

**Religion and Pluralism in the Constitution:
Expanding and Transforming the Kenyan Kadhis' Courts**

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Introduction

Article 8 of the Constitution of Kenya states clearly and unequivocally: “There shall be no State religion” (2010b). Such a strong disavowal of religious establishment by the state effectively welcomes the wide range of religious practices existing in Kenya and thereby fosters the unity in diversity that is a prominent aspirational goal of the 2010 Constitution. Promoting unity is especially challenging when Christianity, the majority religion, has long been associated with Kenya’s political leaders and dominant social groups. Relatedly, religious minorities, most notably Muslims and Hindus, have experienced marginalization at the hands of the state and fellow citizens. Not surprisingly, since independence Kenyan governments have been viewed as supporting and even promoting Christianity, especially from the perspective of non-Christian Kenyans. As an example, resentment by Muslims has grown since the 1998 Embassy bombings and in the post 9/11 era, as police and military crackdowns undertaken in the name of security have appeared to target people primarily on the basis of their Muslim faith. From the opposite perspective Christians have not always agreed that the government adequately supports their religion. During the process of drafting the Constitution, for instance, Christian religious leaders warned politicians and the public that putative unChristian behaviors, such as homosexuality or abortion, should not be endorsed in the new Constitution (see, e.g., Mraja 2011). Thus, in a nation where religion is a key element of social life, and a majority of Kenyans profess religious belief, fostering religious pluralism without seeming to privilege one religion over others is a tall order for the national government.

Perhaps the most sustained charge of “special treatment” on the basis of religion was leveled during the constitution process and culminated in a battle over whether the Kadhis’ Courts should be recognized in the Constitution, an issue that was ultimately resolved in the successful

referendum on the Constitution held on August 4th, 2010. The Kadhis' Courts, which operated pre-colonially and were recognized in the Constitution at Independence, apply Islamic law in matters of marriage, divorce, inheritance, and personal status involving Muslims. Opposition to constitutional recognition for these courts, which came from Christian groups and some politicians, almost derailed the constitution process several times.

This chapter puts forth the argument that the Kadhis' Courts are a successful example of supporting pluralism that results directly from the constitutional process and that also offers the promise of fostering unity. After an overview of religious pluralism in the current Constitution, the chapter takes up the controversy over the Kadhis' Courts during the process of creating the Constitution. The debates that emerged around inclusion of the Kadhi's Court in the Constitution resemble those that emerged in other places worldwide where Muslim minorities have sought state recognition and protection for a variety of religious practices (e.g., use of public space for worship, ability to wear religious clothing) or for the use of Islamic family law (see, e.g., Joppke and Torpey 2013, Van Engeland 2014). Joppke's analysis of the debates over recognition of Muslim courts in several European countries offers a nuanced approach to the concept of pluralism, one that is useful for understanding the debate over constitutional recognition of the Kadhis' Courts in Kenya (Joppke 2013).

Later sections of the chapter address the argument that the Kadhis' Courts exemplify pluralism by offering both a conceptual defense of this argument and preliminary evidence based on the initial years of implementation through judiciary transformation. The conceptual argument turns on a particular way of thinking about the pluralism represented by the Kadhis' Courts. Namely, the pluralism is dual in nature; it has both religious and legal dimensions. The concept of dual pluralism helps to explain why the constitutional recognition of the Kadhis' Courts has the potential to promote the unity in diversity aspired to in Kenya's Constitution. Similarly, evidence from the initial years of implementation of the new Constitution reveals that the Kadhis' Courts play significant material and symbolic roles in the negotiation of religious diversity. The process by which the Kadhis' Courts are incorporated into the judiciary, and thus into broader society, is a crucial determinant of how religious diversity includes the Muslim minority. As outlined in the chapter's penultimate section, given the particular challenges faced by the Kadhis' Courts, how

the courts function is likely to shift over time, and thus they will come to influence religious and legal pluralism in new ways.

The controversies surrounding the Kadhis' Courts highlight how difficult it is to embrace a liberatory approach to religious pluralism in any context. The Kenya process illuminates factors that might contribute to achieving an acceptable pluralism, but this goal is met only if pluralism is understood as a process that is worked out over time and that shifts in ways not fully anticipated at the time of constitution-making. Allowing space for the transformation of ideas and practices is key to embracing pluralism in any democratic society. The efforts to include attention to process in creating the Constitution resulted in the approach to pluralism described herein and ensures that this particular recognition of religious pluralism fosters the governing values enshrined in the Constitution, which include "human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized" (Art. 10 (2) (b) Constitution of 2010b). With that in mind, this chapter concludes by asserting that Kenya can be an example for other nations that are struggling with their approach to recognizing religious minorities. Of course, the controversies over the Kadhis' Courts in Kenya expose some of the challenges to embracing pluralism in a democracy, especially when religion is involved. At the same time the example of the Kadhis' Courts demonstrates that intentional and skillful approaches to crafting and implementing a Constitution can get beyond the tensions raised in the name of religious pluralism.

Religious Pluralism in Kenya's Constitution

Notwithstanding the proclamation that Kenya has no state religion, the 2010 Constitution of Kenya is framed from the outset through a discourse of faith, and religion is mentioned multiple times. Early in the inspirational Preamble to the Constitution comes the assertion that the people of Kenya are "PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation," a phrase that captures the unity through diversity or pluralism that is the hallmark of the Constitution's value commitments (Preamble to the Constitution of Kenya 2010b). The Constitution mentions only those public holidays that mark events in Kenya's political history, while leaving it to the legislative branch of government

to recognize others, such as Idd and Christmas, which it does. Among the rights and fundamental freedoms mentioned in the Bill of Rights are the freedom of religious belief (Art. 32 (1)) and of religious practice (Art. 32 (2)). Relatedly, the Bill of Rights also protects against discrimination on the basis of religion by either the state or individuals (Chapter 4, Art. 27 (4) (5)). Freedom of expression does not extend to advocacy of hatred (Art. 33 (2) (d) (ii)), when it is based on the grounds of discrimination mentioned in Art. 27(4). Those grounds include discrimination on the basis of religion. It bears noting that rights and fundamental freedoms can be limited by law (Art. 24 (1)). Moreover, state institutions and public officials bear a special obligation to protect any groups whose vulnerability stems from their religious faith (Art. 21 (3)). The Constitution's framing through religious language and multiple mentions throughout makes clear the importance of religion generally in Kenyan society.

The prominent role of religion in the personal lives of Kenyans is evident in the constitutional provisions related to marriage and family law. Mentioned in relation to the Family as a Right and Fundamental Freedom, Article 45 endorses the right to marry so long as the marriage is between a man and a woman. Article 45 (4) charges Parliament with enacting legislation to recognize "(a) marriages concluded under any tradition, or system of religious, personal or family law; and (b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution." Thus, various religious traditions are recognized as playing a significant role in the lives of Kenyans. It follows then that the rituals and principles associated with religious communities also gain recognition by the state, and religious adherents find validation for key events in their personal and social lives.

The extent of religious pluralism intended in the Constitution is affirmed through two Acts focused on personal law that were passed in the wake of constitutional reform, namely, the Marriage Act, 2014, (No. 4 of 2014) and the Kadhis Court Act (Chapter 11, Rev. 2012). These Acts follow from the aforementioned constitutional provisions and further the Constitution's recognition of religious pluralism in the personal lives of Kenyans. The Marriage Act identifies several forms of religious marriage among the five types of marriage given legal recognition: Christian, Civil, Customary, Hindu, and Islamic. It is worth noting that "Hindu" also covers the

religious traditions of Buddhists of Indian origin, Sikhs, and Jains. Religious differences in the dissolution of marriage are recognized along with differences in marriage celebration and other aspects of related personal law. Previous constitutions and marriage-related Acts also recognized differences in faith-based personal law, although earlier provisions were effectively defunct, or repealed with the passage of the Marriage Act, 2014.

The Kadhis' Courts Act (2012) is a revised version of previous acts dating back to 1967. It is brief and includes attention to the role of the Chief Justice in determining the jurisdiction and establishment of Kadhis' Courts as well as the rules of procedure to be used. The Kadhis' Courts have long enjoyed constitutional and legislative recognition, as the legal institutions where Muslims can use personal law. For a half century, and also during the colonial period, Muslims have turned to the courts to address concerns related to marriage, divorce, child custody, and inheritance. My own research, which focused on the Kadhis' Courts in the 1980s and 1990s, describes how these courts operated in ways that served the faith community, especially Muslim women, who brought the majority of claims relating to marriage and divorce and were generally awarded judgments in their favor (Hirsch 1998, 2010). Over the years Muslim personal law has been at the center of conflict. For instance, the Succession Act of 1981 sparked a decades long struggle over what legal provisions should be used to settle the estates of Muslims (see, e.g., Cussac 2008; Cotran 1996).

The inclusion of the Kadhis' Courts in the 2010 Constitution is arguably the most significant and explicit recognition of religion in the document. Yet opposition to the inclusion of these courts was fierce, and, as discussed in the next section, the controversy over the Kadhis' Courts threatened to disrupt the constitutional process.

Controversy over Kadhis' Courts During the Constitution Process

During the years of constitutional reform, the various drafts of the Constitution faced many challenges. Chief among these were the struggles to resolve issues of governance, devolution, and land distribution. Yet over the almost two decades of writing, revising, and voting on drafts of the Constitution, concerns over the inclusion of the Kadhis' Courts emerged repeatedly as a

stumbling block. In this same time frame, efforts to promote harmonious religious pluralism were also part of the process and substance of constitutional reform. For instance, in the early years of constitutional development, an interfaith group of religious leaders, calling themselves *Ufungamano*, came together to pressure the government to begin the reform process and to lend their voices and views to that process. Their role was an important demonstration of religious pluralism in civil society leadership, even though the group disagreed over several issues, including the role of the Kadhis' Courts. Although a full discussion of religious pluralism in the development of the Constitution is beyond the scope of this article, this section establishes that civil society leaders were prominent among the many parties who, over the course of constitutional development, have engaged in both supporting inclusion of the Kadhis' Courts and opposing it at all costs (on the role of Muslims in the constitution process, see e.g., Cussac 2008).

In the run-up to the 2010 referendum, the Constitution faced a serious challenge related to religion. Namely, critics argued that the Constitution as drafted could make the legalization of abortion more likely and that the recognition of Kadhis' Courts would favor the Muslim religion over others in contravention of equality clauses (see, e.g., Kramon and Posner 2011, Mwangi 2012, Committee of Experts on Constitutional Review 2010). Although Mwai Kibaki, the sitting President at the time, called these "small matters" (2010a) in comparison to the fundamental changes in governance proposed, about one third of the over thirty per cent of Kenyans who voted against the draft constitution cited religion as a reason for their opposition. Twenty-five percent cited their concern over abortion (Kramon and Posner 2011, 9). Debates among religious and political leaders, conducted face-to-face and in the media, reflected a range of reasons for opposing the Kadhis' Courts. A prominent view was that recognition of the Kadhis' Courts gave Muslims an advantage over other religious groups. To counter this argument, commentators mentioned the pervasive and prominent influence of Christianity on Kenyan society and governance generally. More minor arguments included a concern that secularism would be undermined through mention of the Kadhis' Courts in the Constitution or that the legal basis of the Kadhis' Courts had never been effectively established (Ngugi and Siganga 2009).ⁱ

Some Christian leaders expressed concern that granting recognition to the Kadhis' Courts would fuel extremism linked to Islam that was blamed for violent incidents in Kenya beginning in the

1990s. Driven by fear, frustration, and the Islamophobia circulating the globe following the 1998 Embassy Bombings, the attacks of 9/11, 7/7, Bali and others, this line of argument had little evidence to support it in the Kenyan context, where the mainstream Muslim community had limited connection to extremist elements. A related version of this argument is that any recognition of Islam might lead Kenya toward society-wide Islamicization. The lack of evidence for this argument did not dampen its influence, particularly among Christian fundamentalists, as it had in prior debates over the Constitution also (Mwangi 2012, Cussac 2008).

The image of Islam gaining ground toward inevitable expansion is central to a line of jurisprudence in the European context, where courts have ruled on the legal recognition of religion by the state. Although the European cases tend to address religious practices (e.g., veiling, call to prayer, building mosques, or wearing crucifixes) rather than religious law, the reasoning reveals an embrace of religious pluralism generally yet an equivocation depending on the religion involved (Joppke 2013). Joppke (2013) argues that two contradictory approaches to pluralism underlie the reasoning in cases that involved whether religious symbols and practices are permitted in public contexts. The first approach expresses a fear that recognition of certain Islamic practices (e.g., the wearing of a burka in public) threatens religious pluralism generally and secularism in particular. The reasoning here is that overt religious symbols associated with Islam might create a chilling effect on the free practice of religion by coercing some adherents or overwhelming the presence of other religions in public space. A second line approach to legal reasoning in the European decisions argues that certain practices of Christianity (e.g., the ringing of church bells) promote religious pluralism exactly as anticipated in a democratic society. Specifically, Christianity, even as the state religion (e.g., in Germany), poses no threat to other religions and can even afford secularism a rightful place in society. The two approaches both support pluralism but view Islam as a threat to pluralism and Christianity as an affirmation (Joppke 2013). Joppke also describes a third approach, which conceptualizes enactments of Christianity as part of the culture and history of a (now) secular society and thus acceptable not so much as an establishment of religion but rather as elements of national culture. The embrace of the majority religion “as culture” sidesteps the contradictory treatment of religions in the name of religious pluralism and thus opens the way for unequal treatment of minority religions through a cultural rationale. Although the jurisprudence in Kenya has not addressed these issues directly,

the public perception of differences among the religions, including the taken-for-granted acceptance of Christianity as a key element of Kenyan national culture, leaves open the possibility of depicting Islamic law as inconsistent with Kenya's vision of religious pluralism.

A concern raised repeatedly during the constitution process focused on how recognition of the Kadhis' Courts might affect gender equality, which was also an aim of constitutional reform. Women's organizations were particularly interested in this issue (Mutua 2006). In reviewing a draft of the Constitution produced in the early 2000s, a coalition of prominent women's organizations sought to include a diversity of religious views in its effort to ensure attention to gender equality. As Mutua (2006) argues, developing a united perspective was especially challenging when it came to the Kadhis' Courts. The arguments against the courts were familiar ones. In most jurisdictions, Kenya included, the application of Islamic law makes a distinction between sons and daughters, particularly in matters of inheritance where female heirs are allotted a smaller share in comparison to male heirs. Relatedly, men and women have different obligations to one another as spouses in that a man is required to support his wife or wives during the life of the marriage and for only a short period following divorce. Polygamy is available only to men, and husbands have more opportunity to effect divorce unilaterally. Although many women in the coalition were concerned that the Kadhis' Courts could undermine gender equality, they ultimately endorsed the courts. According to Mutua, they were convinced by three reasons. First, they came to view the courts as supporting women. Drawing on my scholarship, which demonstrates that Muslim women find assistance through the Kadhis' Courts, Mutua affirms that the courts were presented to the coalition as "women's courts" (Hirsch 1998, 2010). As a second reason the group believed that the retention of the Kadhis' Courts was crucial to protecting the religious freedom of Muslims in Kenya. Finally, as a third reason, the coalition had devised an intricate way of using the Constitution's proposed equality clause to produce "equality in fact" through the Kadhis' Courts, even if certain provisions of Muslim law tended toward substantive and procedural inequality. Although appreciative of these efforts, some Muslim women would not endorse elements of the coalition's approach. The coalition fell short of uniting fully across lines of faith, yet their work in the early years of the constitution process stands as evidence of the possibilities for constructive religious pluralism (Mutua 2006).

Throughout the debate over various versions of the Constitution, the argument against the Kadhis' Court on the grounds of posing a risk to gender equality repeatedly emerged.

Muslim political and religious leaders also participated more generally in the debate over the Constitution. Their counter-arguments to opponents of the Kadhis' Courts focused on the crucial role of the courts and Islamic law in the life of Muslims and, relatedly, the generally unproblematic operation of the courts over many decades. Opposition to the Kadhis' Courts from the Muslim community was hardly in evidence. Framed through a sense of grievance over the oppression of Kenyan Muslims, some leaders depicted the opposition to the Kadhis' Courts as yet more evidence of the Muslim community's embattled position. Perhaps a sense of fear—of Islamicization or of increased oppression--drove parties on either side of the issue to articulate their positions ever more stridently in the run up to the 2010 referendum. Also, it became clear that outside interests were trying to influence the debate in an effort to gain followers for particular sects of Christianity and to diminish the strength of the Muslim community (Committee of Experts on Constitutional Review 2010, 27). As tensions rose in late 2009, one Muslim religious leader put it to his Christian counterparts, "For the sake of peace, review your hardline stand against these important courts as we are already sitting on a volcano" (Bocha 2009). Faced with leaving the courts out of the constitutional framework, Muslim leaders had no choice but to focus their efforts on saving them. This strategy, although necessary, compromised their ability to contribute effectively to a discussion of how the courts might be reformed (Tayob 2013). Specifically, strong interest in establishing an appeals level for the Kadhis' Courts was not reflected in the final draft of the Constitution, although other areas of reform, such as increasing scrutiny of the qualifications of kadhis, were subsequently addressed in the judiciary transformation process.

An explanation of why, given all the opposition, the Kadhis' Courts were ultimately included in the 2010 Constitution is beyond the scope of this article. However, it is possible that the drafters may have considered the shadow of the future. Were the Kadhis' Court to be denied constitutional recognition, the future might have included the following: closing the courts, firing the kadhis, and leaving a large population of Muslims to handle their legal matters in civil courts, which would be ill-equipped to address their religious commitments. The effects on individual

and community identity would have been enormous. In writing of the potential consequences, Professor Yash Ghai (2010) warned: “Denying a community its identity as expressed in its most cherished values, and which do no harm to others, is the surest way to conflict and disintegration.” Pragmatism, thus, might have been among the reasons for keeping the courts, along with a belief that neither equality, nor religious pluralism, nor any other fundamental right would be compromised through recognizing the Kadhis’ Courts. The Committee of Experts endeavored to ensure this difficult and delicate balance through the ways in which they crafted the Constitution. In the next sections, I develop the argument that constitutional recognition of the Kadhis’ Courts effects a dual pluralism that is at once legal and religious. (For a more general discussion of Islamic law and constitutions, see Van Engeland 2014).

The Kadhis’ Courts as Legal Pluralism

A definitive article on legal pluralism by Sally Merry advances two ways of understanding the concept (Merry 1988). The first, called classic legal pluralism, results from colonial processes, such as those in force in Kenya, which subordinated customary and religious law to the Common law and other legal traditions of the colonial powers. The legal remnants are still present in many post-colonial contexts. The second approach to legal pluralism, called new legal pluralism, focuses on the multiple normative orders that characterize most contexts where law operates. Merry’s point is that religious norms, cultural norms, and institutional norms operate alongside more formally articulated legal rules and institutions. Both types of legal pluralism are relevant to the argument made in this section, which is that an interest in furthering legal pluralism provides the key rationale for the embrace of the Kadhis’ Courts in the 2010 Constitution. The following subsections provide evidence for this argument by examining the Constitution itself and then the operation of the Kadhis’ Courts in the years since the Constitution became law.

Evidence from the Constitution

Conceptually, the Constitution emphasizes the inclusion of the Kadhis’ Courts in furtherance of legal pluralism. What is the evidence for this assertion? For one, the Kadhis’ Courts are discussed in detail in Chapter 10 of the Constitution (see Art. 170 (1-5)), which focuses entirely

on the judiciary. Although mention of the Kadhis' Courts as part of the judiciary seems unremarkable, a different approach might have been taken had their inclusion been primarily an endorsement of the institution on the basis of religious practice. As a second point, it is possible to view the inclusion of the Kadhi's Courts as one among several initiatives in the Constitution that encourage and support alternative dispute resolution. Specifically, Art. 159 (2) (c) promotes "alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms," so long as these do not contravene the Bill of Rights, the Constitution and its values, and other laws (Art. 159 (3)). Thus, the Constitution clearly supports legal pluralism in the sense of multiple, co-existing normative orders, and these can include religious law, customary law, and also other forms of alternative dispute resolution that focus on youth or women in ways that cut across religious or ethnic groups. At the same time, it is worth noting that the Kadhis' Courts are the only judicial body permitted to limit or qualify the right to equality "to the extent strictly necessary for the application of Muslim law before the Kadhis' courts" (Art. 24 (4)). Article 24(4) paves the way for contraventions that could emerge through the application of law, such as the tendency for Muslim law to treat men and women differently based on gender in, for instance, matters of inheritance. However, the broad strokes of the Constitution mean that such issues can be challenged in court.

Given that the Kadhis' Courts were already long established as part of the Kenyan judicial system, eliminating them during the constitutional process would have reduced the options for legal pluralism at the very moment when an expansion of judicial alternatives was being imagined (For an alternative perspective on this point, see Ngugi and Singanga 2009). Moreover, their elimination would have denied one group in particular the judicial services to which they had become accustomed and would have done so on the basis of religion.

Perhaps the most persuasive evidence that the courts were conceptualized and endorsed with the intention of supporting legal, and not religious, pluralism is found in Article 170 (5), which states: "The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and *submit to the jurisdiction of the Kadhi's courts*" (emphasis mine). Two points are relevant here. For one, the Constitution does not allow for the

application of all aspects of Islamic law but rather specifically eschews leaving aside principles of criminal law and the *hudud* punishments. The recognition of only some areas of Muslim law could be viewed as a limit on the practice of religion or a disinterest in embracing the whole of religious law. Second, and more importantly, is the clause that gives individual Muslims the option to submit to the jurisdiction of the Kadhis' Courts, or not. The clause, which was added to the document late in the constitution process, has caused concern among many in the Muslim community, especially kadhis and other leaders who argue that Muslims should not have the option of sidestepping Muslim law, as if the religion allows them to pick and choose the particular principles of Islamic law to which might adhere. Those who are concerned hold the conventional belief that being Muslim, in most interpretations, means submitting to law, which has its sources in the Koran and the *sunna* (words and deeds of the Prophet Mohamed) and, secondarily, the reasoning and decisions of legal schools, among other sources. The specter of Muslims readily turning away from Muslim law and toward secular options is certainly one that could diminish the Muslim faith, yet this circumstance does not appear to concern the state. The state's position is, of course, quite different, as it is unable to limit any individual—on the basis of religion—to one particular legal option rather than another. Providing free choice protects the state, given the rights and fundamental freedoms outlined in the Constitution. Individuals have free will to choose which legal tradition applies to them; they cannot be forced on the basis of faith tradition or identity more generally to use a particular law or court.

Evidence from post-Referendum Judicial Transformation

The examples provided in this section above make the conceptual case that fostering legal pluralism was the primary aim of including the Kadhis' Courts in the Constitution. This conclusion is borne out as well by an analysis of the judicial transformation process, which followed the adoption of the Constitution and, in implementing it, reshaped the Kenyan judiciary. The changes to the existing Kadhis' Courts are profound; they focus primarily on the role of the Kadhis' Courts in the legal system, rather than as institutions primarily concerned with religious belief. Arguably, the changes described below enhanced the courts as an element of endorsing and extending legal pluralism.

After Kenya's 2010 Constitution came into effect, the number of Kadhi's Courts in Kenya grew from 15 to over 50. The growth was part of the transformation of the judiciary imagined and implemented as a result of the constitution process. In consequence the reach of the Kadhis' Courts extends well beyond the coastal region and Nairobi, where Muslims had mostly lived in the past, and access to justice is provided more efficiently and regularly for a majority of people who profess the Muslim faith. They have also benefitted from the effort to build new courthouses nationwide. Moreover, the expansion and professionalization of clerks and other staff at these courts also means that information about the Kadhis' Court procedure is more readily available and that there is rough equivalence between the Kadhis' Courts and the Magistrates Courts serving the same areas. Until new procedural rules are finalized, the Kadhis' Courts are expected to follow the same procedures as other courts and also to maintain case files and other court records uniformly. Similar to the Magistrates' Courts, they will also experience audits and other kinds of evaluation at which time they will be subject to the same measures.

The Judicial Transformation process also elevated the kadhis to the level of magistrates with respect to their position in the judiciary, their pay, and the benefits accorded them as judicial officers. Two types of kadhis can be appointed: Kadhi 1 and Kadhi 2, in addition to the higher levels of Deputy Chief Kadhi and Chief Kadhi. This ranking makes clear that, on certain issues, claimants' matters are heard by a legitimate and respected member of the judiciary. If they are not already university graduates, kadhis are encouraged to seek further study and credentials in law beyond their qualifications related to Islamic law. The kadhis attend the same trainings as other judicial officers and are encouraged to think of themselves in that status position. This approach to professionalizing the kadhis as full members of the judiciary does not preclude any of them from playing a role as a religious leader in the community where they are appointed or another community. However, the kadhis are, through these forms of professionalization, encouraged to see themselves in their position as government employees, namely, as judicial officers. Arguably, the decision to treat kadhis similarly to other judicial officers could influence how they understand themselves and how others, particularly fellow magistrates, might view them and their role in legal matters. Certainly the changes described above represent material and symbolic endorsement of the Kadhis' Courts as a viable legal option with equal legitimacy to other courts.

The positions of the Chief Kadhi and the Deputy Chief Kadhi have undergone similar changes with respect to compensation, benefits, and training. The Chief Kadhi's position is equivalent to that of a High Court judge. Occupants have always been treated generally as leaders who are called upon by the Government of Kenya to represent all Kenyan Muslims and do so when travelling outside the county. This role has been contentious at times, as other Muslim leaders sometimes vie for recognition or power with the Chief Kadhi. Consultations with Muslim leadership beyond the kadhis concerning matters related to the court have involved an array of judicial, political, and religious leaders, including SUPKEM, CIPK, and leaders of women's organizations.

In contrast to the elements of judicial transformation discussed above, kadhis, including the Chief and Deputy Chief, were treated differently than other judicial officers in that they were not evaluated through the Judges and Magistrates Vetting Board (Alfan 2015, Makana 2015, Ng'etich 2015). The board was set up in the wake of the post-election violence of 2007-08 as one element of transitional justice designed to rebuild confidence in government functions, including the judiciary (Judiciary). It was initially unclear as to whether the Board should evaluate kadhis, as they were not technically designated as magistrates or judges in the Constitution, although their position as judicial officers was clear. This led to some public debate, and in the end their records were not reviewed.

The above mentioned changes related to professionalization combined with the steadily growing use of the Kadhis' Courts have led to an increase in the appearance of advocates on behalf of claimants. Both Muslim and non-Muslim advocates file papers and argue cases in Kadhis' Courts. Whether they are Muslim or not, they are expected to apply the relevant Muslim law. Although the learning curve is steep for some advocates, especially non-Muslims, the effect is to legitimize both the courts and the law. Advocates become more aware of Muslim law as a legal system to be applied to resolve a dispute rather than as an element of a faith tradition. Unskilled advocates can create problems, and those with little connection to Islam can be tempted to take advantage of the system. Yet the approach confirms that the Kadhis' Courts are a legal system designed to accomplish technical and specialized tasks that other legal systems also accomplish,

and that lack of adherence to the faith tradition does not preclude gaining expertise in the laws and legal procedures.

Many elements of judiciary transformation serve to integrate kadhis and the Kadhis' Courts into the broader legal system. One area where this integration has a long yet contentious history is in the appeals process. Appeals of decisions made by a kadhi are reviewed by judges of the High Court who are joined in their deliberations by the Chief Kadhi, unless he made the lower court decision. Appeals from that level go to the Court of Appeal, which is the final arbiter. Given the demography of the bench these judges tend to be non-Muslims, although they are encouraged to apply Muslim law in their decisions. The kadhis would like to have the decisions from their courts reviewed by qualified kadhis and have requested the creation of a Kadhis' Appeals Court, presumably staffed by kadhis holding ranks equivalent to appellate judges. The decision to retain the current organization in the Constitution retains a strong connection across sectors of the judiciary in the areas of procedural and possibly substantive law.

The examples described above offer evidence that the Kadhis' Courts were treated as legal institutions on a par with Magistrate's Courts and that the kadhis were treated similarly, in many respects, to judicial officers, rather than as religious leaders. For the most part the approach to the Kadhis' Courts in judicial transformation focused on the courts' contribution to the legal pluralism of the nation under the frame of the secular legal system. At the same time, as the next section describes, examined from the perspective of Kenyan Muslims, the Kadhis' Courts fulfill an important role in defining and publicizing their presence as a prominent religious community in Kenya. That point highlights the contention in this chapter that the Kadhis' Courts represent a dual pluralism that is both legal and religious and underlines its significance given Kenya's aspirations to achieve unity through diversity.

The Kadhis' Courts as Religious Pluralism

The Kadhis' Courts have always stood as evidence of Kenya's religious pluralism, and this remains the case following the 2010 Constitution and the related judicial transformation already

described. To appreciate this point, one need only consider the perspective of the citizen making use of the Kadhis' Courts. The Muslim citizen who chooses to do so has the experience that significant areas of their religious life and practice—how they marry, how they divorce, how they inherit from family members—are recognized and supported by the Kenyan state. Thus the state facilitates an enactment of religious values that underpins significant aspects of Muslim life. The expanded number of Kadhis' Courts means that a greater number of Kenyans can experience religious practice through state institutions and perhaps believe that their government accepts their faith tradition and welcomes its practice, at least in the narrow spheres covered by the Kadhis' Courts' jurisdiction. Of course, attending prayers at the mosque, participating in religious study groups, celebrating holidays, and many other activities are likely more common and more meaningful enactments of being a Muslim in Kenya and understanding oneself as such. Yet local communities previously lacking Kadhis' Courts certainly found sheikhs, imams, or other knowledgeable Muslims to assist in addressing their legal issues; however, access to formal courts emphasizes the state's role in certain areas of religious practice to the extent that these institutions are functioning and well resourced. Arguably, communities with access to Muslim courts might understand themselves as validated and recognized religious communities. During the debate over the Kadhis' Courts and afterwards, complaints by non-Muslims about the special treatment afforded Muslims on the basis of their religion suggest that the religious element of the Kadhi's Courts cannot be ignored.

A brief comparison to neighboring nations where Muslim minority populations have no recourse to the use of Islamic law offers some perspective on the importance of these courts for Kenyan Muslims. For instance, in mainland Tanzania women find it very difficult to obtain a divorce, even if they have been abandoned or abused by a husband (for background on these issues, see, e.g., Chesworth and Kogelmann 2014, Calaguas, Drost, and Fluet 2007, Hirsch 2010, Segu 2016, Kopwe 2014). The options open to them through Islamic law are difficult to enact through the civil law system. The extent to which the lack of options translate into a diminished sense of recognition as a viable religious community is difficult to assess. However, repeated requests for the establishment of Kadhis' Courts in Tanzania reflect a concern by community members, who need only look to the experience of Zanzibar for an example of state recognition of the relevance of Islamic legal institutions to the lives of Muslim Tanzanians. Although more research in this

area is needed, it is likely that community members sense the inconsistency in the state's commitment to religious pluralism, when it comes to the Muslim minority, and that the opposite might be the case in Kenya.

The fact that the kadhis' positions have been elevated on a par with other judicial officers is evidence of their recognition by the state. Bundled into this recognition is their stance as community leaders. Some kadhis might view themselves as religious leaders more so than judicial officers, and it is certainly the case that the Chief Kadhi is called on to represent the community as a religious community, most notably in public events. His required presence at major state occasions, his role as the representative of the Kenyan Muslim community when abroad, and his prominent position as the arbiter of decisions related to religious holidays indicate the state's endorsement of religious pluralism. This recognition is not without controversy that calls into question whether all Kenyan Muslims regard the Chief Kadhi as a religious leader. Specifically, for years the Chief Kadhi has held the responsibility of determining the beginning of the Idd holidays through conveying an official announcement confirming the sighting of the new moon in Kenya. This role, and often the announcement itself, are contested virtually every year. The politics range from a struggle over religious leadership to an interest in following Saudi Arabia in their determination of the timing of Idd. The tension reflects some uncertainty in whether the role of the religious dimensions of the Chief Kadhi's position—in this instance bolstered by the state's endorsement of his role in determining the start of Idd—is understood as religious by other Kenyan Muslims.

Religious pluralism in a somewhat different form has been increasingly fostered through the Kadhis' Courts in recent years. In deciding cases and presenting their reasoning, the kadhis themselves draw on a wider range of Islamic legal principles than in the past. Previously, the kadhis tended to focus on interpretations from the Shafi sect of Sunni Islam. Although these remain the guiding principles, they turn to other interpretations of law in their rulings. Specifically, they look to legal interpretations across the schools of Islamic law, including courts in Malaysia, South Africa, and India. Their decisions, particularly on appeal, mention other legal schools and other sects of Islam. In their openness to different approaches under the umbrella of Islam, the kadhis welcome and accommodate the diverse Muslim population that makes use of

the courts. Kenyan Muslim communities with roots in South Asia, Persia, and other Shi'ia contexts can find recognition within the broader community of co-religionists. Kadhis find that the material from other sects has been useful not only in accommodating the diverse population of Muslims in Kenya but also in addressing some of the thorny contradictions that arise in the relation between Muslim law and the broader values in the Kenyan Constitution. For instance, if the decision is made to appoint a female kadhi, the rationale will likely cite the Hanafi school of law, which has affirmed Muslim women's ability to serve as judges (Hashim 2015).

Dual Pluralism: Toward Unity through Diversity

The sections above provide evidence that the Kadhis' Courts represent a "dual pluralism." The courts are the site where the legal pluralism intended by the state also enhances religious pluralism in society. Hashim puts this another way when he makes the point that the Kadhis' Courts "have assumed the role of a religious symbol which has since independence engaged Muslims in Kenya with the State on the one hand, and Muslims and Christians from the mainstream churches on the other hand" (Hashim 2015, 81). From this perspective the Kadhis' Courts are material and symbolic evidence that Muslims are recognized as a valued religious community alongside others in Kenya. That said, neither religious pluralism nor legal pluralism are static conditions. Rather, they are ongoing processes. It follows then that shifts and changes of various sorts can be expected in the role of the Kadhis' Courts, given the fluid nature of legal and religious pluralism. Not surprisingly, the Kadhis' Courts are already being reshaped through the efforts to integrate them into the broader Kenyan legal system and judiciary. For instance, as the role of the kadhi changes, the structure of Muslim religious leadership will also be reconfigured. The operation of the Kadhis' Courts is also influenced by developments in areas of law through legislation (e.g., the Marriage Act of 2012) and through rule-making that, for instance, focuses on procedural rules in Kadhis' Courts. Viewing pluralism as an ongoing process opens a space for considering how recent developments related to the Kadhis' Courts, on the one hand, contribute to the unity through diversity that is an aim of the 2010 Constitution and, on the other hand, also pose challenges to that aim. The subsections below explore several areas in which this tension is emerging.

Submitting to Muslim Personal Law

In many parts of Kenya, Muslims have had experiences with the police, secular courts, government offices, and the state generally that have undermined their sense of themselves as full citizens. Reports abound of discrimination against Muslim citizens in, for instance, receiving passports, land titles, and assistance of various types. As the Kadhis' Courts become further integrated into the broader Kenyan legal system, and more Muslim Kenyans become aware of, and make use of these services, an increasing number of individuals will have the experience of connecting to the state through a process that also affirms their religion. The sense that they have the same entitlement to legal services in the area of personal law as do other Kenyan citizens, yet can receive those services in a way that recognizes religious difference, may be meaningful for an increasing number of Kenyan Muslims, as access to justice through the Kadhis' Courts expands to new regions and becomes more predictable and reliable. Arguably, for Kenyan Muslims this experience is an example of the unity in diversity aspired to in the Constitution and a counterpoint to the discrimination that Muslims have long faced and that has increased after specific violent events (e.g., the 1998 embassy bombings and the 2013 Westgate Mall attack). A related instance whereby some groups of Kenyan Muslims are beginning to experience state recognition of their rights is in the area of rights to citizenship and the corresponding ability to apply for and receive a passport or state-issued ID card in a manner similar to other Kenyans.

Although preserving Muslims' ability to use religious personal law was a key aim of many participants in the constitution process, a concern to guard against religious coercion likely fueled the decision to include Article (170 (5)), which limits the purview of the Kadhis' Court to people who profess the Muslim faith and who also submit to the jurisdiction of the Kadhis' Courts. The religious pluralism enshrined in the Constitution assumes the free practice of religion and the freedom of individuals to change religion or their religious practices. Muslim who oppose the "submission" clause articulate several reasons why. Some view it as an affront to suggest that any Muslim would eschew Islamic law by choosing to plead a case involving personal law in a civil court. Others worry about the confusion created if parties to a claim move strategically or haphazardly from one court to another. As individual Muslims come to understand the submission clause and gain familiarity with their options, they might seek out a

venue other than Kadhis' Court to handle an issue related to personal law. Many marital disputes involve financial claims, and parties might be tempted to utilize any available strategy to preserve their economic interests. "Forum shopping" might be recommended by advocates, perhaps especially non-Muslim advocates, when they perceive that different courts might produce different outcomes. The intense desire to win that fuels some disputes may come to drive the choice of courts rather than a sense of fidelity to family, identity, or religious law. The role of the Kadhis' Courts as a key element of religious pluralism might shift dramatically should a large number of Muslims seek legal remedy elsewhere, including in secular civil courts. But this scenario is far from the current situation, as most Muslims continue to handle their personal matters in the Kadhis' Courts.

A related situation is a harbinger of the complexities that can result when submission is a credible option for parties to a Kadhis' Court case. Specifically, more than a few couples have married under Muslim law and then, in the course of seeking divorce or another legal remedy, one party renounces the Muslim faith. Most examples involve individuals who had previously converted to Islam for the purposes of marriage and, after breaking ties with their spouse and their new faith, sought legal remedy in civil court rather than Kadhis' Court. Such situations raise complex scenarios around jurisdiction, for civil courts. In such circumstances the civil courts are not authorized to end a marriage conducted in Kadhis' Court. Moreover, some kadhis express concern to act in a situation where the dissolution of a marriage is requested by a wife, and the husband does not submit to court's jurisdiction. Other kadhis do not share these concerns and will move forward with dissolution, if the circumstances warrant. The lack of resolution in several of these complicated matters suggests that the submission clause is vulnerable to cynical and self-serving uses, but the choice to submit or not might also be a site for a test of faith. How people understand their own experience of opting out of the Kadhis' Court, or whether they simply rely on an advocate to guide them through this process, might be a key to the tension between use of the courts as an act of religious pluralism or one of legal pluralism. This is an area for further research, as it will also illuminate to the degree to which Muslim law itself is seen as a key element or symbol of religion for Kenyan Muslims.

Seeking Equality under the Law

Support for fundamental human rights is woven through the Constitution and the recent laws that have been passed to support its aims. Article 19, which focuses on Human Dignity, and other provisions of the constitution, endeavor to ensure that nothing that is supported through the constitution can harm dignity or stand in the way of equality among people. Yet the Kadhis' Courts are offered an exception to these provisions through Article 24(4), as mentioned in an earlier section. Whether this legal arrangement will result in instances of gender inequality or gender discrimination in court decisions or practices is something that proponents of women's rights in Kenya will likely monitor in the coming years.

The issue of gender equality, mentioned as a persistent concern about the Kadhis' Courts in the constitutional review process, has proven to be a sticking point with respect to the appointment of kadhis, a task that is under the auspices of the Judicial Service Commission. Neither the Constitution nor any written statute stands in the way of women becoming kadhis, and the Kenyan Constitution guarantees equal access to employment. In fact, Article 27(3) of the Constitution endorses equality of opportunity: "Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural, and social spheres." However, vehement opposition to the appointment of female kadhis has come from various sectors, including Muslim religious leaders, whenever the possibility of appointing a woman as kadhi is raised (Hashim 2015). At the same time support for appointing female kadhis has been expressed by the Chief Kadhi, prominent Muslims, and at least one Muslim-run organization, called MUHURI (Muslims for Human Rights). Although women have applied for the position, none have been appointed. A proponent of opening the position to women, the former Chief Justice Willy Mutunga found the opposition so strong that he instead appointed a Muslim woman to the post of magistrate (Wamathai 2016). Magistrate Mwanamkuu Sudi's appointment was incorrectly lauded as the first time a Muslim woman had occupied the position of magistrate; several other Muslim women have held judicial positions, including Sultana Fadhili (Magistrate's Court), Justice Abida Ali-Aroni (High Court), Justice Jamila Mohammed

(Court of Appeal), and Justice Farah A. S. Mohamed (High Court Commercial Division) (for additional details on the career of Justice Ali-Aroni, see Alidou 2013). If a female kadhi is ultimately appointed, the effects on gendered leadership in the Muslim community will be significant.

Promoting Alternative Dispute Resolution

It is a strong possibility that the character of the Kadhis' Courts will change as their approach to dispensing justice cleaves more closely to the formal state judicial apparatus. This process has already taken place in the Kadhis' Courts in urban areas, where high case loads preclude kadhis and clerks from hearing matters informally, and some kadhis insist that all submissions to the court be prepared by advocates. The question is open as to whether the courts will retain the informality that has characterized them in smaller towns and rural settings. Relatedly, the operation of the Kadhis' Courts also has bearing on other actors in the community, such as imams who conduct marriages, sheikhs who mediate disputes, and registrars who prepare marriage and divorce certificates. A good deal of informal legal and religious practice happens outside the Kadhis' Courts, and the form it takes is inextricable from formal judicial functions, which can depend on, incorporate, or otherwise foster alternative approaches, or not.

The increased recognition given to kadhis as judicial officers might empower them in new ways as leaders in Muslim communities, at local and national levels. It remains to be seen how the shift in recognition of kadhis as judicial officers will influence their role in the broader group of magistrates and judges with whom they train and collaborate. Kadhis who possess both a secular law degree and credentials in Muslim law will be poised to hear matters in Magistrates' Courts, as well as in Kadhis' Courts, and dual appointments could be on the horizon. The kadhis could end up in situations where, drawing on their own values and approaches, they influence other magistrates and judges. The increased status afforded kadhis might give a boost to other efforts to use religious law or religious values in alternative dispute resolution or even in courtroom settings. Given the emphasis on alternative dispute resolution enshrined in the Constitution, the configuration of formal and informal legal practices might shift considerably. Religious leaders

of all stripes could take advantage of this opportunity to intervene in disputes and gain authority as alternative dispute practitioners.

Conclusion

It might go without saying that the emphasis on fostering unity in diversity through the constitution process was focused primarily on improving relations among ethnic groups and emphasizing inclusive processes with respect to ethnicity (Ghai and Cottrell 2013). Although it is still too early to say, the effects of attention to legal and religious pluralism seem to have an interest effect on ethnic pluralism. For instance, the expansion of the number of kadhis means that these judicial officers increasingly reflect the range of ethnicity of Kenyan Muslims (Abucheri 2015). The result could be a decrease in the marginalization experienced by some Muslims as a result of the prominence of Muslims from coastal towns and also Somalis in Muslim leadership. In theory, the potentially unifying experience of sharing religious faith can serve to cross-cut ethnic cleavages as it provides an overarching umbrella for identification and connection.

The main conclusion of this chapter is that constitutional recognition of the Kadhis' Courts fosters religious diversity; this approach is best characterized as a dual form of pluralism, both legal and religious, that fosters unity in diversity. Much of the discussion has focused on the origins of this dual pluralism in Kenya's constitution process. However, any national effort to promote pluralism, whether religious or legal in nature, is necessarily influenced by discourses and initiatives that circulate globally. Examples of influences on the Kenya Constitution process include the discourses of women's rights and human rights and also the variety of initiatives that endeavor to position Islamic law in relation to Western values, democratic states, or various ideological commitments. Rather than assume that these discourses emerge from "the West" and circulate globally to influence the less powerful nations of the world, Eve Darian-Smith and other scholars in the new tradition of "global legal pluralism" emphasize a more fluid perspective

on the power dynamics involved, particularly the relevance of nation-state boundaries (Darian-Smith 2013). From Darian-Smith's perspective, "the world is made up of assemblages or 'constellations' of overlapping legal systems that embody a diverse range of cultural values, norms, and meanings" (Darian-Smith 2013, 39). In any given context those systems may influence national approaches to law and law reform, such as constitution-making. The effects can result in new patterns of legal pluralism such that distinct legal traditions are brought together in new ways. The Kenyan Kadhis' Courts reflect a new pattern of secular and religious legal integration. One take-away message from the Kenyan example is that constitutions in secular nations can enhance religious pluralism, including pluralism that includes Islam, through constitutional arrangements, particularly when they take the form of the law or courts and protect the rights of all minorities rather than assert the hegemony of the majority. In the spirit of global legal pluralism, the Kenyan example is one that could circulate globally and become a useful example for other contexts.

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Endnotes

ⁱ Some advocates took a different tack by arguing that the expansion of Kadhis' Courts beyond the coastal region was illegal (Ngugi and Siganga 2009), a point which was affirmed in *Jesse Kamau and 25 Others versus Attorney General (Judgement of 24 May 2010)*.