

Law, Religion and Reconciliation in Africa



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14 STATE OVERSIGHT OF RELIGIOUS COURTS: THE KADHIS' COURTS IN KENYA

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INTRODUCTION

African states mainly feature pluralistic legal systems accommodating the following systems of law: (1) African customary law, (2) received common or civil law, (3) religious law (usually for the Muslim population) and (4) colonial or post-independence parliamentary legislation. These pluralistic legal systems are housed within a centralised judicial system in which the state exercises overall jurisdiction over the legal system, for instance, by modifying customary law to conform to certain legal principles or selecting those who interpret religious law. Kenya is no exception. The Constitution of Kenya, 2010, embraces the cultural, ethnic and religious diversity of Kenya and reflects this diversity in its legal system.¹

Kenya has a minority Muslim community that makes up slightly more than 10% of the population.² Even so, Kenya and the East African coast have a long pedigree with Islam, which predates European colonisation. According to Ali Mazrui, a scholar of African and Islamic studies, Islam found its way to the East Africa coast following the monsoons from the Arabian Peninsula and the Gulf areas on *dhow*s carrying Arabs who were mainly interested in trade but also marginally missionaries. Mazrui points to the fact that the Arab immigrants to East Africa were the religious preachers, rather than indigenous Africans, which impeded its spread compared to West Africa, and thus kept it a minority religion in comparison to Christianity.³ At the advent of the British colonial rule in Kenya, the Sultan of Zanzibar allowed the British to administer the ten-mile coastal strip subject to the British respecting the Islamic way of life.⁴ The Kadhis' Courts were thus preserved pursuant to an agreement between the British colonial administrators and the Sultan of Zanzibar.⁵ Therefore, the British colonial administration presided over a triptych court system of Kadhis' Courts, which were geographically restricted to the ten-mile coastal strip and to areas with a significant Muslim population; native courts applying customary law; and judicial courts applying British common law. Almost

1 Constitution of Kenya, 2010, preamble, para 3.

2 Kenya National Bureau of Statistics. 2019. *2019 Kenya Population and Housing Census*, vol IV. Nairobi: KNBR, 422.

3 Mazrui AA. 1985. "Religion and political culture in Africa", *Journal of the American Academy of Religion* 53: 818-819.

4 Hassan AI, Constitution of Kenya Review Commission. 2020. "Kadhi's Courts: Setting the record", Commonwealth Legal Information Institute. Online at: <http://www.commonlii.org/ke/other/KECKRC/2002/11.html> [Accessed 4 March 2023].

5 Hassan, "The Kadhi's Courts".

to 70 years later, at the time of granting independence to Kenya, questions arose as to what would happen to the ten-mile coastal strip: Was it to be joined to Kenya or to be granted independence as an individual entity, or should it revert to the Sultan of Zanzibar?⁶ A commission established by the British Government recommended that the ten-mile coastal strip should be joined to Kenya subject to Kenya guaranteeing the continuity of the Kadhis' Courts among other conditions. At independence, the Sultan of Zanzibar surrendered sovereignty of the ten-mile coastal strip to Kenya,⁷ and, in exchange, the independence Kenya Constitution listed Kadhis' Courts under the system of courts in Kenya.⁸ It is against this background that Kenya's legal system today includes Kadhis' Courts, which are the only religious judicial courts. The Constitution of Kenya, 2010, also enshrines the Kadhis' Courts in near identical terms as the 1969 amended Independence Constitution.⁹

Notably, the 1967 reform in Kenya's judicial system, integrated the system of courts and expunged administrators from the dispensation of justice, thus abolishing the native courts, and subjecting all persons to state judicial courts.¹⁰ This has often cast the Kadhis' Courts in the spotlight, leading to questions on their necessity, compatibility with the Bill of Rights and justification in light of the fact that Kenya has no state religion, as well as calls for their non-recognition. These calls were most pronounced during the 1997-2010 constitutional review process. In the 2004 case of *Jesse Kamau and 25 others v Attorney General*, a group of Christian leaders filed a case challenging the inclusion of Kadhis' Courts in the Constitution.¹¹ The main contestation was that inclusion of Kadhis' Courts in the Constitution amounted to privileging Islam in an otherwise multi-cultural and multi-religious state, that state funding for the operations of the Kadhis' Courts was discriminatory and that their extension beyond the ten-mile coastal strip was unconstitutional.¹² A May 2010 judgement in the case, delivered just before the Constitutional referendum, agreed with the applicants that inclusion and financing of Kadhis' Courts in the Constitution under the Judiciary was discriminatory to other religions and their subjects in view of the fact that Kenya had no state religion.¹³ In addition, the Court declared the extension of Kadhis' Courts beyond the ten-mile coastal strip unconstitutional.¹⁴ However, the constitutional review process, informed by the

6 Hassan, "The Kadhi's Courts".

7 Hassan, "The Kadhi's Courts".

8 Constitution of Kenya, 1963 (as amended in 1969), s 66 ("[T]here shall be subordinate courts held by Kadhis as Parliament may establish and each Kadhi court, shall subject to this Constitution have such jurisdiction and powers as may be conferred on it by any law.").

9 Constitution of Kenya, 2010, art 170.

10 Cotran E. 1983. "The Development and Reform of Law in Kenya", *Journal of African Law* 27:48.

11 *Jesse Kamau and 25 others v Attorney General* [2010] eKLR.

12 *Jesse Kamau and 25 others*.

13 *Jesse Kamau and 25 others*.

14 *Jesse Kamau and 25 others*.

historical treaty between the Sultan of Zanzibar and the Kenyan Government, opted to maintain the Kadhis' Courts in the Constitution as a way of protecting Muslims as a minority group in Kenya.¹⁵

Having set out the background of Kadhis' Courts in Kenya as religious courts, this chapter examines their operations and how the Kadhis' Courts fit in within the transformational framework of the Constitution of Kenya, 2010, which is founded on the egalitarian principles of equality, freedom and human dignity. The chapter applies the theory of transformative accommodation to weave together the discussion and conclusion. Ayelet Shachar, a political scientist, describes transformative accommodation as a form of joint governance between the state and a cultural or religious group, in which jurisdictional authority in matters that are important for the group's self-definition is dispersed between the state and the group.¹⁶ The theory acknowledges that individuals possess multiple identities and state measures put in place to accommodate distinct group identities against the wider society often result in violation of individual rights within the accommodated group.¹⁷ According to Shachar, the accommodation measures reinforce power hierarchies inherent in the cultural or religious practices of the group resulting in multicultural vulnerability.¹⁸ To address multicultural vulnerability, Shachar proposes a form of shared governance based on the following cumulative principles: subject matter allocation, the no monopoly rule between the state and group in relation to jurisdictional authority and exercise of choice of jurisdictional authority for the group members.¹⁹ Further, Shachar argues that ultimately through shared jurisdiction and by offering jurisdictional choices, the power hierarchies that result in violation of individual rights of group members are dismantled by the group members.²⁰ Illustrating the transformative accommodation theory through the lens of the Kadhis' Courts, the Constitution of Kenya, 2010, establishes a legal-institutional dimension of religious accommodation in which there is shared jurisdictional authority between state courts and Kadhis' Courts on personal matters for persons professing the Muslim religion. However, the Kadhis' Courts do not enjoy absolute jurisdiction and Muslims have jurisdictional choice in that they must expressly submit themselves to the authority of the Kadhis' Courts, beyond professing Muslim faith.

The chapter is organised as follows: Part II of the chapter provides a foundational account of the Kadhis' Courts in the Constitution of Kenya, 2010, including their

15 Committee of Experts on Constitutional Review. 2010. "Verbatim record of plenary meeting of the Committee of Experts on Constitutional Review", held on 2 January 2010, Nairobi, Kenya, 176-180 (on file with author).

16 Shachar A. 2001. *Multicultural Jurisdictions: Cultural Differences and Women's Rights*. Cambridge: Cambridge University Press, 14.

17 Shachar, *Multicultural Jurisdictions*, 14.

18 Shachar, *Multicultural Jurisdictions*, 14.

19 Shachar, *Multicultural Jurisdictions*, 14.

20 Shachar, *Multicultural Jurisdictions*, 15.

jurisdiction and scope of operations; Part III highlights the measures put in place by Parliament and the Judiciary to bring the Kadhis' Courts in conformity with the egalitarian ethos of the Constitution; Part IV analyses selected case law to demonstrate the ongoing contestation and questions on contours of jurisdiction and accommodation of Kadhis' Courts within an egalitarian constitutional framework and secular legal system; and, finally, Part V summarises the chapter and uses transformative accommodation theory to demonstrate the extent to which the Kadhis' Courts have adapted to the constitutional principles of equality, dignity and freedom.

KADHIS' COURTS IN THE KENYA CONSTITUTION, 2010

As pointed out above, the Constitution of Kenya, 2010, enshrines the Kadhis' Courts under the system of courts in the chapter on the Judiciary. The Constitution designates Kadhis' Courts as subordinate courts alongside magistrate courts and courts martial.²¹ It also provides for appointment of a Chief Kadhi and prescribes the minimum number of *kadhis* in Kenya as three.²² This is especially significant, as the one of the contestations during the constitution-making process, which was also raised in the *Jesse Kamau* case, was the extension of the geographical application of Islamic law from the ten-mile coastal strip to other parts of Kenya. Viewed from a religious freedom perspective, conscripting Kadhis' Courts to only the ten-mile coastal strip would amount to a violation of religious freedom by denying access to Kadhis' Courts to Muslims residing in other parts of Kenya. The state obligation to respect religious freedom requires the state not to adapt any measures that would inhibit the enjoyment of a right. Essentially, failure to appoint *kadhis* would defeat the exercise of religious freedom. In addition, the Constitution lays down the qualifications of persons who can hold the office of a *kadhi* as one who professes the Muslim faith and is knowledgeable in Muslim law applicable to any sect of Muslims.²³ Further, the Constitution expressly provides for the jurisdiction of the Kadhis' Courts as limited to "determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess Muslim religion and submit to the jurisdiction of Kadhis' courts".²⁴ Tied to this is a provision in the Bill of Rights which immunises Kadhis' Courts from the equality provisions and which has been the subject of the most stinging criticism against the Kadhis' Courts in Kenya.²⁵ Finally, the Constitution directs Parliament to enact legislation for the establishment of the Kadhis' Courts.²⁶

The above constitutional provisions raise a number of issues. Firstly, the Kadhis' Courts are part of the Judiciary, meaning that they are not an independent system of

21 Constitution of Kenya, 2010, art 169(1).

22 Constitution of Kenya, 2010, art 170(1).

23 Constitution of Kenya, 2010, art 170(2).

24 Constitution of Kenya, 2010, art 170(5).

25 Constitution of Kenya, 2010, art 24(4).

26 Constitution of Kenya, 2010, art 170(3).

courts, but rather an appendage of the Judiciary in the subordinate courts category. Second, the designation of Kadhis' Courts as subordinate courts implies a hierarchy between Islamic law and the secular legal system and a desire to subordinate *sharia* to secular constitutional principles. Third, that Kadhis' Courts do not enjoy exclusive jurisdiction, but rather have concurrent jurisdiction with secular courts, as persons professing the Muslim faith can choose either the Kadhis' Courts or the secular courts, buttresses the point that the Kadhis' Courts are not an independent judicial system but rather offer a jurisdictional choice for Muslims. Fourth, the appointment of *kadhis*, by the Judiciary, which means that *kadhis* are judicial officers, hence making it possible to appoint female *kadhis*. Lastly, the immunisation of *sharia* from the equality provision in a constitutional framework founded on egalitarian principles appears contradictory. Discussion on these five issues is fully taken up in the subsequent Parts III and IV.

Returning to the constitutional directive for Parliament to enact legislation on the Kadhis' Courts, the Kadhis' Courts Act, 2012, concretises the constitutional provisions on Kadhis' Courts. The Kadhis' Courts Act and the Kadhis' Courts Act (Procedure and Practice Rules), 2020, provide specific guidelines for the operation of Kadhis' Courts in Kenya. The Kadhis' Courts Act deals with the issues of procedure and evidence, return of records to the High Court, and notably the rules of procedure and evidence are identical to those applied in magistrate courts.²⁷ The Procedure and Practice Rules are more comprehensive and address matters of evidence, divorce and succession.²⁸ The Procedure and Practice Rules also make provision for conduct of business in Kadhis' Courts in relation to service, commencement of proceedings, judgment, appearance, summons, hearings and appeals.²⁹ In addition to the Kadhis' Courts Act and Procedure and Practice Rules, other statutes relating to matters of personal law such as the Marriage Act, 2014, Matrimonial Property Act, 2013, and the Law of Succession Act, 2021, recognise the application of Islamic law to Muslim marriages, divorce, dissolution of property and inheritance.³⁰

LEGISLATIVE AND JUDICIAL OVERSIGHT OVER KADHIS' COURTS

This part of the chapter examines the measures put in place by the government to oversight the Kadhis' Courts in Kenya. As discussed earlier, the express immunisation of *sharia* from the equality provisions of the Constitution of Kenya, 2010 has been a subject of much debate and criticism in Kenya. At the core of this criticism is the seeming contradiction of a constitution that is founded on egalitarian principles but also exempts part of the population from its equality provisions. As stated, the inclusion of Kadhis' Courts was a political settlement in the drafting of

²⁷ Kadhis' Courts Act, 2012, ss 6, 7 and 8.

²⁸ The Kadhis' Courts (Procedure and Practice) Rules, 2020 (Legal Notice 203 of 220).

²⁹ Kadhis' Courts Rules, 2020.

³⁰ See Marriage Act, 2014 ss 48, 49, 57, 71 and 72; Matrimonial Property Act, 2013, s 3; Law of Succession Act, ss 48(2) and 50(2).

the Constitution of Kenya, 2010, that was meant to protect Muslims as a minority group in Kenya. This part of the chapter, therefore, assesses legislative and judicial oversight over the Kadhis' Courts to ensure that application of *sharia* in Kenya is in conformity with the egalitarian principles of the Constitution.

At the outset, the constitutional provisions discussed in Part II provide a number of safeguards to ensure that Kadhis' Courts operate in conformity with constitutional principles. Firstly, in terms of hierarchy, designation of the Kadhis' Courts as subordinate courts alongside courts martial appears to be a compromise between the two clashing camps on the inclusion of Kadhis' Courts in the Constitution. Significantly, their subordinate status means that their decisions are subject to scrutiny by superior courts thus preserving the egalitarian principles reflected in the secular legal system. Second, their jurisdiction is limited both in terms of material and personal jurisdiction. In relation to material jurisdiction, Kadhis' Courts can only adjudicate over matters of personal status in proceedings on marriage, inheritance, divorce and dissolution of property. The material jurisdiction is further narrowed by the absolute and conjunctive personal jurisdiction requirements enshrined in the Constitution. For exercise of personal jurisdiction, all parties must profess Muslim faith and submit to the Kadhis' Courts. Significantly, the requirement that all parties "submit to the Kadhis' Court jurisdiction" was added to the 2010 Constitution and has proven to be the bulwark for freedom, human dignity and equality. Further, the Constitution also provides for judicial oversight by prescribing the appointment of *kadhis* and vesting the Judiciary with the mandate on appointment. A case law analysis of how these jurisdiction limitations have played out in practice is taken up in Part IV.

In relation to statutory oversight, the Kadhis' Courts Act and the Kadhis' Courts Procedure and Practice Rules contain provisions to ensure that the procedural norms of justice are met according to secular law and that substantively norms on equality, human dignity and freedom are followed. To ensure that the procedural norms of justice are met according to secular law, the Kadhis' Courts Procedure and Practice Rules are modelled on and are identical to the Civil Procedure Rules of Practice, which are applied by all other judicial courts.³¹ The Rules are also subject to the Constitution, which contains safeguards on access to justice, and any interpretation of the Rules that is inconsistent with the Constitution is void.³² In addition, the Act and Procedure and Practice Rules address some of the contentious issues, such as evidentiary procedures. Accordingly, there is no distinction based on sex on the legal weight attached to evidence and evidence is to be assessed based on its credibility and not the number of witnesses.³³ The Rules also vest the burden of proof on the person making the allegations in line with secular law and prohibit compulsion of witnesses.³⁴

³¹ Kadhis' Court Act, s 6.

³² Kadhis' Courts Rules, rule 172.

³³ Kadhis' Courts Act, ss 6(i) and (ii).

³⁴ Kadhis' Courts Rules, rules 123 & 124(2).

In order to ensure substantive justice norms, the Kadhis' Courts are empowered to ascertain that divorce, marriage, inheritance and dissolution of property meet the constitutional safeguards on equality, human dignity and freedom. For instance, in the case of divorce by unilateral *talaq*, the Kadhis' Courts are vested with the role of ensuring that the unilateral divorce is in accordance with the standards of Muslim law.³⁵ Similarly, in divorce by agreement (*khul*), Kadhis' Courts are charged with ensuring that payment is in accordance with the means of the parties and tenets of justice.³⁶ As pointed out earlier, the Marriage Act, 2014, has provisions relating to marriages. To ensure substantive justice, protection of children and to bring Islamic marriages in conformity with the constitutional provisions, the Marriage Act prohibits all child marriages in Kenya regardless of religion or culture and sets the mandatory age of marriage as above 18 years.³⁷

In relation to judicial oversight, the Judiciary exercises control over the Kadhis' Courts as subordinate courts. At a general level, the proceedings of Kadhis' Courts are reviewed by the High Court as directed by the Chief Justice.³⁸ The Constitution also provides for scrutiny of their decisions by the High Court by way of appeals. In order to ensure quality of justice, the Judicial Service Commission is mandated with the appointment of *kadhis*, including making the overall determination that a person can hold a Kadhis' Court.³⁹ The judicial oversight in appointment of the Chief Kadhi marked a departure from past practice in which the Chief Kadhi was appointed through political lobbying and influence. Illustratively, during the 2023 appointment of the Chief Kadhi, the Judicial Service Commission conducted a merit-based process in which the position was openly advertised and applicants interviewed in a public process, in which the representatives of Muslim community participated as observers.⁴⁰

The foregoing constitutional and statutory provisions on the Kadhis' Courts in Kenya bring out the legal-institutional accommodation model in which the constitutional provisions clearly demarcate shared jurisdictional authority between state courts and the Kadhis' Courts on matters of personal status for persons professing Muslim religion. In regard to the no monopoly rule between both courts, decisions of Kadhis' Courts are appealable to the High Court, with the Chief Kadhi or other *kadhis* sitting as assessors during appeals. In addition, persons professing Muslim religion have jurisdictional choice to decide whether to have their matters determined in the Kadhis' Courts or in the state courts.

³⁵ Kadhis' Courts Rules, rule 152.

³⁶ Kadhis' Courts Procedure and Practices Rules, rule 153(5).

³⁷ Marriage Act, s 4.

³⁸ Kadhis' Court Act, s 7.

³⁹ Constitution of Kenya, 2010, art 170(4); Judicial Service Act, s 32.

⁴⁰ Judicial Service Commission. 2023, "JSC Appoints Hon. Athman Abdulhalim Hussein as the New Chief Kadhi", JSC Updates, 20 July.

CONTESTATION, CONTOURS OF JURISDICTION AND ACCOMMODATION OF KADHIS' COURTS

Scholarship on religious courts often cites the points of tension between religious courts and secular courts existing as part of one legal system.⁴¹ In her work on Islamic and Jewish courts in secular jurisdictions, Rabea Benhalim, a scholar of Jewish and Islamic law, identified three schools of thought within the scholarship on legal pluralism as comprising: (1) those who support existing of religious courts alongside secular courts, (2) those who support one law for all and hence oppose religious courts in secular contexts and (3) contextual scholars who support religious courts in certain contexts.⁴² While those in support of religious courts argue that these courts are in line with religious liberty and protection of minority rights, those who advocate for one law for all argue that religious courts are likely to undermine human rights and civil integration.⁴³ With these various perspectives in mind, this part of the chapter examines the actual operation of the Kadhis' Courts in Kenya since passage of the Constitution of Kenya, 2010, with a view to highlighting ongoing contestation and how questions of the jurisdiction Kadhis' Courts have been resolved and their accommodation within the egalitarian principles of the Constitution.

The principle of gender equality, specifically equality between spouses, is often a familiar ground for contestation in religious and cultural pluralism. In Kenya, the Constitution specifically immunises the application of Muslim law from the constitutional provisions on equality. While the justification advanced by the constitutional review process was that it provides an anchor for the Kadhis' Courts, debate has not abated on the constitutionality of the immunisation of *sharia* law from the constitutional provisions on equality. United Nations human rights monitoring mechanisms have pointed out the incompatibility of the provision with human rights treaties that Kenya has ratified. For instance, the UN Committee on Elimination of Discrimination Against Women, after considering Kenya's state report in 2017, recommended that the state should codify Muslim family law in a manner compatible with the equality provisions in the Constitution of Kenya, 2010, and the Convention on Elimination of All Forms Discrimination Against Women (CEDAW).⁴⁴ In an analysis of the compatibility of human rights law and Islamic law on inheritance, Jamil Ddamulira Mujuzi, a legal scholar, has pointed out cases

41 Scolnicov A. 2006. "Religious law, religious courts and human rights within the Israeli constitutional structure", *International Journal of Constitutional Law* 4:734; Benhalim R. 2019. "Religious courts in secular jurisdictions: How Jewish and Islamic Courts adopt to societal and legal norms", *Brooklyn Law Review* 84(3): art 2.

42 Bennalim, "Religious law, religious courts and human rights", 759-762.

43 Benhalim, "Religious law, religious courts and human rights", 760.

44 United Nations CEDAW Committee. 2017. Kenya concluding observations for the 8th periodic report, UN Doc CEDAW/C/KEN/CO/8, para 9.

of non-Muslims and children born out of wedlock in which the Kenyan courts have reached decisions that seemingly uphold discrimination of religious grounds.⁴⁵

The issue of child marriage has also turned out to be an area of contestation in the operation of Kadhis' Courts in Kenya. As discussed in Part III, both the Constitution and the Marriage Act, 2014, prohibit child marriages. In *Council of Imams and Preachers of Kenya, Malindi*,⁴⁶ the petitioners and parents of the child contended that disallowing child marriages under Islamic faith amounted to violation of the right to religious freedom. The case involved marriage of a 16-year-old girl in which the State intervened during the ceremony, subsequently charged the parents with the criminal offence of child marriage and committed the girl to a child juvenile remand home.⁴⁷

The question that the High Court grappled with was whether child marriages constitute a permissible limitation of the equality provisions in the Constitution of Kenya, 2010. The petitioners argued that marriage of a child under Islamic rites was a religious and not cultural practice and further that the Constitution did not expressly prohibit child Islamic marriages. Further, the petitioners argued that under Islamic marriages the female had to consent to marriage, which the girl in this case had, and that the Marriage Act had a provision that ousted its application from Islamic marriages to the extent of any inconsistency.⁴⁸

The High Court stated that religious freedom was not an absolute right and was thus limited by the provisions of the Constitution. Essentially, the High Court ruled that religious freedom must be exercised within the constitutional provisions. While agreeing with the petitioners that Islam allows child marriage, the High Court was categorical that child marriage is prohibited in Kenya. The High Court stated that Kenyans had agreed to protect children from child marriage irrespective of religious belief; hence, the State had a duty to intervene in the event of child marriage.⁴⁹ The High Court thus demonstrated that Kadhis' Courts must act within agreed upon constitutional values.

On differences in the quality of justice between Kadhis' Courts and secular courts, the main issue has been the appointment of female *kadhis*. Writing in 2006 on Kenya's constitutional making process and gender equality, Athena Mutua, a legal scholar, pointed out that Muslim women view Kadhis' Courts as significant sites for the protection and enforcement of their rights as provided within Islamic law.⁵⁰ The

45 Mujuzi JD. 2021. "The Islamic law of marriage and inheritance in Kenya", *African Journal of Law* 65(3):377-401.

46 *Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others* [2015] eKLR.

47 *Council of Imams and Preachers of Kenya, Malindi*.

48 *Council of Imams and Preachers of Kenya, Malindi*.

49 *Council of Imams and Preachers of Kenya, Malindi*.

50 Mutua AD. 2006. "Gender equality and women solidarity across religious, ethnic and class differences in the Kenyan constitutional review process", *William and Mary Journal of Women and the Law* 13:95-96.

question presented was whether adjudication in Kadhis' Courts would benefit from female *kadhis*. At the outset, the Constitution of Kenya, 2010, which provides for the appointment of *kadhis* by the Judicial Service Commission does not bar appointment of female *kadhis*. In addition, the Constitution upholds equality as one of the highest values and requires that in appointive and elective positions, not more than two thirds of members should be of the same gender.⁵¹ Comparatively, in the secular courts, the Judiciary has ensured gender equality in appointment of judges and judicial officers. The debate on appointment of female *kadhis* in Kenya is ongoing. In an insightful analysis of the appointment of female *kadhis*, Tito Kunyuk, a principal *kadhi* in Kenya, noted that Islamic jurists supported or opposed appointment of female *kadhis* by drawing from Quranic verses.⁵² He compared appointment of women *kadhis* to women exercising public authority and argued that in the modernisation state women exercise public authority. He thus opined that opposition to women carrying out the roles of a *kadhi* is misplaced since decisions of the Kadhis' Courts are appealed in the High Court, in which women judges routinely make judicial orders on matters of Islamic faith, such as dissolution of marriages. He concluded by recommending intra-Muslim debate on Kenya on appointment of female *kadhis*.⁵³

In relation to contours of jurisdiction, the High Court and Court of Appeal in Kenya have been instrumental in resolving questions on the reach of Kadhis' Courts. Broadly these issues relate to the requirements for exercise of jurisdiction by the Kadhis' Courts as set out in the Constitution. In terms of material jurisdiction, the Constitution limits it to "matters relating to personal status, marriage, divorce and inheritance". On personal jurisdiction, the Constitution requires that the parties must all profess the Muslim religion and submit to the jurisdiction of the Kadhis' Courts.⁵⁴ Questions have arisen on whether the three requirements on jurisdiction are conjunctive. The High Court has severally answered this question in the affirmative, meaning that all the three requirements are absolute and must be met for the Kadhis' Courts to be seized on a matter. In *AH v HA*,⁵⁵ the appellant argued that the Kadhis' Court lacked jurisdiction to hear the case based on the subject matter. According to the appellant, the dispute was not on the nature of matrimonial property but on general ownership of property, hence one of the three absolute requirements for exercise of jurisdiction had not been met. In the appeal, the Chief Kadhi who was part of the assessors agreed with the appellant and argued that the issue related to ownership of property and not dissolution of matrimonial property, hence the Kadhis' Court was not the appropriate court. The High Court disagreed with both the appellant and Chief Kadhi and determined that the property in issue arose in the course of marriage between the appellant and respondent and

51 Constitution of Kenya, 2010, art 27(8).

52 Kunyuk T. 2021. "The female kadhis controversy", *The Elephant*, 12 November.

53 Kunyuk, "The female kadhis controversy".

54 Constitution of Kenya, 2010, art 170(5).

55 *HA v AH* [2019] eKLR.

therefore met the threshold of matrimonial property.⁵⁶ The High Court has further elaborated that professing Muslim faith is not synonymous with submitting to the jurisdiction of the Kadhis' Courts, there must be express acceptance of the Kadhis' Courts jurisdiction. In the *R.B* case, the High Court observed that this requirement was meant to uphold the right of choice among Muslims to ensure their freedom, human dignity and equality in line with the Constitution.⁵⁷

In addition, in the area of interreligious marriages, the High Court and the Court of Appeal have had to contend with the competing provisions in the Marriage Act, 2014, and the Kadhis' Courts Act on jurisdiction against the constitutional provisions of freedom and human dignity. In the *CAO v JAA* case,⁵⁸ the parties were married under Islamic law. One year later, the applicant filed for divorce, but before the commencement of the divorce proceedings she converted to Christianity. She therefore sought transfer of the divorce case from the Kadhis' Courts to the secular court, the Chief Magistrates' Court, on the ground that she was no longer professing Muslim faith. The respondent opposed the transfer advancing the argument that the certificate of marriage was issued under Islamic law and based on the provisions of the Marriage Act could only be dissolved under Islamic law in the Kadhis' Court. He further contended that although the applicant converted to Christianity, the marriage for all intents remained an Islamic marriage, and was thus governed by Islamic law.⁵⁹ The High Court, while agreeing with the respondent that the marriage was an Islamic marriage and based on the provisions of the Marriage Act fell within the ambit of Islamic law, determined that the Constitution required both parties to voluntarily submit to the jurisdiction of the Kadhis' Court which in the instance case the applicant was unwilling.⁶⁰ The High Court thus transferred the divorce case to the Chief Magistrates' Court.⁶¹ Notably, the High Court relied on freedom as a constitutional value to resolve the seemingly competing provisions of the Marriage Act, 2014 and the Kadhis' Courts Act.

The other site for determination of contours of the jurisdiction of the Kadhis' Courts has been matters to do with children. The confusion seems to arise from whether personal status includes children's issues. In the *IK* case, the appellant filed a case on custody and upkeep of his three sons in the Kadhis' Court on the grounds that his wife left the matrimonial home with the children without his knowledge or consent.⁶² The appellant in the Kadhis' Court was seeking full custody of the children and equal maintenance with his wife. However, the Kadhis' Court awarded actual custody to his wife, while the appellant was awarded legal custody and access. Further, the Kadhis' Court ordered the appellant to pay school

⁵⁶ *HA v AH*.

⁵⁷ *RB & RGO v HSB & ASB* [2014] eKLR.

⁵⁸ *CAO v JAA* [2022] eKLR.

⁵⁹ *CAO v JAA*, paras 4, 14-16.

⁶⁰ *CAO v JAA*, paras 18 and 19.

⁶¹ *CAO v JAA*, para 20.

⁶² *IK v RMS* [2020] eKLR.

fees, food, utility and medical expenses for the children, while his wife would provide clothing and shelter.⁶³ The appellant, aggrieved by the findings of the Kadhis' Court, moved to the High Court on appeal. The High Court, sitting as an appellate court, ruled that it could not hear the appeal, as the Kadhis' Court lacked jurisdiction in the first instance on matters relating to children.⁶⁴ The High Court stated that matters involving children were to be dealt with under the Children Act, regardless of the religion of the child or that of the parents.⁶⁵ Underscoring the level of protection that the State accords to children matters, the High Court pointed out that not even a magistrate court can determine children matters unless designated by the Chief Justice.⁶⁶

Similarly, in an earlier case, *ABMM v SMY*,⁶⁷ the Kadhis' Court had made a determination on divorce and in the course made orders on custody and maintenance of the child of the dissolved marriage. The appellant moved to the High Court seeking a determination on whether the Kadhis' Courts have jurisdiction on custody and maintenance of children. The High Court once again reiterated that the Children Act addressed matters of all children irrespective of their cultural and religious background.⁶⁸ In the opinion of the Court, one of the implementing agencies of the Children Act, the National Council for Children's Services, had representation from the Supreme Council of Kenya Muslims, meaning that any particular issues relating to Muslim children were to be observed.⁶⁹ The rationale, the High Court opined, was to ensure that there was no difference in treatment in matters relating to children in Kenya.⁷⁰

On the issue of accommodation of Kadhis' Courts, this chapter has explored how much Kadhis' Courts have been influenced by the egalitarian principles of the Constitution of Kenya, 2010. Rabea Benhalim, in her discussion on religious courts in Israel, the United States and the United Kingdom, describes critical legal pluralism as religious subjects shaping and influencing religious law based on the legal norms of the secular countries that they live in.⁷¹ In the context of Kadhis' Courts in Kenya, this is probably discernible in cases relating to inheritance by children born outside wedlock. As pointed out, Kenya embraces a universal system of protection of children irrespective of their cultural or religious background. On the one hand, the Constitution specifically provides for the maintenance of a child by the mother and father whether married or not.⁷² The norms of non-discrimination

⁶³ *IK v RMS*, para 3.

⁶⁴ *IK v RMS*, para 5.

⁶⁵ *IK v RMS*, paras 12 and 13.

⁶⁶ *IK v RMS*, para 13.

⁶⁷ *ABMM v SMY* [2019] eKLR.

⁶⁸ *ABMM v SMY*, paras 14-16.

⁶⁹ *ABMM v SMY*, para 17.

⁷⁰ *ABMM v SMY*, para 25.

⁷¹ Benhalim, "Religious law, religious courts and human rights", 762-763.

⁷² Constitution of Kenya, 2010, art 53(1)(e).

against children based on the marital status of the parents have crystallised in the Kenyan legal, social and political structures. On the other hand, under Islamic law, children born out of wedlock cannot inherit from the estate of a deceased father. In *re estate of IOI*,⁷³ the child in contention had been born when the father and mother were married under customary law and not Islamic law. Later the deceased father divorced the mother and remarried under Islamic law. He however continued to maintain the child and was registered as the father of the child in the birth certificate and other identity documents.⁷⁴ In adjudicating the case, the Kadhi's Court noted that under Islamic law the child was not entitled to inherit anything having been born outside an Islamic marriage. The Kadhi's Court, however, considered the doctrine of compulsory will to provide for poor and needy relatives who are not heirs under Islamic law. While noting disagreements in Islamic scholarship over whether authorities could make a compulsory will where a deceased person did not make a will, the Kadhi's Court nevertheless argued that it was permissible. The Kadhi's Court thus invoked the compulsory will and awarded the child 20 per cent of the deceased's proceeds in the bank and employment gratuity.⁷⁵

In a similar trajectory, the Court of Appeal, reflecting on the equality provisions in the Bill of Rights and on Islamic law in the *CKC* case, noted that: "Islamic law is dynamic and adapts to the evolving social, political, cultural and economic realities and that 'not all rules of inheritance are rigidly fixed for all times since the development of Muslim jurisprudence has been and continues to be a search for the good law to be applied in differing times and situations'".⁷⁶ The Court of Appeal had been invited to determine an appeal from the decisions of the Kadhi's Court and the High Court that children born out of wedlock could not inherit from their deceased Muslim father. The Court of Appeal pointed out that Islam was about kindness and justice and that Kenyan courts were mandated under the Bill of Rights to develop the law so as to give effect to the Bill of Rights. The Court of Appeal thus directed the High Court to resolve the inheritance issue under the Law of Succession, since the absolute personal jurisdiction requirements that all parties profess Muslim faith and submit to the Kadhi's Courts were not met.⁷⁷ Of interest in the case is the Court of Appeal's observation that Islamic law is dynamic and adaptable. This resonates with *re estate of IOI* in which the Kadhi's Court deliberately avoided an interpretation of Islamic law that would result in discrimination of children born out of wedlock.

⁷³ *Re Estate of IOI* (deceased) [2019] eKLR.

⁷⁴ *Re Estate of IOI*, paras 4 & 5.

⁷⁵ *Re Estate of IOI*, para 14-19.

⁷⁶ *CKC & another (suing through their mother and next friend JWN) v ANC* [2019] eKLR.

⁷⁷ *CKC & another*.

CONCLUSION

As part of a series on mediation and arbitration in religious and customary courts and tribunals, this chapter has focused on Kenya in its review Kadhis' Courts in Kenya, their procedures, government oversight and judicial review. Examining the jurisprudence emanating from the Kadhis' Courts, the High Court and Court of Appeal more than ten years since the Constitution of Kenya 2010, it posed the question of how the Kadhis' Courts fit within Kenya's egalitarian constitutional framework anchored on freedom, human dignity and equality. To analyse the findings and offer concluding thoughts, the chapter in line with the transformative accommodation theory demonstrates in the context of the Kadhis' Courts in Kenya, accommodation of the individual liberty to practise their religious faith and protection of human rights, thus avoiding multicultural vulnerability.

The analysis of this chapter reveals two related observations. First, while the express provisions of the Constitution establish Kadhis' Courts and immunise the Islamic law from the equality provisions, in the same provision, the Constitution embeds freedom as an overarching constitutional value. Second, the High Court and Court of Appeal have relied on the egalitarian values to limit the judicial reach of Kadhis' Court, particularly in relation to protection of rights. These observations resonate with the theory of transformative accommodation in which the individual liberty of Muslims to choose jurisdiction in personal status matters has been upheld while ensuring protection of rights.

From the first observation, it can be concluded that the Constitution, while immunizing the Kadhis' Courts from the equality provisions, embedded freedom as an overarching constitutional value. Both the Independence Constitution and the Constitution of Kenya, 2010, establish the Kadhis' Courts in near identical terms in their respective chapters on the Judiciary. However, the last part of the provision on jurisdiction of Kadhis' Courts in the 2010 Constitution contains the additional personal jurisdiction requirement that the parties must "submit to the jurisdiction of the Kadhis' courts". Therefore, in addition to the material jurisdiction requirement, that limits the jurisdiction of Kadhis' Courts to questions of Muslim law relating to personal status, persons professing Muslim faith must expressly accept the jurisdiction of the Kadhis' Court. Based on this phrase, persons professing the Muslim faith have been able to exercise their freedom by choosing which forum – Kadhis' Courts or secular courts – to use in adjudication of their personal status matters. It is imperative that one of the motivating principles in the Kenyan Bill of Rights is freedom. Therefore, while the Constitution immunises *sharia* law from the equality provisions, persons professing Muslim faith can choose to have their matters decided in secular courts which adhere to equality provisions.

Tied to this is the second observation in which the High Court and Court of Appeal have heavily relied on these requirements to "submit to the jurisdiction of the Kadhis' Courts" to limit the judicial reach of the Kadhis' Courts and ensure that cases are decided based on secular law, which upholds the egalitarian principles of the 2010 Constitution. In all of the cases cited above, the High Court and the Court

of Appeal relied on the freedom to choose to deny jurisdiction of Kadhis' Courts in contentious issues. The question that arises is whether the denial of jurisdiction of the Kadhis' Courts by secular courts amounts to a violation of religious freedom. The right to religious freedom is not absolute and should be balanced against enjoyment of other rights, such as freedom from discrimination and equal enjoyment of the law. Finally, the jurisdictional choice offers women and children, who would be vulnerable to their rights being violated, the religious freedom to use Islamic law and institutions, on the one hand, and the egalitarian principles of the Constitution of Kenya, 2010, on the other, to assert their rights.