Proportionality on the 'lite': The Kenyan Supreme Court's fatalism in the *Fatma Athman Abud (FAAF)* case

Harrison Otieno Mbori*

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Abstract

This case commentary discusses the recent Supreme Court of Kenya decision in Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others *which, sitting at the intersection of religious pluralism and the right to equality, has elicited quite the public discourse. This commentary forwards three main arguments: first is that the Supreme Court of Kenya, the Court of Appeal, and, to a large extent, the High Court in this case failed to apply Islamic law to resolve the contending claims in the case. This failure is mainly influenced by the relegation of Islamic law to the status of retrogressive culture that the colonial doctrine of repugnancy aimed to check. The second claim is that the Supreme Court did not correctly distinguish between 'limitations' and 'derogations' in the Kenyan 2010 Constitution's Bill of Rights. This terminology and doctrinal inaccuracy affected the general trajectory of analysis, especially on the chosen standard of the review of proportionality. Lastly, the Supreme Court in*

* Post-Doctoral Research Fellow at the Luxembourg Centre for European Law (University of Luxembourg), Adjunct Lecturer, Kabarak University School of Law. ORCID iD: 0000-0003-2517-3816 (https://orcid.org/0000-0003-2517-3816)

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this case, for the first time, introduced the famous four-part proportionality test through a 'side-door' as the appropriate standard of review. This commentary concludes by arguing that although the general outcome of the case has been celebrated as progressive, the outcome is still questionable since the path of reasoning by the Supreme Court is faulty.

Keywords: proportionality, Islamic law, limitations, derogations, religious pluralism, Supreme Court of Kenya, right to equality, repugnancy doctrine

Introduction

The Kenyan Supreme Court rendered its decision in *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others* on 30 June 2025.[1] The decision has been lauded and condemned in equally forthright language in different circles. On the one hand, commentators of 'the total' constitution have lauded the decision as a big win for the right to equality under the Constitution of Kenya, 2010.[2] On the other hand, others, especially commentators who practice the Islamic faith, have condemned it as a death knell to the limited exception on the application of equality in the Bill of Rights granted to Islamic law and principles under Kenya's post-2010 constitutional arrangement.[3]

The central issue of the case was the extent to which the right to equality in Article 27 of the Constitution of Kenya, 2010 can be limited by the 'limiting' clause in Article 24(4) of the Constitution. The Supreme Court is thus correct when it notes at the beginning of its decision that the case 'sits at the intersection of religious pluralism and the right to equality'.[4]

I make three core claims in this short commentary: the first is that the Supreme Court of Kenya, the Court of Appeal, and, to a large extent, the High Court in this case failed to apply Islamic law to resolve the contending claims in the case. This failure is mainly influenced by the colonial logic that relegated Islamic law to the status of retrogressive culture that should be checked by the colonial doctrine of repugnancy.

The second claim is that the Supreme Court did not correctly distinguish between 'limitations' and 'derogations' in the Kenyan 2010 Constitution's Bill of Rights. This terminology and doctrinal inaccuracy affected the general trajectory of the analysis, especially on the chosen standard of the review of proportionality. This false start did not, how-

1 Petition No E035 of 2023, Judgment of the Supreme Court at Nairobi, eKLR.

2 Joshua Malidzo Nyawa, 'From the cold to the fold: Kenya's Supreme Court enclasps rights of "illegitimate" children in Islamic succession', *WordPress.com*, 30 June 2025.

3 Constitution of Kenya (2010), Article 24 (4).

4 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 1.

ever, affect the choice of the proportionality test that the Court eventually settled on, since the Court correctly selected the four-part proportionality test that is typically applied to the analysis of the limitations of rights found in human rights instruments.

The third core claim is that in this case, the Supreme Court for the first time introduced the famous four-part proportionality test as the appropriate standard of review. However, the Supreme Court introduced this proportionality test through a 'side-door'. Even so, the Court misapplied the test. Based on these three arguments, the decision cannot be celebrated as a breakthrough since the process of arriving at the decision was one fraught with serious reasoning deficiencies.

This essay proceeds as follows: the first sub-section offers a very brief fact pattern of the case by focusing on ten core specific facts. The first sub-section also briefly discusses how the previous courts before the Supreme Court, that is the Court of Appeal and High Court, engaged with the vital question of the applicable law. I show that only the High Court, to a limited extent, engaged with aspects of Islamic law, with the Court of Appeal and Supreme Court completely failing to engage with Islamic law. This failure is tacitly linked to the High Court's introduction of the repugnancy doctrine.

The second sub-section discusses the Supreme Court of Kenya's failure to distinguish between the doctrines of limitations and derogations leading to a false analytical start; with the Supreme Court engaging with irrelevant provisions of international and easily distinguishable case law. The third sub-section analyses how the Supreme Court introduces through a 'side-door', fails to apply, and misapplies the principle of proportionality. This essay concludes by holding the view that in this case the end cannot justify the means. Although the general outcome of the case has been celebrated as progressive, the outcome is still questionable since the path of reasoning by the Supreme Court is faulty.

Brief factual analysis

There are about ten critical pieces of fact established in the entire litigation. The first is that the deceased, Salim Hakeem Juma Kitendo, was a Muslim man who died intestate and might have been polygamous at some points of his married life. The second is that he celebrated his first uncontroverted Islamic marriage with Fatuma Athman Abud Faraj on 4 August 2006. The third is that all four children they bore were born within wedlock and would, according to Islamic law, be entitled to an inheritance.[5]

The fourth is that Ruth Faith Mwawasi, the presumptive second wife, has the following four children: SJ, born on 14 July, 1998, LK, born on 8 October, 2003, HK, born on 26 November, 2006 and TK, born on 12 September, 2007.[6] One of Ruth Faith's children, SJ, is not the deceased's biological child.[7] The deceased and Ruth Faith Mwawasi started cohabitation in the year 2000 and formalised[8] their Islamic marriage in 2011. The fifth is that all three of Ruth Faith Mwawasi's children were also born before her Islamic wedding but within her cohabitation, that is before 2011.[9] The sixth is that there is no evidence that those three children are not the deceased's biological children.

The seventh is that the only child of the third respondent, Marlin CP's, in this case was also born out of wedlock but arguably within her cohabitation period with the deceased, since the child was born only six months after Marlin and the deceased's alleged Islamic wedding. The eighth is that there is also no evidence that Marlin's child is not the deceased's biological child.[10]

Thus, cumulatively, we can reach a ninth factual conclusion that outside of the contested issues of the legitimacy of marriages and their

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5 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 2.

6 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 3.

7 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 3.

8 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 3 and 13.

9 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 3 and 13.

10 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 6.

dissolution, eight of the nine children involved in this case are more probably than not the deceased's biological children. Finally, we can also conclude that if the concerns about the legitimacy of marriage are raised, it is possible that only four of the eight biological children of the deceased would be born within wedlock.

Islamic law as 'repugnant' culture?

The Supreme Court's finding in paragraph 41 of its judgment that: 'the superior courts below were cognisant of the provisions of Section 2(3) of the Law of Succession Act and thereby applied Islamic law to determine the beneficiaries of the deceased's estate who indisputably professed Muslim faith' is inaccurate and is not supported by a faithful reading of the High Court and Court of Appeal's decisions. The High Court had found that Islamic law would apply in the case 'to the extent that it was not repugnant to justice and morality'.[11]

The introduction of the 'repugnancy clause' to limit the application and effect of Islamic law is not supported by any law or legal reasoning. It, for lack of a better description, appears out of thin air. It is not only unsupported by any persuasive reasoning, but also has the effect of relegating Islamic law to a cultural practice that must be disciplined by this colonial clause, whose presence in Article 159(3)(b) of the Constitution of Kenya, 2010 is itself unfortunate and arguably retrogressive.

Regardless of this position, neither the High Court nor the Court of Appeal fully applied Islamic law in this case as contended by the Supreme Court. The High Court found that a deceased Muslim's biological child (whether born out of wedlock or not) should be a dependant as required by Section 29 of the Law of Succession Act. This is not an application of Islamic law but an act of forcefully applying statutory law onto Islamic law. The High Court justifies its position as follows:

[11] *In re Estate of Salim Juma Hakeem Kitendo (Deceased*), Succession Cause No 200 of 2015, Judgment of the High Court at Mombasa, (2022) eKLR, para 61.

> This is because the child is innocent and should not be left to suffer out of his or her parents' mistakes. Indeed, choices have consequences and the prudent and inevitable thing a court of equity must do to uphold justice for all is, to recognise such a child as a dependant hence a beneficiary of the estate to the extent allowable under Sharia law. See Quran Sura 4:8 which recognises that, 'if other near of kin orphans and needy are present at the time of division of inheritance give them something of it and speak to them kindly'. It is therefore clear from the Quran that such cases of dependants are also entitled to part of the inheritance.[12]

This finding is a cursory and an after-the-thought use of Islamic law to justify a position the Court already finds plausible that is; a court of equity's view on justice for all. Furthermore, the Court of Appeal's reasoning does not mention any part of Islamic law but directly places the Islamic law position, under the scrutiny of the anti-discrimination provision in Article 27 of the Constitution.[13]

Although Islamic law is the *lex specialis*, the justification or reasons for the apparent discrimination of children born out of wedlock are not interrogated within Islamic law, instead, this rule is immediately placed under the yardstick of the right to equality and freedom from discrimination in Article 27 of the Constitution.

Article 24(4), which specifically limits this right in favour of Islamic law rules on inheritance, only appears when the Court of Appeal approvingly cites *CKC & another (Suing through their mother and next friend JWN) v ANC*.[14] This case is, however, distinguishable from *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others.* The distinction between these two cases is on the basis of the threshold requirement; that not all the parties in *CKC & another v ANC*, unlike in *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, were professing the Islamic faith. Basically, the Court of Appeal ignored Article 24(4).[15]

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12 *In re Estate of Salim Juma Hakeem Kitendo (Deceased*), para 98.

13 *FAAF v RFM and 2 others*, Civil Appeal E043 of 2022, Judgment of the Court of Appeal at Mombasa, (2023) eKLR, paras 57 onwards.

14 Civil Appeal 121 of 2018, Judgement of the Court of Appeal at Mombasa, (2019) eKLR 2.

15 Nyawa, 'From the cold to the fold: Kenya's Supreme Court enclasps rights of "illegitimate" children in Islamic succession'.

The Court of Appeal's rhetorical position that, '[I]t is our view that culture that is harmful to a child in the sense that it denies such a child his or her otherwise right to parental care and protection on the ground of marital status of the father and the mother cannot be countenanced'.[16] This again, confirms the petitioner's suspicion that the Court treated Islamic law as culture and subjected it to the colonial yardstick of repugnancy while using the non-absolute equality provisions of the Constitution of as a straw man.

The non-distinction of limitations and derogations in the Bill of Rights

The Supreme Court's finding in paragraph 40 of its judgement, that Article 24(4) creates a limited constitutional derogation from the equality provisions of the Bill of Rights to permit the application of Islamic personal law in specified areas – namely, personal status, marriage, divorce, and inheritance, is inaccurate and mixes up the doctrinal distinction between derogations and limitations.

A derogation in the bill of rights of most constitutions means a 'temporary suspension (or limitation) of certain rights under exceptional, crisis-like circumstances such as during a state of emergency, disturbances, disasters, and conflicts'.[17] A limitation means a 'justifiable restriction, infringement, or exclusion on the exercise of a right guaranteed in a human rights instrument or constitutional bill of rights'.[18]

Their corollary opposites are non-derogable rights which are rights that cannot be suspended temporarily even under crisis conditions (these rights, such as the right to life, can have in-built limitations), and rights that are absolute which are rights that cannot be infringed, limit-

16 *FAAF v RFM and 2 others*, para 62.

17 Gemmo Bautista Fernandez, 'Within the margin of error: Derogations, limitations, and the advancement of human rights', 92 *Philippine Law Journal* (2019) 4, 8.

18 Gemmo Bautista Fernandez, 'Within the margin of error: Derogations, limitations, and the advancement of human rights', 4, 8.

ed, or excluded for any reason, including general public interests. They include the freedom from torture, cruel, inhuman or degrading treatment or punishment. However, not all absolute rights are non-derogable.[19]

There is a small category of rights that occupy a special status in international law and form part of *jus cogens* norms that neither permit limitations nor derogations. These include the right or freedom from torture, cruel, and inhuman treatment or degrading treatment or punishment; and the prohibition of slavery and servitude.[20]

Thus, the distinction between derogation and limitation lies on the 'temporary' nature and the requirement of 'crisis-like' conditions for derogations, both of which are not required for limitations. This distinction might seem otiose since the result of both concepts is the restriction of the protected right. However, in application, the implications of these two concepts are in many cases widely different.

Article 24 of the Constitution can be termed as a limitation and not a derogation of the right to equality. The Supreme Court refers to Article 24(4) as a derogation numerously in its judgement.[21] However, Article 24 (4) is not a blanket limitation; it has internal safeguards to ensure that no actor violates the right to equality in a cynical and calculated way while invoking Article 24(4). The provision states as follows:

> The provisions of this Chapter [Bill of Rights] on equality [Article 27] shall be qualified to the extent strictly necessary for the application of Islamic law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

The Supreme Court reasons that the expression 'qualified to the extent strictly necessary' is a formulation common in international human

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19 Viktor Mavi, 'Limitations of and derogations from human rights in international human rights instruments', 38 *Acta Jur Hng* (1997) 107, 110.

20 Alex Conte, 'Limitations to and derogations from Covenant rights', in Alex Conte and Richard Burchill, *Defining civil and political rights: The jurisprudence of the United Nations Human Rights Committee* (2nd Ed) Ashgate, 2009, 39-64.

21 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, paras 40, 43, 44, 51.

rights conventions.[22] The Court makes two references, the first to Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR) and the second to Article 15(1) of the European Convention on Human Rights (ECHR).[23] Unsurprisingly, both references are to the main derogation regimes of these two international human rights instruments.

The first reference the Court offers is Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR) that states:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation …

The Supreme Court goes ahead to further its reasoning through General Comment No 29 on Article 4 of the ICCPR that links the notion of the 'extent strictly required by the exigencies of the situation' to the principle of proportionality that is commonly applied to derogations and limitations of powers.[24] This is an example of a false equivalence directly stemming from the Supreme Court's failure to appreciate the differences between limitations and derogations.

From the analysis above, Article 4(1) of the ICCPR and Article 15(1) of the ECHR are the main provisions on the derogation of rights that are specifically applicable during 'crisis-times'. These provisions only apply in times of 'public emergencies that threaten the life of the nation, the existence of which is officially proclaimed'.[25] Even though the formulation of 'the extent strictly necessary' (Article 24(4) Constitution of Kenya) and 'the extent strictly required' (Article 4(1) ICCPR) are close but not identical, the two provisions apply in two separate planes or

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22 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 47.

23 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 4(1); European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, Article 15(1); *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 47-51.

24 UN Human Rights Committee, General Comment No 29: States of Emergency (Article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11, para 2; *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 48.

25 International Covenant on Civil and Political Rights, Article 4(1).

contexts. One applies in 'crisis-times' while the other applies at all times or in times of normalcy. This is a distinction that stems directly from the distinction between the derogation and limitation concepts analysed above.

This distinction is not only just semantic; it has a huge effect on how the proportionality analysis is undertaken to justify whether an action is a derogation or a limitation that is permitted within the context of that instrument, be it a constitution or human rights treaty. In determining whether the provision to be addressed is a limitation or derogation, the appropriate 'standard of review' is the proportionality test.

The Supreme Court reaches this conclusion quite early in its analysis. The Court reasons that 'the phrase "qualified to the extent strictly necessary" signals that any derogation from the general right to equality under the Bill of Rights is narrowly tailored and circumscribed … In other words, Article 24(4) is not a carte blanche for overriding the right to equality and freedom from discrimination; rather, it remains subject to the same proportionality test embodied in Article 24(1)'.[26]

But from the analysis above, one might ask whether the proportionality test on the analysis of derogation is distinct from that of limitations. I discuss the proportionality test more in the next sub-section. However, it is important to note here that that these two proportionality tests are distinct and have different implications. For example, as a threshold question, the proportionality test analysis for derogations only begins after there is evidence of a public emergency (or crisis-like situation) and an official proclamation is issued under the ICCPR.

General Comment No 29 on Article 4 of the ICCPR states that '[d]erogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant',[27] even though the obligation to limit any derogations to those strictly under the exigencies of the situation also reflects the principle of proportionality.

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[26] *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 44.

[27] General Comment 29, CCPR, para 4.

Proportionality as the appropriate standard of review

The standard of review in constitutional law refers to the 'nature, intensity, or level of scrutiny by a court or tribunal of decisions (or other actions that involve some form of prior determination) taken by a governmental authority'.[28] The concept of the standard of review is used in two different contexts in judicial analysis. The first context is the use by courts to examine the actions of other branches of government such as the executive and the legislative (where courts check on the constitutionality of legislative acts). Courts can also examine the actions of administrative agencies to check their compliance with delegated powers (constitutional review). The second context is its use by superior courts to scrutinise a lower court's decisions (appellate review).[29]

The scope of the standard of review ranges from *de novo* review, the most intrusive form, where the reviewer substitutes its own finding in place of the decision maker's finding, to the 'clearly erroneous or manifest lack of reasons' review, which is the least intrusive form.[30] In between these two scopes, there are others that include reasonableness, good faith, proportionality, and abuse of discretion.[31]

The limitations framework of the Constitution of Kenya, 2010 has a general limitations clause in Article 24 that applies to all rights in the Bill of Rights except those in Article 25. The language of that clause was

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[28] Jan Bohanes and Nicolas Lockhart, 'Standard of review in WTO Law', in Daniel Bethlehem, Donald McRae, Rodney Neufeld, and Isabelle Van Damme (eds) *The Oxford handbook of international trade law*, Oxford University Press, 2009, 379; Alexia Herwig and Asja Serdarevic, 'Standard of review for necessity and proportionality analysis in EU and WTO Law: Why differences in standards of review are legitimate', in Lukasz Gruszczynski and Wouter Werner, *Deference in international courts and tribunals*: *Standards of review and margin of appreciation*, Oxford University Press, 2014, 209.

[29] Lukasz Gruszczynski and Wouter Werner, 'Introduction', in Gruszczynski and Werner, *Deference in international courts and tribunals*: *Standards of review and margin of appreciation*, 1.

[30] Vladyslav Lanovoy, 'Standards of review in the practice of international courts and tribunals', in Gábor Kajtár, Basak Çali, and Marko Milanovic (eds) *Secondary rules of primary importance in international law: Attribution, causality, evidence, and standards of review in the practice of international courts and tribunals*, Oxford University Press, 2022, 42.

[31] Lanovoy, 'Standards of review in the practice of international courts and tribunals', 42.

borrowed from the South African Constitution, which had in turn been borrowed from the Canadian Constitution.[32]

The proportionality test in the analysis of the limitations of human rights is now widely linked to German origins and more robustly to the European Court of Human Rights and the Canadian Supreme Court.[33] The 1950 European Convention of Human Rights does not have a general limitations clause but has specific limitations for certain rights. For example, the right to religious freedom contains a limitation that allows for the restriction of religious manifestations when 'prescribed by law and [when] necessary, in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.[34]

The 1982 Canadian Charter of Rights and Freedoms contains a general limitations clause that is applicable to all individual rights to the effect that: '[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[35]

Section 36 of the South African Constitution also provides a general limitations clause that reads as follows:

> the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.[36]

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32 Christina Murray, 'Kenya's 2010 Constitution', 61 *Neue Folge Band Jahrbuch des offentlichen Rechts* (2013) 747-788.

33 Niels Petersen, *Proportionality and judicial activism: Fundamental rights adjudication in Canada, Germany, and South Africa*, Cambridge University Press, 2017, 1-9.

34 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 9(2).

35 Canadian Charter of Rights and Freedoms, Section 1, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

36 Constitution of the Republic of South Africa (1996), Section 36.

This provision is strikingly similar to Article 24(1) the general limitations clause in the Constitution of Kenya, 2010 which provides that:

> (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

None of these legal instruments, including the Kenyan Constitution, mention the principle of proportionality in their texts. Yet, the ECHR, the Supreme Court of Canada,[37] the German Constitutional Court, and the Constitutional Court of South Africa have applied this judge-made principle. Thus, it was only a matter of time before the Kenyan Supreme Court invoked the principle. Its proponents argue that it implies the need to strike a proper balance between various competing interests.[38] The principle of proportionality is used as a tool of balancing and weighing the various interests against each other or finding a 'fair balance of interests'.[39]

The principle of proportionality consists of the following four rules: the legitimate ends or objective rule which interrogates whether the act pursues a legitimate aim; the suitability rule which looks into whether the act is capable of achieving its aim; the necessity rule which analyses whether the act impairs the right as little as possible; and the proportionality rule which can apply in the narrow sense or strict sense (*strictu sensu*) and which examines whether the act represents a net gain, when the reduction on the enjoyment of rights is weighed against the level of

[37] The proportionality principle, also known as the Oakes test was developed by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103.

[38] Aharon Barak, *Proportionality: Constitutional rights and their limitations,* Cambridge University Press, 2012, 457.

[39] Francisco J Urbina, *A critique of proportionality and balancing*, Cambridge University Press, 2017, 9-12.

realisation of the aim.[40] However, the critics of the principle of proportionality see it as a tool that enhances judicial activism.[41]

The mis- and non-application of the proportionality test

The Supreme Court in *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, relied on *Kandie v Alassane Ba and another* (Kandie),[42] where it had affirmed that the proportionality analysis in the context of adjudicating rights under the Bill of Rights involves a balancing exercise guided by the 'reasonable and justifiable' test. The Supreme Court in *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others* goes further to state that:

> [t]he Court [meaning the Supreme Court in *Kandie*] explained that for the effect of impugned law on a right to be proportionate, it must pursue a legitimate objective [legitimate objective test] and satisfy three subtests: First, the measure adopted must be suitable – meaning it must be capable of achieving the intended goal (suitability). Second, it must be necessary – there must be no less restrictive means available to achieve the same purpose (necessity). Third, the benefits of achieving the objective must outweigh the harm caused to the individual whose right is affected (proportionality in the strict sense).[43]

A faithful reading of paragraphs 73-77 of the *Kandie* case which the Supreme Court approvingly cites, reveals that the Supreme Court inaccurately referenced its own jurisprudence. In *Kandie*, the Supreme Court analysed some jurisprudence from the Kenyan High Court and Court of Appeal and concluded that the applicable test is a 'strict and elaborate scrutiny based on the "reasonability and justifiability" test'.[44]

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40 Matthia Klatt and Moritz Meister, *The constitutional structure of proportionality*, Oxford University Press, 2012, 2-3.

41 Grainne de Burca, 'The principle of proportionality and its application in EC Law', 13 *Yearbook of European Law* (1993) 105-50.

42 Petition 2 of 2015, Judgement of the Supreme Court of Kenya at Nairobi, (2017) eKLR paras 73-77.

43 *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 52.

44 *Kandie v Alassane Ba and another*, paras 73-76.

Furthermore, in *Kandie*, the Supreme Court also approvingly cites the leading cases from Canada in *R v Oakes* and South Africa in *S v Makwanyane and another*[45] and *S v Manamela and another (Director-General of Justice Intervening)*[46] (*Manamela*). These cases provide the requirements of reasonable and demonstrable justifications; the criteria for balancing relevant considerations; and emphasise that 'the Court should not follow a mechanical checklist when determining whether a right is justifiably limited, but instead engage in a balancing exercise while considering proportionality'.[47] Specifically, in *Manamela*, the South African Court found that:

> It should be noted that the five factors expressly itemised in Section 36 are not presented as an exhaustive list. They are included in the Section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. … As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. … Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of this legislative and social setting.[48]

The Supreme Court (in *Kandie*) then concludes its analysis by stating that:

> The test to be applied in order to determine whether a right can be limited under Article 24 is the 'reasonable and justifiable' test that must not be conducted mechanically. Instead, the Court must, on a case-by-case basis, examine the facts before it, and conduct a balancing exercise, to determine whether the limitation of the right is reasonable and justifiable in an open and democratic society. The insertion of the word 'including' in article 24 also indicates that the factors to consider while conducting the balancing act are not exhaustive but a guide as to the main factors to be taken into account in that consideration.[49]

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45 [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

46 [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491 (14 April 2000).

47 *Kandie v Alassane Ba and another*, para 76.

48 Quoted in *Kandie v Alassane Ba and another*, para 76.

49 *Kandie v Alassane Ba and another*, para 77.

The vital point to note here is that in *Kandie*, the Kenyan Supreme Court did not establish the four-prong proportionality test (legitimate objective, suitability, necessity, and proportionality *strictu sensu*) as it purports to have in *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*.[50] In fact, the Court in *Kandie v Alassane Ba and another* does not mention the notions of legitimate objective, suitability, necessity, or proportionality *strictu sensu* even once in the entire judgement. In my reading, therefore, the Supreme Court is squeezing or establishing the four-part proportionality test for the first time without appropriate justification and on very weak grounds.

By using its previous case (the *Kandie* case) that barely mentions the notion of proportionality to introduce the four-part test in its analysis, the Supreme Court shows that it is not keen to textually ground the four-part proportionality test in the text of the Constitution.

Moving on to the application of the test, the Supreme Court finds that:

> no reasonable justification has been advanced, nor can we discern any, that would warrant drawing a distinction between children in relation to their entitlement to their father's estate in departure from the guarantee to equal protection and benefit of the law in Article 27(1) of the Constitution. In our view, denying children born out of wedlock by the same parents the same benefits accorded to children born within on the basis of the alleged 'sins' of their parents, is unreasonable and unjustifiable. This therefore means that any attempt to exclude children born out of wedlock from benefitting from their father's estate fails the proportionality test envisaged by the phrase 'qualified to the extent strictly necessary' which is a condition under Article 24(4) of the Constitution.[51]

The Supreme Court's assertion here could easily obfuscate the four-part proportionality test due to two reasons. The first is that the limitation to the right to equality under Article 27 is provided by law and is within the Constitution of Kenya, 2010 itself in Article 24(4). It is therefore expected, and the Court stated it would do precisely this in paragraph 52 of the judgment, that Article 24(4) would then be subjected to the proportionality test analysis. There is also the inherent danger

[50] *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 52.

[51] *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 53.

that this limitation is found within the Constitution itself, and if found impermissible, it would make a provision of the Constitution itself unconstitutional.

Second, the application here would require considering the following questions: does Article 24(4) present a legitimate objective (legitimate objective)? Does Article 24(4) provide means that are capable of achieving the intended goal or objective (suitability)? Does Article 24(4) provide the least restrictive means available to achieve the purpose (necessity)? and does Article 24(4) provide benefits which outweigh the harm caused to the individual whose right is affected (proportionality *strictu sensu*).

However, the Supreme Court asks and answers a different question, which is: is there a reasonable justification for drawing a distinction between children in relation to their entitlement to their father's estate in departure from the guarantee to equal protection and benefit of the law in Article 27(1) of the Constitution? I contend that this question and its answer, given in the negative, is a misapplication and non-application of the proportionality test.

It is a misapplication because the stated issue the Supreme Court had decided to address was the following: whether the Court of Appeal improperly limited the application of Article 24(4) of the Constitution, and in doing so, misconstrued the relationship between Article 24(4) and Article 27 of the Constitution.[52]

The Supreme Court should not therefore have asked and answered the narrower and different question of whether the drawing of a distinction between children in relation to their entitlement to their father's estate is a departure from the guarantee to equal protection and benefit of the law in Article 27(1) of the Constitution. This is because this distinction stems directly out of the Islamic law of inheritance, which is exempted as a whole to the 'extent strictly necessary' for its application. So, while the case here concerned only one facet of Islamic law and its discriminatory effects, Article 24(4) covers a full array of Islamic law on personal status, marriage, divorce, and inheritance.

[52] *Fatuma Athman Abud Faraj v Ruth Faith Mwawasi and 2 others*, para 29.

It is possible to offer a pragmatic reading of the finding and argue that the Supreme Court was limiting its answer to just the specific issue that was at the core of the case to avoid the danger of declaring Article 24(4) of the Constitution unconstitutional. But this justification does not lead to whether the Court answered the question it had set before itself, which was broader and covered the relationship between Articles 24(4) and 27. In this instance, we can conclude that the Court did not therefore offer a persuasive resolution to the debate on the interpretation of Article 24(4), contrary to Joshua Malidzo Nyawa's conclusions.[53]

Assuming for the sake of argument that the question the Supreme Court created in its application of the proportionality test was the central question the Court needed to answer, I would still argue that the Court did not apply the test to this question, at least not as rigorously as would have been expected. So, the question is whether there is a reasonable justification in Islamic law for drawing a distinction between children in relation to their entitlement to their father's estate in departure from the guarantee to equal protection and benefit of the law in Article 27(1) of the Constitution?

The Supreme Court would only have found an answer to the legitimate objective question, which is the first part of the test, after an analysis of Islamic law. The Court does not attempt to engage in this analysis and reaches its conclusion without any engagement with Islamic law. Because my claim here is that there was a non-application of the test, we don't know what conclusion would have been reached if this analysis was undertaken.[54] It is possible a legitimate objective would have been found in which case the other parts of the test would have played a role in finding a much more robust solution to even this emergent question the Court decided to answer.

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53 Nyawa, 'From the cold to the fold: Kenya's Supreme Court enclasps rights of "illegitimate" children in Islamic succession'.

54 Mohamed Hoosain Sungay, 'A constitutional analysis of the disqualification of the child born out of wedlock form the inheritance principle found in Islamic law of compulsory succession', 58 *De Jure Law Journal* (2025) 75-91.

Take for example, the justification Prof Christina Murray offered in the same paper cited by the Court explaining the presence of Article 24(4) in the Constitution. Prof Murray stated that Article 24(4) was included in the Constitution of Kenya Review Committee Draft and retained in all later drafts. According to Prof Murray, Article 24(4) was retained at the request of Muslim women for whom Kadhis' courts 'had become an important site for resisting the oppression experienced in marriage and in domestic circumstances in a traditionally patriarchal and male-dominated society' and for whom recognising and protecting the religious and cultural aspects of Islam was important.[55]

It is therefore likely that if Article 24(4) was interpreted as a whole and not confined to one section of Islamic law, it would have or should have passed the legitimate objective test. Whether the provision as a whole or the narrower question of discrimination against children born out of wedlock would pass the more stringent parts of the test of suitability, necessity, and proportionality, *strictu sensu*, is an outcome we cannot know, as the inquiry did not go this far.

Conclusion

The Supreme Court of Kenya's doctrinal analysis and path of reasoning in this case is, unfortunately, unpersuasive regardless of the pro-formal equality outcome of the decision. Regardless of whether one agrees or disagrees with the findings of the Supreme Court, its findings can only be accepted as authoritative when a sound internal and intellectual logic compels the judging process.

In this short essay, I have shown that the decision of the Kenyan Supreme Court faces two arguably fatal inconsistencies that inevitably lead to a faulty outcome. The first is the doctrinal mixing up of the concepts of derogations and limitations and the consequential effect of referencing irrelevant international law instruments and decisions. This

[55] Murray, 'Kenya's 2010 Constitution', 747- 788 citing the Constitution of Kenya Review Commission, *The final report of the Constitution of Kenya Review Commission*, 2005, paras 13.5.5.

was and remains a case of the limitation of the right to equality through a legal provision in the Constitution itself. Whether one is convinced of the wisdom of having such a limitation is not irrelevant to answering the question whether the limitation itself is permissible under our Constitutional setup.

The second argument flows from the first in relation to the use, non-application, and misapplication of the principle of proportionality. The introduction of the principle of proportionality within Kenya's constitutional rights limitation framework is inevitable. The way the Supreme Court introduces and justifies it is unpersuasive and, unfortunately, for such a vital tool of constitutional interpretation, creates more constitutional uncertainty. We should just pause, reflect, and think about the future of some of the conflicts that will come in future in relation to the limitation in Article 24(4) of the Constitution.