islamic marriage in agreement with Islamic law.[80]

3.2. Marriage Under Islamic Law

The Constitution of Kenya gives legality to Islamic marriages in Article 45(4) which proceeds to state that parliament shall pass laws that acknowledge matrimonies determined under any custom or structure of religious, individual or family law.[81] Islamic marriages can be classified as customary in nature. This can be justified by the fact that certain requirements listed in the Marriage Act have been met. The first feature of a customary marriage is that it is polygamous or potentially polygamous. The Marriage Act justifies this as it states matrimony commemorated under traditional law or Islamic law is presupposed to be polygamous or potentially polygamous.[82] It is important to note that, in Muslim marriages polygamy is restricted.[83] Secondly, marriage under the act is expected to be commemorated as per the traditions of the communities of one or both of the parties to the intended marriage.

In addition to that, religion is seen to play a large role in marriage and that is quite evident in the Marriage Act as it recognizes the various marriages that take place in spite of the existence of different religions and cultures. It is seen to act as a guide to many people who want to get married. The Constitution gives legality to Islamic marriages through Article 32 which goes ahead to state that, each individual has the right, either separately or in a community with others in the open or private, to show any religion or belief through worship, educating, practicing, or recognition of a day of adoration.[84] The significance of this article is that it can be said to validate the existence of section 49 of the Marriage Act. This is because when one is conducting an Islamic marriage, they are seen to be expressing their religious beliefs when exercising their religious freedom.

[80] Section 6(1), Marriage Act (Act No 4 of 2014).
[81] Article 45, Constitution of Kenya (2010).
[82] Section 6(3), Marriage Act (Act No 4 of 2014).
[83] Andrea Buchler, Christina Schlatter, 'Marriage Age in Islam and Contemporary Muslim Family Laws,' 1 Electronic Journal of Islamic and Middle Eastern Law 1, 2013, 43.
[84] Article 32, Constitution of Kenya (2010).

3.3. The definition of the principle of the best interest of the child in relation to marriage

A minor implies any being who has not achieved the age of 18 years unless, the laws that govern the region the child inhabits; the majority age is reached earlier.[85] As far as the applicable legislation on children in Kenya, namely the Children's Act, a minor is defined as any person less than eighteen years of age.[86] Simply put the best interest of the child means that any decision that is seen to be affecting the life of a child is highly considered before implementation.[87] This principle is seen to be defending and advancing the rights of the minors including young persons undergoing puberty who fall under its competence. Article 3 of the Convention of the Rights of the Child articulates that the best interests of the minor shall be a predominant thought in all activities affecting children.[88] In the context of marriage, the best interest of the child is to be protected from early marriages. This is because it is an infringement of critical rights, which tends to deny the child other rights such as the right to education. It is also as a dangerous cultural practice that exposes the minor to physical and psychological harm that is detrimental to their development.

3.4. Religious freedom and the principle of the best interest of the child

Evidently when an Islamic Marriage is conducted, one is exercising their religious freedom. There now exists a need to balance the two to prevent conflict, as religious freedom is usually a delicate area in necessitating the creation of relations between the religious communities and the government. With an aim to decide the extent of margin of appreciation of the freedom of religion the court is guided by Article 24 of the Constitution which states the guidelines in which a fundamental freedom can be restricted in an open and democratic society.[89]

There seems to exist conflict between religious freedom and the best interest of the child when conducting an Islamic Marriage and thus there is need to balance the two using the different laws. This is because the Marriage Act is seen to accord Islamic Law, a high and prominent position compared to other marriages celebrated in accordance to the said Marriage Act. It states

[85] Article 1, *Convention on the Rights of the Child*, 20 November 1989.
[86] Section 2, *Children Act* (Act No 8 of 2001).
[87] Yvonne Dausab, 'The Best Interest of the Child' In Children's Right in Namibia (2009) https://www.kas.de/c/document_library/get_file?uuid=8d63dc56-5e47-cc0a-1e09-89240398a776&groupId=252038
[88] Article 3, *Convention on the Rights of the Child*, 20 November 1989.
[89] Article 24, *Constitution of Kenya*, (2010).

that, any requirement conflicting with Islamic Law and practices won't have any significant bearing to people who proclaim the Islam faith.[90] This section compromises the principle of the best interest of the child since in Islam Culture a child can marry as long as they have reached the age of puberty and they are of sound mind.[91]

In the instance of the *Council of Imams and Preachers of Kenya* the issue of children marriages was raised when conducting an Islamic marriage.[92] The summary of the facts of the case were, a girl aged sixteen years was a child ascribed to the Islamic faith at the material time when she was getting married in conformity with Islamic law. The Attorney General's argument was that the marriage was illegitimate because of her age. The Council of Imams and Preachers of Kenya replied that she had the ability to get married with reference to Islamic law. This resulted to criminal proceedings, as it was marriage with a minor, which is prohibited.[93] The main claim of the Council of Imams and Preachers of Kenya was that they claimed violation of the girl's right to express their religious freedom.[94]

It was decided that in Kenya, the law prohibits marriages of individuals under the age of 18. It was evident that the girl fell under the category of a child as portrayed in article 260 of the Constitution.[95] In addition to that, the right to marry which is stated in article 45(2) of the Constitution is only accessible to grown-ups.[96] A grown-up is any human being who has accomplished the age of 18 years.[97] It is true that the Constitution of Kenya allows the liberty to practice one's religion however; the said liberty must be undertaken in accordance with the rest of the Constitutional provisions.[98] Thus the marriage was declared to be null and void.

The Constitution is seen to recognize the warrant to marry only as between adults of the opposite gender.[99] It goes ahead to call upon the legislature to pass laws that acknowledges certain marriages. Article 45(4) stipulates that such matrimonies or structures of private law ought to be

[90] Section 49(3), Marriage Act (Act No. 4 of 2014).
[91] Andrea Buchler, Christina Schlatter, 'Marriage Age in Islam and Contemporary Muslim Family Laws,' 1 Electronic Journal of Middle Eastern Law, 1, 2013, 40.
[92] Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others (2015) eKLR
[93] Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others (2015) eKLR
[94] Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others (2015) eKLR
[95] Article 260, Constitution of Kenya (2010).
[96] Article 45(2), Constitution of Kenya (2010).
[97] Article 260, Constitution of Kenya (2010).
[98] Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others (2015) eKLR
[99] Article 45(2), Constitution of Kenya (2010).

to the degree that they are in line with the Constitution.[100] Article 32 of the Constitution of Kenya warrants religious rights and freedoms and consents for one's manifestation in conjunction with Article 45(4).[101]

The query that is seen to arise is, is there a law that is in place that restricts minors from contracting a valid marriage in Islamic culture. According to the treatises depended on by the Council of Imams and Preachers of Kenya, it is apparent that Islamic law allows unions involving children bearing in mind that the child has reached that age of adolescence and is of a developed mind and has assented to the equivalent.[102] The Council of Imams and Preachers of Kenya argued that regardless of the meaning that is taken on it must not restrain the right or crucial freedom so as to lessen it from its basic or indispensable meaning as per article 24(4).[103] Article 24 is recognition by the citizens of Kenya that not all rights and fundamental freedoms in the Bill of Rights are supreme.[104] The constitution anticipated the rights and freedom that can be limited hence stated that the rights and fundamental freedoms in the Bill of Rights are subject only to the limitations contemplated in this constitution.[105] Article 24 provides guidance on limit of the said rights and freedoms that are not absolute. The right to conduct an Islamic marriage is not one of those rights considered absolute under article 25 of the Constitution.

Since Islamic Marriages are not considered absolute, the Constitution goes ahead to compel the court that before limiting one's right to religious freedom, it should read the law in a way that promotes crucial freedoms and human rights.[106] Thus, if a person is practicing a religious freedom that is against certain fundamental rights it can be limited with an aim of protecting the fundamental freedom and rights. This can be justified by the fact that the freedom of conscience and of religion does not defend every single act or form of behavior encouraged by a religion or a belief. It protects a persons' private sphere of conscience but not necessarily any public conduct inspired by that conscience.

[100] Article 45(4), Constitution of Kenya (2010).
[101] Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others (2015) eKLR
[102] Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others (2015) eKLR
[103] Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others (2015) eKLR
[104] Article 24, Constitution of Kenya (2010).
[105] Article 19(c) (3), Constitution of Kenya (2010).
[106] Article 259(1), Constitution of Kenya (2010)

Article 53 of the Constitution looks into the different rights of children. It stipulates that each minor has a right to be safeguarded from threatening ethnic practices, abandonment issues and any kind of insensitive conduct.[107] It is clear from that provision, that the Constitution of Kenya considers the principle of best interest of the child as a paramount and predominant point of deliberation before making important decisions affecting children. Thus, from Article 53 children have a right to be safeguarded from untimely matrimonies regardless of it being a religious practice.

The Children Act section 14 forbids premature marriages and proceeds to describe it as, no individual will expose a minor to female genital mutilation, early matrimonies or other ethnic rites, traditional or custom practices that are probably going to have negative impacts to the minor's well-being, social well-being, solemnity or physical or mental growth.[108] It goes ahead to state that a child who is subjected to premature marriage in need of support and protection since the practice is detrimental to a child's life, education and health.[109] In the Council of Imams and Preachers of Kenya case the girl in question was a minor at the material time when the marriage took place since she was 16 years.

The Kenyan legal regime has made significant strides towards the prompt embodiment of the principle. The constitution has ensured that it protects the child within its borders despite their beliefs. Thus, one cannot qualify the reason for orchestrating early marriages is justified under article 32 of the Constitution. Therefore, there is a need for legal reforms with the Marriage Act Section 49(3). The reform should set the legal age for marriage at 18 or higher and eliminate any religious exceptions that affect the best interest of the child. This is because in Kenya, child marriages are seen to be prohibited by national law, however, its seen that one can contract a marriage earlier through religious or personal law exceptions. The courts can defend this amendment as they serve as good ground to ensure the enforcement of laws that prohibit early marriages, thus any person discovered carrying out the felony is criminalized and condemned to jail.

[107] Article 53(1d), Constitution of Kenya (2010).
[108] Section 14, Children Act (Act No 8 of 2001).
[109] Section 119(1)(h), Children Act (Act No 8 of 2001).

CHAPTER 4: INTERNATIONAL FRAMEWORK THAT GOVERNS THE CHILDREN MARRIAGES.

4.1. Introduction

We see that in the past, children were simply expected to be seen and not heard. Subsequently, their perspectives and interests did not make a difference. These and other entrenched convictions about children in our communities have left them defenseless, making them helpless to physical, mental, emotional and sexual abuse.[110] Therefore, the state of affairs in which children find themselves into justify their need for protection. There is thus a developing universal agreement that children matrimonies need to be eliminated, and this agreement finds its roots in international law. This is because children marriages are seen to deprive the child, especially the girls, their rights to education amongst many other rights.[111] In addition to that, early marriages prevent children from experiencing their youth and youthfulness as they are relied upon to assume control over family responsibilities at a very tender age.[112] Lastly, from a clinical perspective, there exist numerous risks about young ladies married off when they are still minors such as the dangers of difficulties during the pregnancy and delivery.[113]

Looking into the significant and delicate nature of this issue, there have been various endeavors to define what qualifies as children marriages through international framework. This chapter seeks to discuss what international human rights agreements state about the child marriages as posed in question four of the study, which reads, can guidance be derived from international law regarding child marriages as it is seen to constitute part of the domestic laws in Kenya? This is because of the way that, the Kenyan Constitution specifies that universal agreements and the general rules of public international legislation are relevant and form some portion Kenyan

[110] Dausab Yvonne, 'The Best Interest of the Child,' Children's Rights in Namibia, 2009, 145 https://www.kas.de/c/document_library/get_file?uuid=8d63dc56-5e47-cc0a-1e09-89240398a776&groupId=252038

[111] Gender, Rights and Civic Engagement Section, Division of Policy and Practice, 'Child Marriage and the Law,' UNICEF, Legislative Reform Initiative- Paper Series, April 2007, 6 https://www.unicef.org/french/files/Child_Marriage_and_the_Law.pdf

[112] Andrea Buchler, Christina Schlatter, 'Marriage Age in Islam and Contemporary Muslim Family Laws,' 1 Electronic Journal of Islamic and Middle Eastern Law, 2013, 44.

[113] Laura Davids, 'Female Subordination Starts At Home: Consequence of Young Marriage and Proposed Solutions,' 2007 https://heinonline.org/HOL/LandingPage?handle=hein.journals/regjil5&div=13&id=&page=

domestic law.[114] Thus once the Kenyan government ratifies an international instrument, it becomes directly applicable in the legal system.

4.2. International framework that addresses child marriages

International awareness and the global commitments regarding rights of children and early marriages began with the Universal Declaration of Human Rights in 1948 and since then the world has witnessed improvements in children rights. This instrument generally addresses human rights as a whole and thus each individual is eligible to the said rights. Article 16 of the declaration deals with marriage and states, persons of eligible age, without any restriction due to race, nationality or religion, reserve the option to wed and establish a household.[115] In addition to that, under the same provision, minors are explicitly tended to by the UDHR when it articulates, motherhood and childhood are owed exceptional attention and aid including infants born out of wedlock.[116] This declaration grants all individuals socio-economic rights that are critical for their well-being.

The ICCPR and the ICESCR of 1966 are two important global covenants that uphold a crucial repute in the realm of human rights movement.[117] Article 23 appreciates the right of both male and female of marriageable age to found a household.[118] Article 24 unmistakably expresses a responsibility of the family, the general public and the government towards the safeguarding and execution of the rights of the minor in overall and the well being of the minor specifically.[119] In the ICESCR, the household is perceived as the normal and foundational unit of the community and is given the widest possible protection and support not only for it being a critical pillar of the community, but also for its duty regarding the care and education of children.[120] It also goes ahead to state that minors should be safeguarded from financial, social and any kind of exploitation.[121]

[114] Article 2, Constitution of Kenya (2010)
[115] Article 16, Universal Declaration of Human Rights, 10 December 1948
[116] Article 25, Universal Declaration of Human Rights, 10 December 1948
[117] International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, 19 December 1966
[118] Article 23, International Covenant on Civil and Political Rights, 19 December 1966
[119] Article 23, International Covenant on Civil and Political Rights, 19 December 1966
[120] Article 10, International Covenant on Economic, Social and Cultural Rights, 16 December 1966
[121] Article 10, International Covenant on Economic, Social and Cultural Rights, 16 December 1966

In the CEDAW it is categorically provided that children marriages are not allowed.[122] While children marriages are not addressed directly in the UNCRC but instead are associated with different rights such as the right to be safeguarded from all sorts of maltreatment and the privilege to be shielded from dangerous conventional practices.[123] It goes ahead to stipulate that in all activities regarding children the fundamental consideration shall be the well-being of the child. [124] The CRC also forbids state parties from allowing or offering legality to a union between people who are yet to achieve their age of majority.[125] There is a need for overall obligation of the government and the family or guardian of the minor who are required to ensure the child is protected from early marriages.[126] This provision implicates a universal legal duty on the state parties to make utmost endeavor to guarantee the acknowledgement of the principle that both parents have mutual responsibility for the nurturing and advancement of the infant.[127]

4.3. Balancing religious freedom and the principle of the best interest of the child under international law.

Freedom of thought, conscience and religion is based on the establishment of a society that is democratic society. It is, in its religious dimension, one of the most crucial components that go to make up the distinctiveness of a believer and their notion of life.[128] We can therefore derive guidance from European jurisprudence on how the right to freedom of conscience, religion, thought, belief and opinion is viewed. Article 9 of the convention states that, every individual has the right to freedom of thought, conscience and religion which encompasses the ability to adapt one's religion or conviction, either separately or with a society.[129] It proceeds to state that one's freedom to religion or conviction will be dependent upon restrictions that are stipulated by law.[130] It is evident from the above provisions that the ECHR appreciates diverse cultures and

[122] Article 16, Convention on the Elimination of All Forms of Discrimination against Women,18 December 1979.
[123] Global Policy Section, 'Child Marriage and the Law, Legislative Reform Initiative -Paper Series,' 2007 https://www.unicef.org/french/files/Child_Marriage_and_the_Law.pdf
[124] Article 3, Convention on the Rights of the Child, 20 November 1989
[125] Article 16(2), Convention on the Rights of the Child, 20 November 1989
[126] Article 18, Convention on the Rights of the Child, 20 November 1989
[127] Aron Degal, Shimelis Dinku, 'Best Interest of the Child: Meaning, History and Its Place Under Ethiopian Law', 5 Mizani Law Review 2, 2011, 329
[128] Barton Daniel, 'Freedom of Religion in European and International Law and its Relation to other Fundamental Rights' Published LLM Thesis, Charles University, Prague, 2008, 19.
[129] Article 9, European Convention on Human Rights, 4 November 1950
[130] Article 9, European Convention on Human Rights, 4 November 1950

upholds their manifestation of religion. Thus, one is free to carry out an Islamic marriage in observance to their religious belief.

Despite the fact the ECHR appreciates that all individual have an established right to freedom of conscience, religion, thought, belief and opinion and the right to manifest his/her religious beliefs through worship and practicing what is required by his religious faith, these rights are not absolute. The said right can be justified if it is seen to be interfering with public safety, safeguarding of civic order, well being or the fortification of the rights and freedom of others.[131] Bearing that in mind, there now arises a need to balance the two fundamental rights to prevent conflict, as religious freedom is usually a delicate area in necessitating the creation of relations between the religious communities and the government, the state appreciates a wide edge of appreciation.[132]

The query that then arises is whether a minor can contract a legal marriage relying on European and international laws. In relation to early marriages we see that it goes against the principles of human dignity, as they are a violation of the guideline of the best interest of the young person, which is seen as one of the most dangerous practices. It denies the child room for growth and development, which is viewed as a fundamental interest in the society that is necessary. Thus, there is a need to limit religious freedom to ensure the best interest of the child is attained. In *Kokkinakis v Greece* the reason why religious limitations exist is because the state acknowledges in a society that is democratic in nature there exists various religions that live together in the same population thus, it is crucial to put limitations on religious freedom so as to accommodate the interest of different communities and to guarantee everybody's convictions are regarded.[133]

Lastly, in the account of *Cantwell v Connecticut*, the U.S Supreme Court clearly states that, the freedom of conscience and freedom to follow those religious institution or system of adoration as a person may please cannot be constrained by legislation however the freedom to act on that belief may be limited.[134] This is because the freedom to belief is absolute but behavior stays subject to the guideline for the assurance of people.[135] This case acts, as a good explanation as to

[131] Article 9, *European Convention on Human Rights*, 4 November 1950.
[132] Council of Europe, Overview of the Court's case law on freedom of religion.
[133] *Kokkinakis V Greece* (1993), The European Court of Human Rights, (2013).
[134] *Newton Cantwell v State of Connecticut* (1940), Supreme Court of the United States.
[135] *Newton Cantwell v State of Connecticut* (1940), Supreme Court of the United States.

why the freedom of religion embodied in our Constitution and other universal instruments that constitute part of Kenyan legislation is not absolute. That depending on the peculiar circumstance of a case, limitation of the freedom of religion is possible if it is seen as necessary, legitimate and proportionate for the sake of equality, harmony and equity.

CHAPTER 5: CULTURAL COMPARISON ON MARRIAGE

An Islam marriage is referred to as nikah and is viewed as a profoundly strict contract. This is because it is a civil agreement that legitimizes sexual interactions and procreation.[136] It is critical to note that Islamic law is basically founded on four sources, the first one being the Quran, which is the predominant source of law, followed by the Sunna, which represent the sayings, the ways and the habits of the prophet.[137] It is also founded on the qiyas, which means the interpretation through analogy and the ijma which means the agreement of legal scholars.[138] These sources are seen to act as a guide to any party wanting to marry under Islam. As stated in the Quran, each individual has an obligation to contract a marriage as long as they are physically, financially and mentally fit.[139] In Islam a marriage is only seen to be valid if the two parties have full legal competence. Legal competence is seen to mean that they are both of age and sane mind.[140] It is important to note that in Islam, marriageable age coincides with the commencement of puberty.[141] The idea of puberty is characterized by physical maturity, for instance the onset of menses or the emission of semen.[142]

The Marriage Act emphasizes that any requirement that is stated in the Marriage Act and is perceived to be conflicting with Islamic law and practices shall not be applied to any person who professes Islamic faith.[143] This clause is seen to accord Islamic Law, a high and prominent position compared to other marriages celebrated in accordance to the said act. It is safe to say, based on that provision, that it is a discriminatory clause. This is because all the other marriages are seen to comply with the basic prerequisites of the Constitution and the Marriage Act required by any party intending to marry. One of the requirements is that both parties contracting the marriages have attained the age of eighteen years.[144] The marriages stipulated in the Marriage Act, which may be registered once commemorated include: a Christian marriage celebrated in conformity with the rites of a Christian denomination, a civil marriage, a marriage in line with

[136] John L. Esposito, Natana J. Delong- Bas, Women in Muslim Family Law, 2 ed, Syracuse University Press, Syracuse, New York, 2001
[137] Andrea Buchler, Christina Schlatter, 'Marriage Age in Islam and Contemporary Muslim Family Laws,' 1 Electronic Journal of Islamic and Middle Eastern Law, 2013, 38.
[138] Andrea Buchler, Christina Schlatter, 'Marriage Age in Islam and Contemporary Muslim Family Laws,' 38.
[139] Andrea Buchler, Christina Schlatter, 'Marriage Age in Islam and Contemporary Muslim Family Laws,' 39.
[140] Andrea Buchler, Christina Schlatter, 'Marriage Age in Islam and Contemporary Muslim Family Laws,' 40.
[141] Andrea Buchler, Christina Schlatter, 'Marriage Age in Islam and Contemporary Muslim Family Laws,' 40.
[142] Andrea Buchler, Christina Schlatter, 'Marriage Age in Islam and Contemporary Muslim Family Laws,' 40.
[143] Section 49(3), *Marriage Act* (Act No. 4 of 2014).
[144] Section 4, *Marriage Act* (Act No. 4 of 2014).

the customary rites which relate to any of the communities in Kenya, a Hindu marriage that is honoring the Hindu rites, are all seen to comply with the requirement that one has to have attained eighteen years.[145]

Bearing that in mind, we see that impartiality provisions in the Constitution have aided to destroy inconsistent family legislations and marital legislation.[146] Law reform processes have the ability to examine regional customs and traditions taking into consideration the national and global standards.[147] The Constitution of Kenya is based on the idea that where ethnic limitations prevent the realization of the best interest of the child, the cultural custom must give way. It states that where such matrimonies or systems of personal law exist, they should only be allowed to the degree that they are in conformity with the Constitution.[148] From an international view, we can derive guidance on the same from the CEDAW, which ties states to wipe out discrimination in national constitutions and to change or abolish practices, legislations and customs that discriminate against females.[149] In addition to that, the UNCRC places an obligation upon states to ensure that they take suitable measures to guarantee that the minor is shielded against all types of discrimination.[150] The rationale behind the rules is that when a minor is married off he or she is discriminated against on the justification of age or religion.

In conclusion, Islamic law is not national law, but a source and perspective for a lawful directive for Muslims. This is because it is not codified but it is seen to represent a specific interpretation of the religious sources on which it is based. Thus, it should not be viewed as absolute. The Constitution is the preeminent legislation and if personal legislation is in contradiction to the Constitution, the Constitution will always override personal legislation, which is not the case when conducting an Islamic marriage involving minors. Along these lines there is justification to ensure the protection of key rights and freedoms. One way to shield children from early marriages is by interpreting the importance of human rights provisions to the leaders of the

[145] Section 6(1), The Marriage Act (Act No 4 of 2014)
[146]Global Policy Section, 'Child Marriages and the Law,' Legislative Reform Initiative- Paper series, 2007, 18 https://www.unicef.org/french/files/Child_Marriage_and_the_Law.pdf

[147] Global Policy Section, 'Child Marriages and the Law,' Legislative Reform Initiative- Paper series, 2007, 19 https://www.unicef.org/french/files/Child_Marriage_and_the_Law.pdf

[148] Article 45(4), *Constitution of Kenya* (2010).
[149] Article 2, *Convention on the Elimination of Discrimination against Women*, 18 December 1979.
[150] Article 2.2, *Convention on the Rights of the Child*, 20 November 1989.

Muslim Community broadly. This can be possible by trying to investigate different ways by which rights intersect. A good example is, if children marriages are allowed, they regularly have a negative impact on the children leaving them vulnerable to social, sexual, emotional and physical abuse. Lastly, there is a need to strengthen civil society advocacy through working with the media on ethical reporting on children marriages. This is by using the media to act as a teaching tool to sensitize on the implications of child marriages.

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

This section presents the various conclusions and suggestions relying on empirical finding of the past chapters.

6.1. Conclusions

This research was guided by four research questions. The first was whether a legal problem arises on the decision of legislation between the Constitution of Kenya and Islamic personal law when conducting an Islamic marriage involving minors? Secondly, was whether section 49(3) of the Marriage Act is consistent with the principle of the best interest of the child? The third question was whether religious freedom as elaborated in article 32 of the Constitution of Kenya validates the existence of section 49(3) of the Marriage Act when conducting an Islamic marriage involving minors? Lastly, can guidance be derived from international law in regards to child marriages as it seen to form some portion of the domestic laws in Kenya?

In addition to that, the study sought to test two hypotheses, namely, first, the retention of section 49(3) of the Marriage Act and article 32(4) of the Constitution of Kenya will prevent the achievement of the best interest of the child and, second, section 49(3) of the Marriage Act and article 32(4) of the Constitution of Kenya are inconsistent with article 53(1d) (2) of the Constitution of Kenya and section 2 of the Children Act.

As it was seen in this study phrase best interest is seen to mean that the minor's well being ought to be of greatest importance before making any decision affecting his or her life. In chapter two, the paper seeks to address the history of marriage law in Kenya and how the exemption evident in the Marriage Act became applicable to Muslims in Kenya when getting married. Section 49(3) of the Marriage Act states that Islamic law shall governs issues in respect to marriage to persons who professes the Islamic faith.[151]

Chapter three, four and five are seen to respond to the issues raised by the research questions. The chapters have taken an approach of identifying the different legal regimes that govern marriage law in the country and reconciled it with the standard of the best interest of the child. It was found that section 49(3) of the Marriage Act was conflicting with different provisions in the Constitution, the Marriage Act and the Children's Act.

[151] Section 49, *Marriage Act* (Act No 4 of 2014).

It was also found, in relation to the third research question raised, that Article 32 of the Constitution of Kenya cannot validate the existence of section 49(3) of the Marriage Act. Every individual in Kenya is indeed guaranteed the right to wed an individual of the contrary sex. This right however has set a requirement that the individuals contracting the said marriage should be above 18 years.

6.2 Recommendations

On the premise of the conclusions, the dissertation makes the accompanying suggestions;

There is need for legal reforms with the Marriage Act Section 49(3). The reform should set the legal age for getting married at 18 or higher and eliminate any religious exceptions that affect the best interest of the child. This is on the grounds that in Kenya children national law prohibits marriages. However, we see that one can contract a marriage earlier through religious or personal law exceptions.

Aside from actualizing and changing the statute, it might likewise be conceivable to implement the amended provisions of the Marriage Act through the courts. The national courts also serve good ground to ensure the legislations denying the act of early marriages are implemented, with the goal that anyone discovered committing the offence is criminalized and condemned to prison.

The Government should also adopt national strategies and action plans that are efficient with an aim to delay children marriages. This can include things such as working with different Non-Governmental Institutions and various stakeholders to end harmful religious practices.

Another way to end children marriages is by interpreting the importance of human rights provisions to the leaders of the Muslim Community broadly. One way to do that is to try and investigate different ways by which rights intersect. A good example is, if children marriages are allowed, they regularly have a negative impact on the children leaving them vulnerable to social, sexual, emotional and physical abuse.

Strengthening civil society advocacy through working with the media on ethical reporting on children marriages. This is by using the media to act as a teaching tool on the importance of the right to marriage as a vital human right.

Based on the above, it very well may be presumed that section 49(3) of the Marriage Act is unconstitutional and ought to be amended. It opens the floodgates of early marriages to children adhering to Islam. This in turn imposes key difficulties on the progression of the minor physically, mentally and socially.

BIBLIOGRAPHY:

BOOKS:

Agnes R. Quisumbing, *Household Decisions, Gender, and Development: A Synthesis of Recent Research*, International Food Policy Research Institute, Washington D C, 2003.

Daniel Moeckli, Sangeeta Shah, Sandesh SivaKumaran, *International Human Rights Law*, Oxford University Press, Oxford, 2010.

Dr. Peter Onyango, *African Customary Law System: An Introduction*, LawAfrica, Nairobi, 2013.

Esposito L. John, Natana J. Delong-Bas, *Women in Muslim Family Law*, 2 ed, Syracuse University Press, Syracuse, New York, 2001.

Patrick Kiage, *Family Law in Kenya; Marriage, Divorce and Children*, LawAfrica, Nairobi, 2016.

Shamil Jeppie, Ebrahim Moosa, Richard L. Roberts, *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post- Colonial Challenges*, Amsterdam University Press, Amsterdam, 2010.

JOURNAL ARTICLES

Andrea Buchler, Christina Schlatter, 'Marriage Age in Islamic and Contemporary Muslim Family Laws,' 1 *Electronic Journal of Islamic and Middle Eastern Law*, 2013.

Aron Degal, Shimelis Dinku, 'Best Interest of the Child: Meaning, History and Its Place Under Ethiopian Law' 5 *Mizani Law Review* 2, 2011.

Garnett W. Richard, 'Religious Liberty, Church Autonomy and The Structure of Freedom' Legal Studies Research Paper No. 10-10, *Notre Dame Law School*, 2010.

WORKING PAPER

Gender, Rights and Civic Engagement Section, Division of Policy and Practice, 'Child Marriage and the Law,' United Nations Children's Fund, Legislative Reform Initiative-

Paper Series, https://www.unicef.org/french/files/Child_Marriage_and_the_Law.pdf on April 2007

ARTICLE

Dausab Yvonne, 'The Best Interest of the Child,' Children's Rights in Namibia, https://www.kas.de/c/document_library/get_file?uuid=8d63dc56-5e47-cc0a-1e09-89240398a776&groupId=252038 2009.

Laura Davids, 'Female Subordination Starts at Home: Consequences of Young Marriage and Proposed Solutions,' (2007)

The UNHCR Guidelines on determining the best interest of the children.

Zhipheng He, 'The Derogation of Human Rights: Reason, Purpose and Limits,' (2003)

REPORTS

Republic of Kenya, *Report of the Commission on the Law of Marriage and Divorce*, 1968

INSTITUTIONAL AUTHORS

Nancy Baraza, Kenya Law Reform Commission, 'Family Law Reforms in Kenya: An Overview,' Presentation at Heinrich Boll Foundation's Gender Forum, Nairobi, 30 April 2009.

Thomas Hammarberg, Commissioner for Human Rights, 'The Principle of the Best Interest of the Child- what it means and what it demands from adults,' Council of Europe, 30 May 2008.

DISSERTATIONS:

Anyango Monica Ruben, 'Causes and effects of early marriages on the girl-child in Suba Sub County, Western Kenya' Published University of Nairobi 2013

Barton Daniel, 'Freedom of Religion in European and International Law and its Relation to other Fundamental Rights' Published LLM Thesis, Charles University, Prague, 2008.

Odhiambo Brian Patrick, 'The limitations of Rights under the Kenya Constitution,' Published LLM Thesis, University of Pretoria, Pretoria, 2015.

Wanyonyi Kevin Odimbe, 'The Kadhis' Courts in Kenya: Towards Enhancing Access to Justice for Muslim Women,' Published, Lund University, Sweden, 2016.

INTERNET SOURCES

https://www.alrc.gov.au/publications/justifications-limits-freedom-religion

https://www.iep.utm.edu/hum-rts/

https://muslimsinafrica.wordpress.com/numbers-and-percentage-of-muslims-in-african-countries/

https://www.alrc.gov.au/publications/justifications-limits-freedom-religion

http://www.kenyalawresourcecenter.org/2011/07/marriage-under-islamic-law.html

https://www.kas.de/c/document_library/get_file?uuid=8d63dc56-5e47-cc0a-1e09-89240398a776&groupId=252038

http://philosophy.uonbi.ac.ke/sites/default/files/chss/arts/philosophy/hashim/Coping_with_conflicts.pdf