

Religious Equality in Kenya? Adjudicating the Constitutionality of Kenya's Kadhis' Courts

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ABSTRACT

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The legality of Islamic Kadhis' Courts in Kenya was a central question of the constitutional reform process leading up to the adoption of the 2010 Constitution. In May 2010, the Kenya High Court declared Kadhis' Courts unconstitutional in light of the state's commitment to secularism and religious equality. The ruling was grounded in transnational sources from domestic contexts of other states, avoiding constraints attached to local conceptions of religion and the surrender of authority implicit in invoking international mandates. Invoking transnational sources in this case led to two key outcomes. First, appealing to transnational sources bolstered the court's authority to fabricate a universal consensus on religion, secularism, and their proper relation to the state, and to position itself as an impartial arbiter of global norms without submitting to universal mandates of international jurisprudence. Second, as the legal basis for domestic law was denationalized, the experience of local religious communities was displaced as an appropriate basis for conceptualizing religious freedom.

Introduction

Observers have begun to take note of the potential consequences of the expansion of secularist norms and practices expand throughout the globe (Hurd, 2008). Some have called attention to how emphases on secularism and religious freedom can paradoxically deprive minority practitioners of rights central to their religious identity, as in the oft-cited case of the *burqa* ban in France (Scott, 2007). Others point to cases in which Western norms compel states to revise their policies in order to allow equal access to new religious organizations, often with ramifications for the experience of local religious communities (Pelkmans, 2009). This paper approaches the questions of law, religion, and globalization through the lens of a 2010 Kenyan court case adjudicating the constitutionality of Islamic Kadhis' Courts in a state self-described as promoting religious freedom. The case sheds unique light on these questions given its considerable reliance on international sources to define religion, secularism, and their appropriate relation.

Although Islamic Kadhis' Courts in Kenya enjoy a constitutional mandate and only limited jurisdiction over select cases in which both parties are Muslim, in May 2010 the Kenya High Court declared them an unconstitutional violation of Kenyan secularism.¹ This case, *Jesse Kamau & 25 Others v. Attorney General*, had been filed in 2004 by a group of Protestant clergy. The clergy argued that public funding for and entrenchment of Kadhis' Courts in the constitution amounted to state preferential treatment for Islam over other religions. The High Court's opinion, and the plaintiff and defendant's positions, drew on universal rights discourse, global conceptions of secularism, and transnational court decisions to adjudicate the constitutionality of Kadhis' Courts. Of the total references cited in the court's opinion, 67% were from sources outside Kenya.

While embedding global sources into domestic jurisprudence clearly evidences the "processes of denationalization" inherent in globalization (Sassen 2006, p. 403), this case does not simply reflect an instance of diminishing state sovereignty as a developing nation encounters international norms. Though the majority of sources that influenced legal arguments in the court's opinion originate from outside Kenya, no references are made to United Nations declarations, international laws or conventions. Rather than conforming to globalization's expected pattern of "the use of international human rights instruments in national courts" (Sassen 2006, p. 3), the High Court's opinion is constructed largely around domestic sources in other states, referred to here as transnational sources.

This paper suggests that the reliance on transnational legal sources produced two key outcomes in the case of *Kamau v. Attorney General*. First, appealing to transnational sources bolstered the court's authority to fabricate a universal consensus on contentious terms such as religion and secularism, and to position

itself as an impartial arbiter of global norms without submitting to universal mandates of international jurisprudence. Second, as the legal basis for domestic court decisions was denationalized, the experience of local religious communities was displaced as an appropriate basis for conceptualizing religious freedom. Thus, denationalization allowed the High Court to define religion, secularism, and their appropriate relation without reference to local religious minorities, and to conclude that the failure of Muslims to conform to universal standards is grounds for legal de-recognition. As such, this case indicates that rather than less powerful states passively receiving global norms, the High Court actively repurposed global secularist norms by reaching out to it as a toolkit for effecting a particular local agenda. To this author's knowledge, *Kamau v. Attorney General* is the first Kenyan court case or piece of legislation to explicitly define religion or secularism.

This paper proceeds in three parts. It first situates the case of *Kamau v. Attorney General* in its political context. The historical role of Kadhis Courts in Kenya, and the political stakes of their constitutionality, is considered within the broader debates on Kenyan secularism. Second, the paper considers the relevance of invoking transnational sources as legal authorities in this case. It shows that while the case accords with a larger pattern of Kenyan judiciary appeals to such sources, this process does not limit the court's decision-making purview but rather expands its ability to adjudicate contentious claims by positioning itself as an arbiter of global consensus. Last, the paper discusses the consequences of denationalizing debates on the definitions of secularism and rights of religious subjects.

Secularism in Kenya: The Political Stakes of Kadhis' Courts

The ruling of Kadhis' Courts as unconstitutional should be understood in light of both the symbolic role of the courts as signifying Muslim political belonging in spite of their marginalization in Kenyan society and politics, as well as the broader debates on Kenyan secularism provoked by the constitutional reform process. This section discusses both subjects before providing an overview of the particular case in question.

Historical Role of Kadhis' Courts in Kenya

Kadhis' Courts have a long legal history in Kenya predating British colonialism. When Zanzibar ceded control over coastal Kenya to Britain in 1889, it did so on the condition that "all cases and lawsuits between natives will continue to be decided according to the Sheria,² and that all the Muslim officials... would continue to exercise their administrative or judicial duties" (Cussac 2008, p. 291).³ The British later scaled back Islamic law and permitted Kadhis to arbitrate only cases of personal status (e.g. marriage, divorce and inheritance), disputes not exceeding 1,000 shillings, and certain minor criminal cases.

Upon independence, a political deal between the new Kenyan president, Jomo Kenyatta, and Britain embedded Kadhis' Courts into the 1963 Constitution but further restricted their jurisdiction to only matters of personal status. Section 66 of the constitution stipulated that in order to serve in a Kadhi's Court, an individual must "profess the Muslim religion," and possess "such knowledge of Muslim law applicable to any sect or sects of Muslims." It also provides:

The jurisdiction of a Kadhi's Court shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce and inheritance in proceedings in which all parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or any subordinate court in any proceeding which comes before it (Kenya Const. sect. 66, cl. 2, 5).

Although Kadhis' Courts were embedded in the constitution, they were not to diminish the authority of secular courts. State surveillance over the courts continues to take "a variety of forms: *qāḍīs* must comply with the edicts concerning the administrative operation of the courts; their work is periodically reviewed; and any appeals of their decision are heard in the Kenya High Court rather than in an Islamic Court of Appeal" (Hirsch 2000, p. 10). At present, 15 Kadhis' Courts operate throughout the country.

As religious minorities comprising an estimated 10% of the population, Kenyan Muslims view Kadhis' Courts as not only religiously important, but also as a symbol that the state accepts Islamic practice as compatible with political membership.⁴ The courts are "symbolic, in the sense that their constitutional recognition can be considered the result of a political deal to facilitate the integration of the Muslims within the country," in light of their fear at independence that "Arab-inspired traditions and laws would lose influence to the African traditions" (Cussac 2008, pp. 291-92).

The symbolic importance of Kadhis' Courts in signaling an acceptance of Muslims within the Kenyan polity is sharpened in light of the history of exclusions directed against this community. For example, Kenyan President from 1978-2002, Daniel arap Moi, constructed his *nyayo* ideology around symbols of Christianity that effectively excluded other religions from participating as public and full members of the Kenyan nation (Mazrui, 1994).⁵ As Kenya transitioned to multiparty rule in 1992, the Islamic Party of Kenya was denied the right to register as a political party given its religious nature. Coastal Muslims today continue to complain of their marginal position within Kenya, pointing to their difficulty securing Kenyan identification and legal documents, low educational standards, and the general sense that "national politics are upcountry politics which seek to keep the [Muslim] coast weak and internally divided" (Kresse 2009, p. S78).⁶ That Kadhis Courts are a key symbol of Muslim belonging in Kenya in spite of these exclusions is

further demonstrated by the reemergence of secessionist rhetoric aimed at separating the Muslim coast from Kenya following the High Court's decision of the *Kamau* case.

Most Kenyan Muslims continue to see the courts as compatible with the Kenyan state, as reflected by the growing trend to perceive Kadhis as holding a legal rather than religious mandate. The Constitution of Kenya Review Commission, comprised of one-third Muslim commissioners, distributed a questionnaire in 2001 to gauge citizen attitudes on various aspects of the constitution, including Muslim views on Kadhis' courts in particular.⁷ A key finding of the survey was the desire for court reform so that "a *qāḍī*'s work should be restricted to judicial work" and that a separate spiritual leader (*mufti*) be elected to represent the community in religious affairs (Hashim 2005, p. 45). The Commission found that the majority of Muslims surveyed preferred that Kadhis hold the same qualifications as other magistrates within the Kenyan judicial system (Cussac 2008, p. 295). In addition, "to many lawyers, the *Kadhis* should not only be conversant with Islamic Law but also be trained in secular law, so that their courts can be fully considered part of the judicial system" (Cussac 2008, p. 296). These findings show little evidence that Muslims perceive Kadhis' Courts as a point of tension with their political membership in Kenya, but rather suggest a desire toward greater incorporation of the courts and compatibility with the Kenyan state.

The Question of Secularism in Constitutional Reform

While the push for Kenyan constitutional reform began in 1991 primarily as a means of addressing land conflicts and the question of federalism (*majimboism*), the process that culminated in the adoption of the 2010 Constitution provoked societal debates on a broad range of issues, including whether Kadhis' Courts should be enshrined in the new constitution. This debate was linked to broader popular dispute over the nature of Kenyan secularism and the politics of religious equality, spurred by the changing language around religion in the draft constitutions and the prospect that a successful constitutional referendum could grant popular legitimacy to Islamic courts.

The 1963 independence constitution provided for freedom of religion under the freedom of conscience clause but did not explicitly declare Kenya a secular state. However, Sections 1 and 1A of the independence constitution, providing that "Kenya is a sovereign democratic Republic," and "the Republic of Kenya shall be a multiparty democratic state," have been interpreted to infer that Kenya is a secular state (Kamau 2010, p. 29-30). The constitutional review process retained the original provisions on the freedom of religion but addressed the relationship between religion and the state more explicitly. Article 9 of the 2004 Bomas Draft Constitution held that: "(1) State and religion shall be separate, (2) There shall be no state religion, (3) The state shall treat all religions equally." While *Kamau v. Attorney General* was filed to

dispute Kadhis' Courts in the Bomas Draft and makes reference to these provisions, the 2010 Draft Constitution contemporary with the court's ruling shortened the provisions to state in Article 8 only: "There shall be no state religion."

Removing the clauses that called for the separation of state and religion reinvigorated the debate around the substance of Kenyan religious freedom and secularity. It provoked outcry among some members of the Evangelical community, who argued that eliminating the explicit declaration that all religions were to be treated equally would allow for Kadhis' Courts to be embedded in the constitution and thus for Islam to be elevated above other religions. A series of newspaper articles were written and public protests organized around this concern:

Unfortunately, the Kadhi courts are themselves an institutionalization of inequality. They seek to favour one religion over others by creating and protecting and providing for state funding of a purely religious system of dispute resolution... Excluding the Kadhi courts from the new constitution would not in any way hinder the rights of Muslims to worship Allah or to establish courts and other mechanism of dispute resolution (Ondeng and Waiyaki, 2010).

The "No" campaign against the new constitution received substantial support from the National Council of Churches in Kenya (NCCK) and other Kenyan Evangelicals. It expressed concern that while the inclusion of Kadhis' Courts had been largely a colonial imposition, a constitution decided by referendum would risk publically sanctioning the courts. These debates occurred in spite of the fact that the decision to retain a constitutional mandate for Kadhis' Courts had originally been made at an interfaith constitutional convention.

Arguments in favor of Kadhis Courts argued that a secular state could protect a variety of religious practices across different religions without elevating one religion over another. They pointed out that Kenyan secularity should be interpreted in terms of religious tolerance and that religious freedom would be impeded if the state infringed on a group's religious practice or community rights. Thus, debates on secularism in Kenya, reinvigorated during the constitutional reform process, were linked directly to the question of the inclusion of Kadhis' Courts within the constitution and thus the place of Muslims within the state.

Kamau v. Attorney General

Kenya's lengthy constitutional review process reignited questions on how a secular state should accommodate a variety of religious practices, most notably, the Kadhis' Courts. The filing and decision of *Kamau v. Attorney General* coincided with two statewide referenda on whether draft constitutions should be adopted. The 2004 Bomas Draft constitution and the 2010 Constitution retained the provisions for Kadhis' Courts from Section 66 of the independence constitution. While the Bomas Draft was rejected in the 2005 referendum, the High Court did not decide *Kamau v. Attorney General* until May 2010, as Kenya was preparing for its upcoming referendum in August.

The plaintiffs, a group of Protestant clergy, submitted four main arguments against the constitutionality of Kadhis' Courts. They argued that the Kadhis Courts' constitutional entrenchment lacked historical basis in Kenya, that they afforded special treatment to Islam so violated the equal protection guarantee in the Kenyan Bill of Rights, and that including the courts in the constitution violated the separation of church and state and the secular nature of Kenya. Finally, plaintiffs contended that Kadhis' Courts promoted an Islamic agenda "whose ultimate objective is to turn Africa in general into an Islamic continent and Kenya in particular into an Islamic nation" and that as such Kadhis' Courts constituted a "stepping stone and or vehicle" for the "introducing of Sharia Law" (Kamau 2010, p. 5). The Attorney General responded for the defense by arguing that the case was inadmissible on procedural grounds as it posed a political question, was not ripe, and was moot. Affidavits supporting the defendants were submitted by the Constitution of Kenya Review Commission and its chairperson, Abida Ali-Aroni, herself a High Court judge not on the case. These affidavits submitted a range of arguments in favor of Kadhis' Courts, including that the freedom of expression guaranteed the rights of religious practitioners, that Kenyan secularism should accommodate diversity, and that the separation of church and state did not preclude the state from protecting religious minority practices (Kamau 2010, pp. 22-30).

The case was heard by a three judge bench of the High Court, with all justices trained in Kenya.⁸ The High Court ruled Kadhis' Courts unconstitutional and called on parliament to correspondingly amend the constitution. The decision was rendered May 24th, just over two weeks after the 2010 Draft Constitution had been publically released for popular review. Thus, the High Court's ruling can be interpreted as an attempt to leverage legal authority against the 2010 Constitution, particularly in light of the fact that the judges had an interest in preventing the constitution from passing since it would remove their security of tenure. However, the 2010 Constitution went on to pass the referendum on August 4 with 67% of the vote. The Kenyan Parliament has not followed the High Court's directive to remove Kadhis' Courts from the constitution, and Kadhis' Courts continue to operate in Kenya today.

Bounding Religion and Defining Secularism

In building its argument for the unconstitutionality of Kadhis’ Courts, the High Court drew on transnational sources to define religion, secularism, and their relation, as well as to adjudicate the content of Islam and decipher whether Kadhis’ Courts were primarily judicial or religious entities. By drawing on transnational sources, the High Court was able to expand its definitional power in deciding what constituted a valid legal source and to embed its decision within a manufactured consensus on these issues.

Using discourse analysis, references to sources in the High Court’s opinion invoked as authoritative were coded as either domestic or transnational. Each source was coded only once, even if it was referred to multiple times. Doing so avoids problems of determining the relative weight the court assigned to each source, for example, in determining the importance of sources quoted once at length versus multiple times in brief. No references to international sources such as United Nations conventions or international court rulings on religion were made. Table 1 presents the results. It is of note that transnational sources were more heavily relied on when defining religion and secularism than in other sections of the opinion.

TABLE 1. Sources Referenced by the Kenya High Court in *Kamau v. Attorney General*

	Domestic Sources (%)	Transnational Sources (%)
References to define religion and secularism	4 (13%)	27 (87%)
References to determine procedural questions	12 (50%)	12 (50%)
All references cited	26 (33%)	58 (67%)

Power of Selection

Contentious definitions of secularism and religion were made with reference to sources locally embedded in other states, only some of which constituted explicitly legal sources. For example, to define secularism, the High Court invoked definitions drawn from varied sources such as Donald Smith’s *India as a Secular State*, a speech by Thomas Jefferson to Baptists in Virginia in 1808, a letter by James Madison, and additional commentators on the separation of church and state in the U.S.⁹ Appealing to other sources such as dictionaries to define secularism underscored that the seemingly self-evident content of the term could be defined without reference to any particular context. For example, the Court observes that:

Random House Dictionary defines the term secularism as ‘a system of social political philosophy that rejects all forms of religious faiths.’ Secularism means liberation of politics from hegemony of

religion. Oxford Learners Dictionary defines secularism, as ‘belief, morality and education etc should not be based on religion [sic]’ (Kamau 2010, p. 58).

Drawing on varied sources ranging from former United States presidents to social scientists and transnational court opinions indicates that the High Court enjoyed a high degree of freedom in choosing which sources it found most useful and in extending the bounds of what constituted an admissible legal source. The court was constrained neither to adhere to local conceptualizations of secularism, as laid out in defending affidavits, nor to reference positions put forth by international bodies. Neither did the High Court limit its sources to Supreme Courts of other states, but included as precedent decisions given by the lower courts such as the Court of Appeals in New York state.

A student of Kenyan law will note that the proclivity of the judiciary to invoke transnational sources extends beyond this present case. This precedent dates to colonialism, when, for example, the British imported the Indian Penal Code as the basis for Kenyan criminal law. After independence, Commonwealth cases were seen as appropriate but non-binding sources for guiding Kenyan court judgments (Cotran 1983, p. 44). Today, legislation such as contract and tort law is largely imported from English common law, with minor amendments to suit the Kenyan context. The sources of Kenya law as specified in Section 3 of the Judicature Act (Chapter 8 of the Laws of Kenya) include the Constitution, Acts of Parliament, certain Acts of Parliament of the United Kingdom and of India, English Statutes of General application in Force in England on 12th August 1897, the Substance of Common Law and Doctrines of Equity, African customary law, Islamic Law to be applied in Kadhis Courts, and International Instruments (Ojienda and Aloo, 2011). Inter- and trans-national legal sources were to apply in Kenya only conditionally until state was further developed. However, *Kamau v. Attorney General* demonstrates that the tendency to overlook domestic sources has been significantly amplified, though not at expense of reducing the state’s sovereignty or limiting the court’s decisions to accord with international precedent.

First, although Commonwealth cases were considered appropriate legal sources to guide decisions, the High Court significantly expanded its sources beyond the conventions of common law. Invoking sources from the United States, for example, falls beyond the legal purview of the sanctioned sources of Kenyan law. Thus, the High Court amplified the trend to invoke transnational sources and significantly expanded the purview of sources available to it, in turn increasing its capacity to render desired decisions without reference to domestic sources or local communities. Additionally, whereas transnational sources were seen to play a “residual” role in guiding but not constraining Kenyan law for issues in which no precedent had yet been established (Cotran 1983, p. 57), with two-thirds of sources deriving from outside Kenya,

Kamau v. Attorney General signals that this relationship has been inverted. This trend is magnified when defining religion and secularism: that 87% of sources invoked to define these terms were transnational signals that the local in this case plays a residual role to the primary weight accorded to transnational sources. Doing so ignored the Kenyan convention that African customary law, or here Islamic law, should be considered a valid source of law in the absence of explicit state law on a given subject (Cotran, 1983). However, the lack of legal precedent for defining secularism did not lead judges to consider how local communities practice and understand their religion, despite defending affidavits providing ample sources on the domestic conceptions of Islam.

Second, resisting reference to international instruments while expanding the court's definitional authority reflects a more general emphasis in Kenyan society on preserving state sovereignty. In choosing transnational sources for its opinion, the court avoided references to international human rights frameworks or other international conventions and laws that would constrain its authority. This sentiment was particularly strong in Kenyan society as the International Criminal Court took over jurisdiction to prosecute Kenyan leaders associated with the 2007 post-election violence. Submitting Kenyans to international rather than local jurisdiction led to widespread discontent and reactions against Kenya being "exposed to external ridicule associated with failed states" (Komolo, 2012) and assertions that "Kenya has suffered serious erosions of sovereignty" (Abdullahi, 2011). The Kenyan state has also made a point to assert its sovereignty vis-à-vis international institutions it perceives as potentially threatening, as evident in Kenya's refusal to extradite Sudanese President Omar al-Bashir to the International Criminal Court in 2010.¹⁰ Thus, the High Court's decision to avoid UN covenants or international conventions is in line with a broader Kenyan effort to resist the intervention of international bodies into domestic affairs. This suggests that relying on transnational sources was viewed as less problematic in terms of preserving Kenyan sovereignty than invoking international sources directly.

Defining Religion

Turning to transnational sources allowed the court to procure more force for its decision by embedding its legal opinion in what was presented as a global consensus. As in its definition of secularism, the court turned to an array of legal cases drawn from other states including India, Mauritius, the United Kingdom and the United States, as well as social scientists and legal scholars from outside of Kenya to define religion. The court opinion cited a range of sources expressing similar views on the definition of religion to craft a consensus on its content. For example, it noted that a former Professor of Sociology at Columbia, William Ogburn, described religion as "an attitude toward super human power," and that another sociologist defined it as "a mental faculty or disposition which enables men to apprehend the infinite"

(Kamau 2010, p. 56). The High Court does not cite any controversies in defining religion or any points of disagreement between sources. Instead, it portrays a consensus that religion is associated closely with doctrinal belief. This follows a larger global trend that, “since the Reformation, religion or its ‘essence’ has come to be defined as belief, meaning the voluntary and affective assent to a particular doctrine” that holds “religious conduct... as non-essential to religion” (Sullivan and Yelle 2005, p. 5329).¹¹

The irony, and innovation, of the court’s reliance on transnational sources was using such a plurality of references enabled the court to embed its own perspectives on religion and secularism within a forged consensus on otherwise contentious issues. Using global sources in such a way underscores Sassen’s thesis that global and state relations should not be conceptualized as mutually antagonistic. Rather, as she points out:

the zones of interaction are dynamic and the outcomes vary. It is not simply a zero sum where either the national loses at the hands of the global or vice versa, nor is it simply a question of direct power. The matter cannot be reduced to the victimhood of the national at the hands of a powerful and invasive global (2006, p. 380-81).

In this case, the Kenya High Court was able to creatively use resources of globalization without the requisite loss of sovereignty often assumed as a necessary corollary. By deciding what constituted an admissible legal source, the court created a sense of global consensus around the definitions it used. While this denationalization did not have the expected consequences on sovereignty, it did jeopardize local conceptions of religion and displace the authority of domestic sources, as is discussed in the following section.

Denationalization and its Outcomes

The High Court’s reliance on transnational sources had the effect of denationalizing what are considered as appropriate sites for legal appeal. Denationalization in turn granted the court more power to define what constituted religion and its appropriate relationship to the state by enabling it to portray itself as an impartial arbiter of global consensus on these issues. In so doing, domestic sources and experiences of Kenyan religious minorities were delegitimized as appropriate sources for domestic rulings, even though the state’s legal tradition admits customary practice as a valid source for cases for which no legal state precedent yet exists. By invoking universal definitions to manufacture a global consensus, the court was able to hold that a religious subject’s failure to conform to universal standards constituted legitimate grounds for legal de-recognition. These consequences are discussed as follows.

The High Court's move to define religion aimed to achieve precisely what Talal Asad (2011) asserts as a reason to avoid definitions:

To define is to repudiate some things and to endorse others... The act of defining (or redefining) religion is embedded in passionate disputes; it is connected with anxieties and satisfactions, it is affected by changing conceptions of knowledge and interest, and it is related to institutional disciplines (p. 39).

However, the High Court's reliance on a fabricated global consensus to adjudicate what constitutes religion and secularism obscures how contentious these definitions are, and presents them instead as neutral or natural. Global consensus enabled the court to sideline the "passionate disputes" within Kenya and to take on a presumably neutral position. Doing so masked the local consequences of invoking these definitions in the domestic arena.

For example, defining religion as belief responded to the defendant's position that Islam is a way of life that "provides an individual with rules governing each and every aspect of his or her existence," and that as such, adherents require access to Kadhis' Courts (Cussac 2008, p. 300). While defendants emphasized religion as practice, the High Court countered: "If the argument for the adherents of Islam is that the articles of faith are also their way of life, why would that not be true to say that Christianity and indigenous traditional worship... is also a way of life?" (Kamau 2010, p. 84). Not only is belief given as the appropriate definition of religion, but alternate conceptions or practices are questioned and the uniqueness of any given religious tradition undermined. As the definitions of religion reflect the tendency to emphasize belief over ritual, the High Court is able to rule that the Muslim defendant's argument that "Islam is a way of life" is an unnecessary additive to religion. Because a consensus definition is invoked, however, the court does not compromise its status as an objective arbiter.

Appealing to global sources on secularism and religion also displaced the authority of the domestic Muslim community to define itself. Paradoxically, conceptions of religion arising from local religious minorities were de-legitimized even as transnational sources of dubious relevance, such as letters written by Thomas Jefferson and James Madison, were invoked. As in the definitions of secularism and religion, the court again relied on transnational sources to identify the content of Islam, and its relationship to the state, and in deciding whether Kadhis' Courts were primarily judicial or religious instruments.

The court defined Islam as coinciding with an aim to assume political power and religious uniformity. It identified an “Islamic agenda” which was made public at the 1989 Islam in Africa Conference in Ghana and described thus:

The Conference notes the yearning of Muslims everywhere on the continent who have been deprived of their rights to be governed by Sharia and urges them to intensify the effort in the struggle to reinstate the application of Sharia... by this Resolution, Islam has declared a jihad to spread the Muslim faith, and destabilize states which did not readily accommodate or support the Islam agenda [sic] (Kamau 2010, p. 76).

The court went on to reference “clandestine plans now in operation for Islamic world domination” (p. 77). It cited as such an example an “eminent Islam Scholar” who threatened a Vatican synod: “By means of your democracy we shall invade you, by means of our religion we shall dominate you,” as well as Khurram Murad of the Islamic Foundation who defined an “Islamic Movement” as “an organized struggle to change the existing society into an Islamic society based on the Quran and the Sunna, and make Islam, which is a code for entire life, supreme and dominant, especially in the socio-political spheres” (p. 79).¹² On the basis of these sources, the court concluded that the Islamic agenda violated the “wall of separation between Church and State” and as such posed a threat to the secular state (p. 110).¹³

By citing a variety of diverse sources, the court again portrays a global consensus on the goals of Islam and its relation to the state, without discussing the perspectives of the domestic Muslim community in Kenya. The court also adjudicates the line between Islam and Christianity in declaring that “although theoretically at least, Islam encompasses a version of Christianity, in reality, no Muslim is likely to describe himself as a Christian and vice versa” (Kamau 2010, p. 81). Further, it portrays Christian-Muslim relations as embroiled in “rivalry” and “inherently competitive” (p. 80). The High Court provided a stilted perspective of Islam and portrayed the Christian-Muslim rift in Kenya as a point of enduring tension. This ignored other local voices, such as Rev. Timothy Njoya, a Protestant clergyman in favor of Kadhis’ Courts, who noted that the “rift between Muslims and Christians in his country is a recent one,” increasing as the result of state rhetoric on terrorism after 9/11 (O’Kadameri, 2010). It also overlooked the fact that the original decision to retain a constitutional mandate for Kadhis’ Courts was made at an interfaith constitutional convention. This was pointed out in the defendant’s position, who indicated that there “is not a universal opinion of all Christians nor is there unanimity in the debate among Christians” (Kamau 2010, p. 29). The High Court’s definitions thus muted the pluralism within Islam and Christianity in order to present a picture of a universal struggle toward Sharia inherently at odds with the rights of the religious majority.

Assessing the religiosity of Kadhis' Courts formed another key point of contestation. Applicants argued that Kadhis' Courts were primarily religious institutions and as such should not be entrenched in the constitution. The court agreed with this submission, indicating that Kadhis' Courts were too public an expression of religion to be compatible with the modern secular state. This contrasts with the affidavit submitted by Muslim women's rights advocate and current High Court justice, Abida Ali-Aroni. She argued that, "Kadhis' Courts are not established as religious instruments or organs but are included as judicial institutions" and as such do not violate Kenyan secularism (Kamau 2010, p. 29). Further, from the perspective of the Muslim communities, courts hold not simply a religious identity but serve as indicators of political membership in Kenya:

[T]he issue of the Kadhis' Courts also became an identity problem, since the question was to know whether the Constitution would allow a religious group to apply its own personal law without contradicting their inclusion as citizens of one state. Muslims often regret that they usually face more problems than other Kenyans to get access to citizenship: for instance, when they need to obtain a national identity card or passport. In this context, the Kadhis' Courts became a symbol, and their constitutional recognition was not only considered a historical heritage but also a right. (Cussac 2008, p. 300)

By ruling that "Muslim law was a special and religious law which could not be treated as an ordinary secular law" (Kamau 2010, p. 98), the High Court sidelined this perspective on the courts in order to focus narrowly on them as religious institutions.

In discussing the content of Islam, its doctrines, and its relationship to the state and to Christianity, domestic sources and the minority viewpoint were sidelined. Local conceptions were not seen as valid sites for defining the minority's position. Failing to consider the "multivocal" nature of Islam allowed the court to construct a particular image of it as a threat to the modern state given its lack of conformity to the public/private sphere divide and assumed political ambitions (Stepan 2001; Hurd 2008). Invoking transnational sources for defining Islam also overlooked the particularity of Kenyan Muslims, who, as Swahili speakers indicate a sense of "felt distance" from the Muslim community and of being on the "periphery" of Islam (Kresse 2009: 579).¹⁴ Doing so allowed the court to categorize Kenyan Muslims as Muslim others rather than Kenyans.

Another source of tension in this case centered on the relation between global norms, on the one hand, and Kadhis' Courts as instruments of Islam, on the other. The High Court grounded its decision in another presumed universal consensus: that individual rights are "universal, inherent and natural rights" (Kamau 2010, p. 49), holding:

Writings from the Age of Enlightenment posited that people enjoy certain rights which exist in a state of nature, unrestrained by governments or societies. These are known as natural rights. The theory of natural rights found its expression in law in the American Constitution - Bill of Rights (p. 48).

Individual rights are considered more fundamental than other types of rights. As a corollary, religious subjects who fail to adhere to these standards forego their entitlement to legal recognition. The court proceeded to interpret the content of Islam and assess its compatibility with individual rights, with reference to the question of women's rights in particular:

Muslim law regards women as less than men in matters of both marriage and divorce, as well as devolution of property: Holy Quran Surah 2:228-232, and Surah 65:1-7 (only a man may divorce his wife even if he is required to provide for her); a man may beat his wife, even if lightly, the evidence of two women, is equal to evidence of one man (Surah 2:282). The application of such beliefs of faith are contrary to the Constitution (p. 48).

While the court rooted its decision in universal rights norms, it positioned Islamic doctrine (e.g. the Islamic agenda and abrogation of women's rights) and practices (e.g. access to Kadhis' courts) as inherently opposed to liberal rights, and so identifies grounds for their de-recognition. The High Court thereby argued that by imposing communal regulations, Kadhis' Courts contravened more fundamental and universal individual rights, and were in conflict with the "values, principles or purposes of a democratic constitution such as ours" (p. 50).

In defining an appropriate religious subject as one who approaches religion as belief and does not impose religious practice in the public realm, there seems no space in the court's opinion for religious subjects who do not conform to this liberal assumption. Instead, the court portrays Islam as in inherent tension with a democratic secular state, constructing a boundary between "Muslims" and "global norms." The court concludes that since religion ought not to operate in the public sphere and Kadhis' Courts are one aspect of a broader "Islamic agenda," they are unconstitutional. Islam's failure to conform to global

standards was grounds for legal de-recognition of Kadhis' Courts, and as such, of the symbol of Muslim membership in Kenya. Ironically, while the state itself invokes multiple sovereignties through the transnational, it fails to view religious subjects as capable of similarly managing multiple loyalties.

Conclusion

Scholars such as Saskia Sassen have emphasized the changes that occur as global practices become interwoven with national institutions. While her analysis points to financial centers as a particularly good example of this global embedding in the national, the Kenya High Court's decision in the *Kamau* case represents another instance of the entanglement of global norms with domestic legal practice. However, as this case demonstrates, the primary impact of globalization is not simply a waning of state sovereignty. Rather, by reaching out to select transnational norms and sources as seemingly neutral standards, the High Court expanded its authority over domestic sources contending for alternate interpretations of the role of Kadhis' Courts, the content of Islam, and its relation to the Kenyan public sphere. Translating global norms on the relation of religion to the state into domestic court law enabled the High Court to de-legitimize domestic sources as bases for claiming rights and to displace minority understandings of religion. International norms emphasizing individual rights and separation of religion and state cited by human rights advocates in the name of religious freedom, in this instance, served as tools for local exclusions.

What further implications might this case suggest for changing configurations of law and authority under globalization? For one, it indicates that scholars must explore arenas where local-local linkages become thicker even as local-international linkages are comparatively shirked, or develop more slowly. While the transnational sources invoked in this case accord with articulations of rights, religion, and the secular state at the international level, the locus of these sites of legal authority used in domestic cases may be just as important as their content. In addition, these transnational linkages are not only products of non-state actors, but may reflect changing patterns of state engagement in the global as they adopt new strategies to preserve sovereignty and effect local agendas.

Last, this paper suggests the importance of looking beyond conventional areas of inquiry into secularism—the United States, Europe, South Asia, and Turkey—to understand how it is negotiated in a broader array of contexts. In particular, the Kenyan case of *Kamau v. Attorney General* highlights a new terrain of contestation in the relationship between religion and the state. It poses an important challenge to the assumption that the diffusion of global norms and definitions of religious freedom form a coercive process in which less powerful states are compelled by international actors to localize global norms. Rather, this case demonstrates both that states are not limited to explicitly *international* conventions when



negotiating the extension throughout the globe and that particular agents within less powerful states reach out to global standards as a toolkit for legitimizing their own domestic agendas. Instead of assuming a simple marginalization of less powerful states as a whole as some previous studies of secularism have (Pelkmans, 2009), this case highlights the need for observers to look within less powerful states to understand how norms of secularism and dominant conceptions of religion enable certain local groups to effect particular agendas often at the expense of others. Finally, tracing diffusions of secularism across a broader variety of states can provide a more robust understanding of how existing models of secularism are renegotiated and reformed as they are redeployed domestically.

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End Notes

¹ The High Court of Kenya sits above magistrates and Kadhis' Courts, but underneath the Court of Appeals and the Supreme Court. The term Kadhis' Courts is the Swahili adaptation of *Qāḍī* courts.

² Sheria is the Swahili spelling of Sharia.

³ Originally found in Sir Edward Hertslet, 1896, *The Map of Africa by Treaty*, Vol. III, "Appendix, Alphabetical Index, and Chronological List," 2nd edition, London: Harrison and Sons, 1896, p. 1070.

⁴ The estimate of the Muslim population of Kenya is contested and varies widely, ranging from 6% to 35%. See Kresse's (2009) footnote from p. S77.

⁵ Nyayo, Swahili for footsteps, originally called for Kenyans to follow in the footsteps of the first president, Jomo Kenyatta, and later developed into a call for obedience to the state in pursuit of the principles of love, peace, and unity. See Daniel arap Moi (1986) *Kenya African Nationalism: Nyayo Philosophy and Principles*. London and Basingstoke: Macmillan Publishers.

⁶ "Upcountry" refers to the largely Christian area of continental Kenya beyond the traditionally Muslim coast. However, the upcountry v. coastal cleavage risks obscuring the internal divisions in both areas and the sizable Muslim community in western Kenya.

⁷ For more on the survey results and the commission's recommendations, see Hassan (2002).

⁸ Kenya High Court justices receive presidential appointments after having served for seven years as advocates before the High Court, being a judge of court with "unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in the Republic of Ireland" (Kenya Const. art. 61 sect. 3), or meeting specifications laid out in the Advocates Act of Kenya. The Judge of Appeal for *Kamau v. Attorney General*, J.G. Nyamu, had adjudicated previous religious freedom cases, including the 2007 *Ndandu v. Minister for Education* case in which school children belonging to the Arata Aroho Muthuru Society religious group petitioned for the right to wear headscarves in school. Nyamu ruled that it was necessary for "public order" that headscarves not be worn in schools and noted that this case was a "novel matter" for the court (Ndandu 2007, p. 5), but did not attempt to define religion or secularism. For more on the Kenyan judicial system, see Cotran (1983) and Mutua (2001). For more on the role of Islam in the Kenyan judiciary, see Hirsch (1998) and Bakari and Yahya (1995).

⁹ In defining secularism, the High Court relied on the following sources in order of appearance in its opinion: Random House Dictionary; Oxford Learner's Dictionary; Donald E. Smith, *India as a Secular State*; "one commentator on the American constitution"; Articles 2(1) and 3(3) of the US Constitution; the American Bill of Rights; Speech of Thomas Jefferson to Virginia Baptists, 1808; Letter from James Madison to Edward Everett dated March 8, 1823; *Engel vs. Vitale*, 370 U.S. 421 (No. 468, Decided June 25, 1962); *Elk Grove United School District and Davis W. Gordon vs. Michael A. Nendon et al*, 542 U.S. 2004 (no. 02-1624), including Rehnquist's concurring opinion; Privy Council in *Bishop of Roman Catholic Diocese of Port Louis & Others vs. Tengur & Others*, Mauritius (2004) 3 LRC 316, UKPC 9; the Constitution of Mauritius; 1957 Education Act of Mauritius; *Bhewa & Another vs. Government of Mauritius & Another* (1991) 1 LRC 298.

¹⁰ While the Kenyan High Court issued a warrant for Bashir in 2011, this action has been interpreted as an attempt to establish judicial independence from an executive that has traditionally encroached on its power, rather than a commitment to international law per se.

¹¹ See also Hurd (2012) and Asad (2011).



¹² The court indicates that Archbishop Giuseppe Bernadin of the Vatican reported that this scholar addressed this audience during a Synod held by the Vatican in October 1999.

¹³ A similar argument was made in the *Case of Refah Partisi (The Welfare Party) and Others v. Turkey* [2003] ECtHR 2.

¹⁴ Originally cited in Lambek (1990: 25).