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Introduction

Abdulkader Tayob

From 1996 to 2010, Kenya was engaged in an important and extensive process of re-writing the constitution. Initiated by civil society groups, the review of the constitution was part of an important part of the democratizing process after the fall of the Berlin wall that swept the globe. A new constitution was finally accepted at a referendum on 4 August 2010. During this fourteen-year period, the place of the Kadhis courts in the constitution became a source of heated debate among some Christian and Muslim leaders and organizations. At some point, it seemed the review of the constitution was going to be derailed on the fractious relations between Christian and Muslim relations in the country.

This set of essays documents various aspects of the Kadhis Court debate in Kenya during this process. They emerged from a conference organized jointly by St. Paul's University's Department of Religious Studies and the Centre for Contemporary Islam of the University of Cape Town on 20 March 2010. The papers were selected among many others, and they have been reviewed and revised for this publication. The conference and the publication of these papers were supported by the research chair held by Abdulkader Tayob on "Islam, African Publics and Religious Values" managed by the National Research Foundation, financed by the Department of Science and Technology, and hosted at the University of Cape Town.

The collection begins with a contribution by John Chesworth who presents a detailed chronology and legal trail of the Kadhis courts in Kenya. This full documentation of the sequence of events, and texts of agreements and draft constitutions provides an important overview of the Kadhis Courts. This is followed by Samuel Mbithi Kimeu's article that covers the material from a legal perspective. His article frames the Kadhis courts as a minority rights issue in the Kenyan legal structure. In his essay, Hassan Mraja turns to the popular debate around the Kadhis courts in the same period, particularly as reflected in newspapers and some public meetings. His article shows some of the assumptions and presumptions the Kadhis courts dominated the public sphere in Kenya. Joseph Wandera's essay differentiates among Christian groups in the country, arguing that they were far from unanimous in their approach to this matter. Moreover, he makes the important and critical comment that the Anglican Church's response to the Kadhis courts reflects its general approach towards the public sphere. From a once-active engagement in the public sphere, the Anglican Church now followed the new churches in promoting a sectarian approach in public life. The next article by Kahumbi Maina shows how the Kadhis courts for many Christians became part of a larger threat that Muslims appeared to pose to the Kenyan state. The Kadhis Courts was clearly a Muslim issue, which was closely associated with the US Embassy bombings in 1998, the attacks on an Israeli-owned hotel and aircraft in Kilifi in 2005, and other global attacks carried by Islamic militants. This Islamophobia, as Maina calls it, determined some Christian leadership opposition to the Kadhis courts in the constitution. The final paper by Abdulkader Tayob turns to a deeper analysis of some Muslim responses to the Kadhis courts, showing that Muslims were signalling the development of a new politics and a new approach to the Kadhis courts. Such views were often buried in the reactionary responses that Muslims took in public debate.

The Kadhis court issue raised important questions about the relationship between religion and politics in the region. Initially, religious groups across Kenya played a constructive and important role in the development of a broad-based movement for constitutional change. Without them, the constitutional change would have been limited to politicians and legal professionals. Religious groups ensured that it was an inclusive and broad-based process. Nevertheless, the Kadhis court debate also showed the limitation of religious engagement in the public sphere. It showed how religious groups could easily slip into

another mode of engagement. Public engagement could and did become a site for sectarian competition for symbolic presence. For some Christian groups, thus, the mere presence and mention of the Kadhis courts in the constitution was unacceptable. It gave Muslims a distinct advantage over others, particularly Christians. At the same time, it was also evident that the political space of Kenya was infused with religious symbols. Political parties and leaders sought out support from what they considered clearly influential religious leaders, and their extensive followings. All religious groups were willing to lend their support in return for greater public exposure. The third point in the Kadhis court debate was signalled by the result of the referendum, and could not have been made in March when our workshop was held in Limuru. The overwhelming support for the constitution showed that the majority of Kenyans ignored the highly controversial religious debates on the Kadhis courts. Newspaper reports and public meetings over the Kadhis courts up to August 2010 would have given observers the impression that Kenya would be engulfed in deep civil conflict along religious lines. The Kadhis court would have been a catalyst for this conflict. Nothing of the sort happened. Support for the referendum showed the importance but also the limitation of the religious public debate. Support for the constitution showed that religious organizations could not direct or guide the public deliberations. Their rhetoric revealed as much as it obscured what Kenyans wanted from their government.

Kadhi's Courts in Kenya: Reactions and Responses¹

John Chesworth

By setting out the historical context, the paper seeks to find the reasons why Islamic Courts (Kadhi's Courts) have become such a contentious issue in Kenya. The paper begins by reviewing the historical context until independence; it then examines the ways in which independent Kenya dealt with Islamic law and the place of Kadhi's Courts within the Constitution of Kenya.

Two matters need clarification: *How do you spell Kadhi's Court? and What issues are dealt with by the Kadhi's Courts?* Kadhi is the Swahili transliteration of the Arabic word Qāḍī, as Swahili has no letter q. But whether a comma should appear or not when applied to the court overseen by a Kadhi is a mystery. Legal documents give every variation possible. The first constitution of independent Kenya, uses "court of a Kadhi", which circumvents the question as to where the apostrophe should go. The following spellings occur in official documents from 1888-2010, sometimes within the same paragraph: Kathi, Kadhi, Kadhis, Kadhi's, Kadhis', Cadi's.

Under the British, the Courts were codified and restricted in the areas they could hear. The cases that are heard in Kadhi's Courts are those that concern personal status, that is, 'Family Law': Marriage, divorce, custody and inheritance.

Historical scene setting

Around 1330 the Moroccan traveller Abū 'Abdallāh ibn Baṭūṭa travelled along the coast of East Africa. As a part of his lengthy travels the report of what he found is informative. While in Maqdashaw [Mogadishu] Ibn Baṭūṭa refers to legal practices.

Then the sheikh goes into his house and the *qāḍī*, the *wazīrs*, the private secretary, and four of the leading *amīrs* sit for hearing litigation between the members of the public and hearing the cases of people with complaints. In a matter connected with the rules of the

sharīa the *qāḍī* passes judgement; in a matter other than that, the members of the council pass judgement, that is, the ministers and the *amīrs*. In a matter where there is need of consultation with the sultan, they write about it to him and he sends out the reply to them immediately on the back of the note in accordance with his view. And such is always their custom (Hamdun and King 2003, 21).

He then moved to Mombasa and reveals that the inhabitants follow Shāfi'i jurisprudence.

Then I sailed from the city of Maqdashaw going towards the land of the *Sawāḥil*, intending to go to the city of Kulwā [Kilwa] which is one of the cities of the land of Zunūj. We arrived at the island of Manbasā [Mombasa] ... a large island with two days journey by sea between it and the land of the *Sawāḥil*. It has no mainland. ... They are Shāfi'i by rite, they are religious people, trustworthy and righteous. ... (Hamdun and King 2003, 22-23).

From this we know that long before the modern era an Islamic legal system was already operating and that the Muslims followed the Shāfi'i Madhhab.

The colonial era began in 1498 with the arrival of the Portuguese. After 200 years, in 1698, the Omanis helped to liberate the East African coast from the Portuguese and subsequently colonised it themselves. The Omani rulers were Ibādi (*khawārij*) and established a system of both Ibādi and Shāfi'i courts on Zanzibar; on the Ten Mile Strip. Shāfi'i law was regarded as the norm.

[T]he Islamic judicial system ... continued under the rule of the Omani rulers who later [moved] shifted [*sic*] their base to Zanzibar in the 19th century laying claim a 10-mile strip

along the East African coast (Ebrahim n.d.).

During the second part of the 19th Century the European states began their ‘Scramble for Africa.’ The Berlin Conference of 1884 divided the continent into spheres of interest between the European powers. In East Africa it was divided between the Italians around the Horn and Somalia, the British, in what is now Kenya, and the Germans in what is now mainland Tanzania. Over a number of years the Sultan of Zanzibar negotiated separate agreements with each of the powers allowing the Ten Mile Strip to be controlled by these European Powers. These International agreements drawn up with Britain and Germany maintained the existing legal system in the protectorates. The Concession granted by the Sultan of Zanzibar to the British East Africa Company drawn up on 24th May 1887 (Hertslet 1896, 110-117) included a clause concerning the appointment of Judges on the mainland territories of the Sultan of Zanzibar which were taken under the protection of the Company:

The Judges shall be appointed by the Association, or their Representatives, subject to the Sultan’s approval, but all “Kathis” shall be nominated by His Highness.

Further to this on 1st July 1895, during a speech made by Sir Lloyd Mathews, Wazir [chief minister] of the Sultan of Zanzibar, during a *baraza* [council] marking the transfer of territory administered on the mainland, held in Mombasa, stated:

[A]ll affairs connected with the faith of Islam will be conducted to the honour and benefit of religion, and all ancient customs will be allowed to continue, and his wish is that everything should be done in accordance with justice and law (Hertslet 1967, 380).

A speech given by A.H. Hardinge, Her Majesty’s Consul-General at Zanzibar, on 16th June 1895 was read in Arabic and translated into Swahili. The speech affirmed what the Wazir had announced concerning Muslim Law and Religion for the citizens of the Sultan of Zanzibar who were resident on the mainland:

Mahommedan Law and Religion. Religious Liberty to all:

And with respect to what the Wazir of the Sultan has told you about religion, let it be known to you

that it will be protected and respected by the new Administration, and that all mosques and religious festivals, and Cadis and Ulema will receive all honour at our hands, The Mahommedan religion will remain the public and established creed in the Sultan’s territory, and all cases and lawsuits between natives will continue to be decided according to the ‘Sheira,’ [sic] but although the Mahommedan is and remains the State religion, we intend that there shall be the fullest liberty for all others, and that all their adherents, whether they be Christians, or Parsees, or Hindoos, shall freely worship God according to their respective rites. (Hertslet 1967, 380-382)

This shows that the British were intent on ensuring the continuation of an Islamic legal system, whilst desiring freedom of religion for those of other faiths living in the Sultan’s territories. The British also set up Islamic Courts in up-country areas, outside the ten-mile strip, where there were significant numbers of Muslims (Anderson 1970, 107).

The British set up a tripartite legal system for local courts, all being approximately at the same level: Magistrate’s Courts, hearing cases following British Common Law; Native Courts, which used local traditional law; and Muslim Courts. The British, in cases of Muslim law often applied laws that they had previously promulgated in India and as such the law applied could no longer be viewed as being purely Shāfiī.

The British Colonial Government legally recognized the operation of Kadhi’s courts in the coastal area, as one of three classes of ‘Muslim Subordinate Courts’. The Courts’ Ordinance, 1931, Section 17 (as amended) defines them as follows:

Liwalis’ courts: Full jurisdiction over Arabs, Baluchis and Africans (including Somalis, Malagasies and Comoro Islanders), in all matters in which the value of the subject-matter in dispute does not exceed one thousand five hundred shillings.

Qādīs’ courts: Full jurisdiction over Muhammadan Arabs, Baluchis and Africans (including Somalis, Malagasies and Comoro Islanders), in all matters relating to personal status, marriage, inheritance and divorce, and, within the coast districts, over all Arabs, Baluchis and

Africans (including Somalis, Malagasies and Comoro Islanders), in all matters in which the value of the subject does not exceed one thousand shillings.

Mudīrs’ courts: Full jurisdiction over Arabs, Baluchis and Africans (including Somalis, Malagasies and Comoro Islanders), in all matters in which the subject-matter in dispute does not exceed five hundred shillings. (quoted by Anderson 1970, 89)

The Baluchis had been employed as bodyguards by the Sultan of Zanzibar and they made up a distinct minority group. Unlike all the other groups they followed Ḥanafī law. All others whose cases would have been heard followed Shāfiī law. However, it appears that judgements for cases involving Baluchis regularly followed Shāfiī law.

During the British colonial period the office of the Chief Kadhi continued to be based in Mombasa. The Chief Kadhi was the head of the Islamic judicial system, appointed by the colonial administrators in the same way as other members of the judiciary since he was a civil servant (Ebrahim n.d.). Beyond the Coastal Strip, Kadhi’s courts were established in Isiolo in Eastern Province and Mumias in Western Kenya (Trimingham 1964, 158). Hassan Mwakimako has written about the appointment of a Kadhi for Mumias, during the colonial period (2008, 424-443).

In the move towards Independence from the British, the Sultan of Zanzibar wished that the agreements concerning the Ten Mile Strip should be retained. Seyyid Jamshid bin Abdullah bin Khalifa, Sultan of Zanzibar, Duncan Sandys, British Secretary of State on behalf of H.M. Queen Elizabeth II, Jomo Kenyatta, Prime Minister of Kenya, and Mohammed Shamte Prime Minister of Zanzibar met for talks held at Marlborough House and signed a joint agreement concerning the Kenyan Coastal Strip, dated 8th October 1963.²

The agreement includes the texts of two letters, signed by the two Prime Ministers, and dated 5th October 1963, both of which included a clause stating:

- (2) The jurisdiction of the Chief Kadhi and of all other Kadhis will at all times be preserved and will extend to the determination of questions

of Muslim law relating to personal status (for example, marriage, divorce and inheritance) in proceedings in which all parties profess the Muslim religion.

It is this clause, contained in the Exchange of Letters between the Prime Ministers of Kenya and Zanzibar that confirms the existence of Kadhi’s Courts and is the basis of their presence in the post-independent Constitution of Kenya.

Independent Kenya

After Kenya gained independence in December 1963, Jomo Kenyatta’s (1963-1978) government chose to respect the agreement even after the Sultan of Zanzibar was removed from power in January 1964. The initial Constitution set out the place of Kadhi’s Courts in Kenya, following independence:

179. (1) There shall be a Chief Kadhi and such number, not being less than three, of other Kadhis as may be prescribed by Parliament.
- (2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless:
 - (a) he professes the Muslim religion; and
 - (b) he possesses such knowledge of the Muslim law applicable to any sect or sects of Muslims as qualifies him, in the opinion of the Judicial Service Commission, to hold a court of a Kadhi.
- (3) Without prejudice to the generality of section 178 (1) of this Constitution and subject to the provisions of subsection (4) of this section, there shall be such subordinate courts held by Kadhis (in this section referred to as “courts of a Kadhi”) as Parliament may establish and each court of a Kadhi shall, subject to the provisions of this Constitution, have such jurisdiction and powers as may be conferred on it by any law.
- (4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being less than three in number) as may be prescribed by or under an Act of Parliament, shall each

be empowered to hold a court of a Kadhi having jurisdiction within the former Protectorate or within such part of the former Protectorate as may be so prescribed:

Provided that no part of the former Protectorate shall be outside the jurisdiction of some court of a Kadhi.

- (5) The jurisdiction of a court of a Kadhi shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.

The process of integrating the judicial system began in 1962, when powers of administrative officers to review African Courts' proceedings were transferred to magistrates. The process was completed by the passage of two acts in 1967. The Magistrates' Courts Act 1967 abolished African Courts and the Court of Review and established District and Resident Magistrates' Courts and a High Court. The Qadis' Courts Act 1967 established six Qadis' Courts for the application of Muslim personal status law (An-Na'im 2002, 54). Rather than just maintaining the Kadhi's Courts at pre-independence levels, Kenya increased the number of Kadhi's Courts to 14, one in each province, as well as additional locations in Coast and North East provinces.

The 1967 Kadhi's Courts Act established the present system of courts, extending them to all the provinces of Kenya. Islamic law is applied by Qadis' Courts, where "all the parties profess the Muslim religion" in suits relating to "questions of Muslim law relating to personal status, marriage, divorce or inheritance." There are eight Qadis' Courts in Kenya, presided over by a Chief Qadi or a qadi appointed by the Judicial Services Commission. Appeals to the High Court, [are conducted] sitting with the Chief Qadi or two other qadis as assessor(s) (An-Na'im 2002, 55).

An-Na'im also refers to the place of Kadhi's Courts within the Constitution and the constitutional status of Islamic law in postcolonial Kenya:

The Constitution was adopted on 12 December 1963, and has been amended several times, most notably in 1964, when Kenya became a republic, and in 1991, when

a multiparty system was restored. The Constitution does not provide for any official state religion. Article 66(1) to (5) provides for the establishment of Qadis' Courts (An-Na'im 2002, 55).

Why are Kadhi's Courts in the Constitution at all?

At Independence the Constitution's chapter on the Judiciary included a section called Subordinate Courts, which included Magistrates Courts, Native Courts and Kadhi's Courts. When the Native Courts were abolished they were removed from the Constitution, whilst the Kadhi's Courts remained together with the Magistrates Courts. Even though the Constitution has been revised the original wording of the clauses has been retained, with a few minor changes. The clause concerning Kadhi's Courts in the present constitution is as follows:

Constitution of Kenya—Revised Edition (1998) 1992

66. Kadhi's Courts.

1. There shall be a Chief Kadhi and such number, not being less than three, of other Kadhis as may be pro-scribed by or under an Act of Parliament.
2. A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless—
 - a. he professes the Muslim religion; and
 - b. he possesses such knowledge of the Muslim law applicable to any sect or sects of Muslims as qualifies him, in the opinion of the Judicial Service Commission, to hold a Kadhi's court.
3. Without prejudice to section 65 (1), there shall be such subordinate courts held by Kadhis as Parliament may establish and each Kadhi's court shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law.
4. The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being less than three in number) as may be prescribed by or under an Act of Parliament, shall each be empowered to hold a Kadhi's court having jurisdiction within the former Protectorate or within such part of

the former Protectorate as may be so prescribed:

Provided that no part of the former Protectorate shall be outside the jurisdiction of some Kadhi’s court.

5. The jurisdiction of a Kadhi’s court shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.

Having seen the changes following independence we can date the start of public discourse about Kadhi’s Courts to 1998, following the demand for a review of the Kenyan Constitution.

Resulting from the pressure that the church and civil society had put on the government during the 1997 election campaign, the Government of Kenya announced that the Constitution of Kenya would undergo a comprehensive review. The new parliament subsequently passed the Constitution of Kenya Review Commission (Amendment) Act of 1998. This established the Constitution of Kenya Review Commission (CKRC), with a membership appointed by a Parliamentary Select Committee. As the process was parliament-led, the establishment of the CKRC was viewed with suspicion by many organizations in civil society (Andreassen and Tostensen 2006, 1). The President, Daniel Arap Moi (1978-2002), was defensive about the Constitutional Review process and in February 1998 all but attacked church leaders.

The Kenyan head of state was addressing a public meeting in Eldoret on 20th February ... he said the churches had been on a smear campaign against the government and were now “curiously joining the many shady and illegal groups opposed to the formation of a Constitutional Review Commission”. He said that that this was a betrayal of Christian doctrine. President Moi’s attack came closely after several church organisations had issued a hard-hitting statement which criticised the Kenyan government. (ACNS 10 March 1998, no. 1545)

In December 1999 various civic organizations initiated the Ufungamano Initiative. This was a “faith-based” group, named after the building where the initiative was launched, Ufungamano

House (the Christian Students’ Leadership Centre), which is jointly owned by the NCKK, the umbrella organization for the Protestant churches, and the Kenya Episcopal Council (KEC), the umbrella organization for the Catholic church. The membership of this group was drawn from different faith groups, including the Catholic Church, member churches of the NCKK, the Supreme Council of Kenya Muslims (SUPKEM) and the Hindu Council of Kenya. In June 2000 they announced the formation of a People’s Commission, which would draw up its own proposals for the Constitution.

It could be said that the establishing of the People’s Commission impelled the government to start the long-expected process of establishing an official commission. The Parliamentary Select Committee on Constitutional Reform guided an Enabling Act through Parliament in October 2000, the Constitution of Kenya Review Act, under which the 15-member Constitution of Kenya Review Commission headed by Prof. Yash Pal Ghai was established (CKRC 2002b, 2).

Joint Process between CKRC and the People’s Commission

Yash Pal Ghai, as head of CKRC, insisted on a joint process with the Ufungamano Initiative’s People’s Commission. In March 2001, agreement was reached on the merger of the commissions, and in June 2001, the Constitution of Kenya Review Act was amended to increase the membership of the CKRC by including ten members from the People’s Commission and two nominees of the Parliamentary Select Committee on the Constitution (CKRC 2000a, 2).

The report of the CKRC published in September 2002 explained the processes of public hearings held throughout Kenya from December 2001 to August 2002:

The Commission began listening to the People public hearings in Nairobi and provincial capitals in early December 2001. Hearings continued in Nairobi until the end of July 2002. From late April to early August 2002, the Commission visited every constituency for hearings, in panels of five or three commissioners, spending two days in every constituency and three days in the larger constituencies. Altogether 35,015 submissions were received, many from organised groups, like political parties, religious communities,

professional organisations, trade unions, NGOs, and ethnic communities, so that through formal hearings and memoranda, millions of Kenyans, throughout the country and overseas, have spoken to the Commission. (CKRC 2002b, 4)

Soon after the publication of the CKRC draft, the author participated in a meeting of Anglican clergy, held at St. Stephen's Church, Jogoo Road, Nairobi, having been invited specifically to respond to concerns about Kadhi's Courts in the draft. Many of the comments by speakers and participants were negative towards Muslims and showed little awareness of the purpose of Kadhi's Courts, reflecting much of what was to occur during the latter phases of constitutional reform.

David Kanyoni, now an Anglican priest in the Diocese of Nyahururu, whilst undertaking research for his Master of Arts in Islam and Christian Muslim Relations at St. Paul's University, Limuru, made an examination of the submissions made by Muslims and he reports:

During the constitutional review process, the CKRC received a number of submissions expressing the need for the expansion and reform of the jurisdiction and structures of the Kadhi's courts, primarily from the Muslim communities. Muslims claimed that they should be properly integrated into the national legal system. Most specifically, the Muslim Communities asked the review commission to ensure that there were enough Kadhi's courts; and that the jurisdiction be extended to civil and commercial matters.

These recommendations received considerable opposition from some Christian quarters. Regarding their proposals to expand the Kadhi's courts, the Muslims cited a number of inadequacies in the current constitution, which needed redress. They felt, for example, the role of the Kadhi or the Chief Kadhi as an assessor in the High Court is not given the weight that their contribution deserves. The procedure of appointment of Kadhis was also questioned. The Muslims also expressed the need to codify into legislation the Muslim personal law on marriage, divorce, inheritance and succession. They also disputed the need for the Kadhis to observe the guidance of the Evidence Act and the Civil Procedure Act, which according to them contradict the

Muslim evidentiary law. The Muslims also advocated the need to legislate relevant terms of service for the Chief Kadhi and all the Kadhis (Kanyoni 2006, 6).

The CKRC draft contained a clause on Kadhi's Courts, which in essence reflected the existing clause in the constitution, whilst simplifying it and leaving details to Acts of Parliament.

CKRC Draft

The Kadhis' courts

- 199 (1) There are established Kadhis' Courts the office of Chief Kadhi; office of Senior Kadhi and the office of Kadhi.
- (2) There shall be a number being not less than thirty, of other Kadhis as may be prescribed by the Act of Parliament.
- (3) A Kadhi is empowered to hold a Kadhis' court called a District Kadhi Court, having jurisdiction within a district or districts as may be prescribed by, or under, an Act of Parliament.

The publication of the report and a draft constitution was followed by a series of National Constitutional Conferences (NCCs) held at the Bomas of Kenya on the outskirts of Nairobi. Because of the location, they became known as Bomas I, II and III. These three conferences produced the Bomas Draft Constitution. The Bomas I conference lasted from April to June 2003, Bomas II from August until September 2003 and Bomas III, which finalized the "Bomas draft constitutional Bill", lasted from January until March 2004. Around 630 representatives from locally elected bodies, members of selected nongovernmental organizations and all members of parliament attended the Bomas conferences (Andreassen and Tostensen 2006, 2). The proceedings became increasingly acrimonious during Bomas III. The place of Islamic Law within the Constitution of Kenya issue led to the collapse of the multi-faith aspect nature of the Ufungamano Initiative. Mutava Musyimi, General Secretary of NCCCK, resigned as a commissioner.

Bomas Draft (2004)

Kadhis' Court

198. (1) There is established the Kadhi's Court.
- (2) The Kadhi's Court shall—
 - (a) consist of the Chief Kadhi and such

- number of other kadhis, all of whom profess the Islamic faith; and
- (b) be organized and administered, as may be prescribed by an Act of Parliament.

Jurisdiction of the Kadhis' Court

199. The Kadhis' Court shall be a subordinate court with jurisdiction to determine questions of Islamic law relating to personal status, marriage, divorce and matters consequential to divorce, inheritance and succession in proceedings in which all the parties profess the Islamic faith.

The subsequent clause then set out in great detail the jurisdiction of the Kadhi's Courts:

Jurisdiction of Kadhis' courts

200. (1) The jurisdiction of a Kadhis' court extends to
- (a) the determination of questions of Muslim Law relating to personal status, marriage, divorce, including matters arising after divorce, and inheritance and succession in proceedings in which all parties profess Islam;
 - (b) the determination of civil and commercial disputes between parties who are Muslims, in the manner of a small claims court as by law established, but without prejudice to the rights of parties to go to other courts or tribunals with similar jurisdiction;
 - (c) the settlement of disputes over or arising out of the administration of wakf properties.
- (2) Subject to the Constitution, an appeal lies, as of right, from a judgement, decree or order of the District Kadhis' Court to the Provincial Kadhis' Court, presided over by a Senior Kadhi, in any matter or cause determined by the lower court:
- (3) An appeal lies, as of right, from a judgement or order of the Provincial Kadhis' Court to the Kadhis' Court of Appeal, presided over by the Chief Kadhi and two senior Kadhis.
- (4) An appeal from the Kadhis' Court of Appeal lies to the Supreme Court only on a point of Islamic Law or on an issue affecting the interpretation of the Constitution or any

other constitutional issue.

- (5) For the purposes of hearing and determining an appeal within its jurisdiction, the Provincial Kadhis' Court and the Kadhis' Court of Appeal have all the powers, authority and jurisdiction in the court from which the appeal is brought.
- (6) The Chief Kadhi shall, in consultation with the Chief Justice and the Law Society of Kenya, make rules of Court for the practice and procedure to be followed by the Kadhis' Courts.

This proposed draft extended the role of the Kadhi's Courts to include a 'small claims' procedure, the administration of *wakf* and the establishment of an Appeal Court. The increase in the apparent powers of the courts shows some of the reasons for some Christian stakeholders objecting to the presence of the Kadhi's Courts.

The 'Kenyan Church', formed from a broad spectrum of Christian groups, has taken upon itself a role of defender of Christianity and Kenya against *kadhi's* courts in the constitution, without apparently taking it on themselves to understand the historical place of the courts nor to exhibit any sensitivity towards the Muslim community. The 'Kenyan Church' argued that:

- [The Kadhi's Courts] can no longer be accommodated as the draft clearly states the relationship between the state and religion and indicates that there is no state religion.
- Article 10(3) on which they based their arguments states:
 - State and religion shall be separate
 - There shall be no state religion
 - All religions will be treated equally

Attacks such as this left Muslims feeling marginalised; confirming them in their feeling of being treated as second-class citizens.

The debate, which focussed itself on the *kadhi's* courts and the constitutional review, allowed extreme elements from both sides to speak out with great vehemence and so increased tensions between the two communities. It has crystallised the perceived hurts and prejudices that have lain under the surface of a thin veneer of mutual tolerance. Aspects of the entire situation must be examined for the influence of political elements that use religion for their own ethnic reasons.

In an interview with David Kanyoni in January 2004, David Gitari, the former Archbishop said:

The personal laws of all minority groups cannot be given a constitutional recognition in the total exclusion of all other religions in Kenya and especially of the mainstream Christian religion which comprises over 80% of the total population (Gitari, 6th January 2004, in Kanyoni 2004).

Kanyoni also reports on a seminar run by NCKK in Machakos where Oliver Kisaka, the Deputy General Secretary of NCKK and Eric Simiyu, formerly of Life Challenge Africa and Oliver's brother, both spoke. He reports that Kisaka said:

Having dialogue with the Muslims is a waste of time and resources, as Muslims are never trusted as they bombed American Embassy and the following day they were celebrating ... (Oliver Kisaka NCKK Seminar, 4th March 2004, in Kanyoni 2004).

The arguments set out at that time reflect some of the current discourses. One strand concerned the idea that no religion should be favoured over others in a secular state, such as Kenya. The other centred on distrust of Muslims, containing aspects of Islamophobia. This was at a time when Hope FM was conducting a weekly phone-in where Islam was being criticised and there were explanations being given about the 'hidden agenda' of the Abuja Declaration.³

November 2005 Referendum on the proposed New Constitution

Following the various Bomas meetings a final draft Constitution was produced by the Attorney General, Amos Wako, which became known as the Wako draft. Whereas the clause concerning Kadhi's Courts in the earlier drafts had kept closely to the existing Constitution the Wako Draft sought to appease Christians and other non-Muslim stakeholders, by establishing a Religious Courts Clause rather than Kadhi's Courts.

Wako Draft (2005)

179. (3) The subordinate courts are—
- (a) The Magistrates' courts, Christian courts, Kadhis' courts, Hindu courts and other religious courts.
195. (4) To determine questions of their religious

laws relating to personal status, marriage, divorce and matters consequential to divorce, inheritance and succession in proceedings in which all parties profess the respective faith, as may be prescribed by an Act of Parliament.

(“Wako Draft” 2005)

The referendum campaign divided the nation into Bananas (Yes) and Oranges (No) and led to the creation of the Orange Democratic Movement (ODM).

The referendum was held on 21st November 2005. The results of the referendum, issued on 22 November 2005, showed a resounding rejection of the proposed constitution. Nationally, the “No” side received 57 per cent, and the “Yes” side 43 percent.

When the votes on a provincial basis are analysed, we see that only in the home province of the president (Central) was there a majority in favour of the constitution, with 92 percent voting “Yes,” whilst in the home province of the leader of the “No” campaign (Nyanza), 87 percent voted against it. This indicates that many people voted on ethnic lines. The two provinces with a majority of Muslims (Coast and North Eastern) also heavily rejected the draft constitution, 80 and 75 percent, respectively, also indicating that Muslims were not in favour of the proposals.

Whilst other factors led to the rejection of the draft constitution, it can also be said that for both Christians and Muslims, the place of Kadhi's courts in the constitution, was regarded as a significant reason for their rejection of the Wako draft of the constitution. Paul Gifford writing about church involvement in the whole process and Kadhi's Courts comments:

... these courts seemed to become a major issue especially for the newer churches whose agenda was adopted by the Catholics and NCKK; ... much Christian activity against the new constitution revolved around narrowly evangelical concerns rather than the broad human rights issues that initiated the drive for a new constitution (Gifford 2009, 41).

Constitution of Kenya Review and the Committee of Experts 2009

Following the December 2007 elections and the ensuing Post Election Violence and the agreement brokered by Koffi Annan and others, a process was

set in train to draw up a new draft constitution. The Constitution of Kenya Review Act was passed in December 2008 and the Committee of Experts sworn in March 2009, charged with the task to review all previous drafts and reports. Their *modus operandi* meant that they largely sidelined Civic Society initiatives. In an interim statement issued at the end of October 2009 ‘Progress on the Constitution Review process by the Committee of Experts (CoE) and Reference Group (RG) as at October 2009’ two weeks before the Harmonized Draft was published they stated that:

The RG and CoE appreciated that the Kadhis Courts raise various concerns and they are important socio-cultural issues in our society. To this extent, the RG and CoE have deliberated on the issue of the Kadhis courts and there is an emerging consensus. While members of CoE and RG will continue to educate and engage with Kenyans and religious leaders, the CoE and RG wish to affirmatively state that the Cadis [sic] will no longer be a reason to object to the process of constitution making or to defeat the draft constitution.

This revealed that they were aware of the ‘socio-cultural’ issues, but did not see these as a barrier to retaining the Kadhi’s courts clause in the harmonized draft.

The Committee of Experts published the *Harmonized Revised Draft Constitution* in mid November 2009. As expected it included a clause concerning Kadhi’s Courts.

Harmonized Draft Constitution of Kenya (2009)

Part 3—Subordinate courts

Subordinate courts

208. (1) The subordinate courts are—
- (a) the Magistrates’ Courts;
 - (b) the Kadhis’ courts;
 - (c) the Courts Martial; and
 - (d) any other court or local tribunal as may be established by an Act of Parliament.
- (2) Parliament shall by legislation confer jurisdiction, powers and functions on the courts established under clause (1).

This retained the Kadhi’s Courts’ place as a subordinate court, together with Magistrates’ Courts, as in the current constitution. The next clause then set out the place of the Kadhi’s courts.

Kadhis’ Courts

209. (1) There shall be a Chief Kadhi and such number, not being fewer than three, of other Kadhis as may be prescribed by or under an Act of Parliament.
- (2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless the person—
- (a) professes the Muslim religion; and
 - (b) possesses such knowledge of the Muslim law applicable to any sects of Muslims as qualifies that person, in the opinion of the Judicial Service Commission, to hold a Kadhi’s court.
- (3) Without prejudice to Article 208, there shall be such subordinate courts held by Kadhis as Parliament may establish and each Kadhi’s court shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law.
- (4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being fewer than three in number) as may be prescribed by or under an Act of Parliament, shall each be empowered to hold a Kadhi’s court having jurisdiction within the former Protectorate or within such part of the former Protectorate as may be so prescribed.
- (5) No part of the former Protectorate shall be outside the jurisdiction of some Kadhi’s court.
- (6) The jurisdiction of a Kadhi’s court shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.

In general it followed the current constitution. However sub clauses 209 (4) and (5) both include reference to ‘the former Protectorate’, a phrase that needs some clarification. It appears to refer to the ‘ten mile strip’ that the Sultan of Zanzibar had controlled and subsequently ceded to British ‘protection’ in 1895. That is the same area in which Kenyatta had agreed to retain Islamic Law at independence, with the Marlborough House agreement. If this is the case, it implied that the Kadhi’s Courts clause only applied to this geographically defined region, which lies within Coast Province, but does not incorporate the whole province.

On the 29th January 2010 a revision of the harmonised draft constitution by a Parliamentary Select Committee was published. The accompanying report included a section on the judiciary 4.1 which makes no reference to Kadhi's courts and stated that:

The Chapter on Judiciary was not considered contentious by the Committee of Experts although Judiciary is one arm of Government that has raised concern among the public in its dispensation of justice and the question of its independence. The Committee deliberated on the Chapter and made to remove clauses which could be addressed through legislation (Report of the Parliamentary Select Committee on the Review of the Constitution on the Reviewed Harmonized Draft Constitution 29th January 2010).

This revision retained the Kadhi's Courts clause:

Revised Harmonised Draft Constitution of Kenya

29th January 2010

Part 3—Subordinate courts

Subordinate courts

160. (1) The subordinate courts are—
- (a) the Magistrates courts;
 - (b) the Kadhis' courts;
 - (c) the Courts Martial; and
 - (d) any other court or local tribunal as may be established by an Act of Parliament.
- (2) Parliament shall by legislation confer jurisdiction, powers and functions on the courts established under clause (1).

Kadhis' Courts

161. (1) There shall be a Chief Kadhi and such number, not being fewer than three, of other Kadhis as may be prescribed by or under an Act of Parliament.
- (2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless the person—
- (a) professes the Muslim religion; and
 - (b) possesses such knowledge of the Muslim law applicable to any sects of Muslims as qualifies that person, in the opinion of the Judicial Service Commission, to hold a Kadhi's court.

- (3) Without prejudice to Article 160, there shall be such subordinate courts held by Kadhis as Parliament may establish and each Kadhi's court shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by law.
- (4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being fewer than three in number) as may be prescribed by or under an Act of Parliament, shall each be empowered to hold a Kadhi's court having jurisdiction within Kenya.
- (5) The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.

The Revised Harmonised Draft Constitution of Kenya clause concerning Kadhi's Courts makes no reference to 'the former Protectorate', thereby removing one area of contention.

On 6th May 2010 the Attorney General published the text of the *Proposed Constitution* to be put to a referendum on 4th August 2010. The wording of the two clauses concerning Kadhi's Courts is almost identical to that of the Revised Harmonised Draft Constitution of 29th January 2010.

Part 3—Subordinate courts

Subordinate courts

169. (1) The subordinate courts are—
- (a) the Magistrates courts;
 - (b) the Kadhis' courts;
 - (c) the Courts Martial; and
 - (d) any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(2).
- (2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).

Kadhis' Courts

170. (1) There shall be a Chief Kadhi and such

number, being not fewer than three, of other Kadhis as may be prescribed under an Act of Parliament.

- (2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless the person—
 - (a) professes the Muslim religion; and
 - (b) possesses such knowledge of the Muslim law applicable to any sects of Muslims as qualifies the person, in the opinion of the Judicial Service Commission, to hold a Kadhi’s court.
- (3) Parliament shall establish Kadhis’ courts, each of which shall have the jurisdiction and powers conferred on it by legislation, subject to clause (5).
- (4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being fewer than three in number) as may be prescribed under an Act of Parliament, shall each be empowered to hold a Kadhi’s court having jurisdiction within Kenya.
- (5) The jurisdiction of a Kadhis’ court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi’s courts.

The only differences are found in 169(1)(d) and 170(3). The first instance refers to additional courts listed in 162(2):

System of Courts

162. (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
- (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.

Whilst 170(3) appears to restrict the potential powers of Kadhi’s Courts to those listed in 170(5), rather than the possibility of additional powers referred to in 161(3), January 2010: “each Kadhi’s court shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by law”.

Conclusion

This article serves to document the history of the Kadhi’s Courts clause in the Constitution of Kenya and the draft proposals to modify it. Kadhi’s Courts have had a place within Kenyan coastal society from at least the thirteenth century. Their existence was recognised and incorporated by colonial powers, both the Omanis from the late seventeenth century and the British from the late nineteenth century. This historical presence led to the acceptance and continuation of the system of Kadhi’s Courts following independence.

Various changes have been made to the Constitution of Kenya over the years since independence, but none were made to the clauses referring to Kadhi’s Courts.

The presence of the Kadhi’s Courts in the Constitution led to no adverse comment until the Constitutional Review of 2002. At that stage it would appear that other proposals in the review, taken together with events elsewhere, raised awareness of Kadhi’s Courts. The review initially included proposals for a Federal system of government. Events in northern Nigeria, where under a federal system, beginning in 1999, several states had re-introduced *sharia* raised concerns that the same could happen in Kenya. These concerns were largely generated by a lack of understanding of the system of *sharia* in operation in Nigeria when compared to Kenya.

With the support given to the proposed Constitution on 4th August 2010, the clauses allowing Kadhi’s Courts will remain until they are removed or amended through due process.

Notes

- 1 This paper reflects research carried out in Kenya for the ‘Sharia Debates and Their Perception by Christians and Muslims in Selected African Countries’ project that John Chesworth is involved in. Some of the material is drawn from research carried out by John Chesworth for a recently published chapter ‘The Church and Islam: *Vyama Vingi* (Multipartyism) and the Ufungamano Talks’, in *Religion and Politics in Kenya*, Ed. B. Knighton, Palgrave 2009.
- 2 Please see appendix for the full text of the agreement, and the full texts of the two rescinded agreements, neither of which specifically refers to the status of the courts. Please note that the Marlborough House talks were held in October 1963 with the sole purpose of drawing up an agreement between Zanzibar and Kenya on the Coastal Strip. These talks were separate from the Lancaster House talks which had dealt with other issues concerning the independence process for Kenya.
- 3 See Hassan Mwakimako ‘Christian-Muslim Relations in Kenya: A Catalogue of Events and Meanings’, *ICMR* 18.(2) 2007, Pages 287-307; see also John Chesworth ‘Challenges to the next Christendom: Islam in Africa’. In: *Global Christianity: Contested Claims*, eds. Frans Wijzen and Robert Schreiter, 117-132. Amsterdam: Editions Rodopi, (2007), especially pages 119-124 which examines the Abuja Declaration in detail.

Appendix

Kenya Coastal Strip Agreement 8th October 1963

Full Text of Agreement:

[Cover Page 1]

Coat of Arms of the United Kingdom of Great Britain and Northern Ireland

Title: Kenya Coastal Strip

Agreement between the Government of the United Kingdom, His Highness the Sultan of Zanzibar, the Government of Kenya and the Government of Zanzibar

Presented to Parliament by the Secretary of State for the Colonies by Command of Her Majesty

October 1963

London

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[Agreement Page 3]

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM, HIS HIGHNESS THE SULTAN OF ZANZIBAR, THE GOVERNMENT OF KENYA AND THE GOVERNMENT OF ZANZIBAR

An agreement made this 8th day of October 1963 between the Right Honourable Duncan Sandys, M.P., one of Her Majesty's Principal Secretaries of State, on behalf of Her Majesty Queen Elizabeth II, His Highness Sayyid Jamshid bin Abdulla bin Khalifa Sultan of Zanzibar, Jomo Kenyatta Prime Minister of Kenya on behalf of the Government of Kenya and Mohammed Shamte on behalf of the Government of Zanzibar:

Whereas by an Agreement made on behalf of Her Majesty Queen Victoria on 14th June 1890 with His Highness Sultan Seyyid bin Ali Said it was agreed, among other things, that His Highness's dominions should be placed under Her Majesty's protection:

And whereas by an Agreement made on behalf of Her Majesty Queen Victoria on 14th December 1895 with His Highness Sultan Seyyid Hamed bin Thwain it was agreed that His Highness's possessions on the mainland of Africa and adjacent Islands, exclusive of Zanzibar and Pemba, should be administered by others appointed direct by Her

Majesty's Government and those territories being at present administered accordingly as part of Kenya under the name of the Kenya Protectorate:

And whereas by an Exchange of Letters completed in London on 5th October 1963 between the Prime Minister of Zanzibar and the Prime Minister of Kenya the Government of Kenya agreed to certain undertakings concerning the protection, after Kenya has attained independence, of the interests of His Highness's present subjects in the Kenya Protectorate and their descendants:

NOW THEREFORE it is hereby agreed and declared that on the date when Kenya becomes independent

- (1) the territories comprised in the Kenya Protectorate shall cease to form part of His Highness's dominions and shall thereupon form part of Kenya;
- (2) the *Agreement* of 14th June 1890 in so far as it applies to those territories and the *Agreement* of 14th December 1895 shall cease to have effect.

Signed

DUNCAN SANDYS.

SAYYID JAMSHID BIN ABDALLA.

JOMO KENYATTA.

M. SHAMTE.

Marlborough House

London

[Letter from Jomo Kenyatta Page 4]

LETTER FROM THE PRIME MINISTER OF KENYA TO THE PRIME MINISTER OF ZANZIBAR

London,

5th October 1963

My Dear Prime Minister,

I have the honour to refer to discussions held between our respective Governments on the subject of the future of the Kenya Protectorate (the Coastal Strip) and to place on record the following undertakings by the Government of Kenya in relation thereto:—

- (1) The free exercise of any creed or religion will at all times be safeguarded and, in particular, His Highness's present subjects who are of the Muslim faith and their descendants will at all times be assured of complete freedom of worship and the preservation of their own religious buildings and institutions.
- (2) The jurisdiction of the Chief Kadhi and of all the

- other Kadhis will at all times be preserved and will extend to the determination of questions of Muslim law relating to personal status (for example, marriage, divorce and inheritance) in proceedings in which all parties profess the Muslim religion.
- (3) Administrative Officers in predominantly Muslim areas should, as far as is reasonably practicable, themselves be Muslim.
 - (4) In view of the importance of the teaching of Arabic to the maintenance of the Muslim religion. Muslim children will, so far as is reasonably practicable, be taught Arabic and, for this purpose the present grant-in-aid to Muslim primary schools now established in the Coast Region will be maintained.
 - (5) The freehold titles to land in the Coast Region that are already registered will at all times be recognized, steps will be taken to ensure the continuation of the procedure for the registration of new freehold titles and the rights of freeholders will at all times be preserved save in so far as it may be necessary to acquire freehold land for public purposes, in which event full and prompt compensation will be paid.

I have the honour to propose that this letter and your reply in confirmation thereof shall constitute an agreement between our two Governments.

Yours sincerely,
JOMO KENYATTA.

[Letter from M. Shamte Page 5]

LETTER FROM THE PRIME MINISTER OF ZANZIBAR
TO THE PRIME MINISTER OF KENYA

London,
5th October 1963

My dear Prime Minister,

I have the honour to refer to your letter of today’s date on the subject of the future of the Kenya Protectorate (the Coastal Strip) in which you placed on record the following undertakings by the Government of Kenya in relation thereto:—

- (1) The free exercise of any creed or religion will at all times be safeguarded and, in particular, His Highness’s present subjects who are of the Muslim faith and their descendants will at all times be assured of complete freedom of worship and the preservation of their own

religious buildings and institutions.

- (2) The jurisdiction of the Chief Kadhi and of all the other Kadhis will at all times be preserved and will extend to the determination of questions of Muslim law relating to personal status (for example, marriage, divorce and inheritance) in proceedings in which all parties profess the Muslim religion.
- (3) Administrative Officers in predominantly Muslim areas should, as far as is reasonably practicable, themselves be Muslim.
- (4) In view of the importance of the teaching of Arabic to the maintenance of Muslim religion. Muslim children will, so far as is reasonably practicable, be taught Arabic and, for this purpose the present grant-in-aid to Muslim primary schools now established in the Coast Region will be maintained.
- (5) The freehold titles to land in the Coast Region that are already registered will at all times be recognized, steps will be taken to ensure the continuation of the procedure for the registration of new freehold titles and the rights of freeholders will at all times be preserved save in so far as it may be necessary to acquire freehold land for public purposes, in which event full and prompt compensation will be paid.

I have the honour to confirm the contents of your letter and to accept your proposal that your letter and this reply shall constitute an agreement between our two Governments.

Yours sincerely,
M. SHAMTE.

Text of the two agreements referred to in the Coastal Strip Agreement:

The Agreement of 14th June 1890

No. 42. — PROVISIONAL AGREEMENT concluded between the *Sultan of Zanzibar and Her Britannic Majesty’s Agent and Consul-General (subject to the approval of Her Majesty’s Government), respecting the British Protectorate of the Sultan’s dominions, Succession to the Throne of Zanzibar, &c.* § Zanzibar, 14th June, 1890.

British Protectorate.

Art. I.—His Highness Seyyid Ali-bin-Saïd, the Sultan aforesaid, accepts freely and unreservedly

for himself, his subjects, and his dominions, the Protectorate of Great Britain, to commence from any date which may hereafter be fixed by Her Majesty's Government.

Relations of Zanzibar with Foreign Powers to be conducted through British Government.

Art. II.—His Highness Seyyid Ali-bin-Said further understands and agrees that all his relations, of whatever sort, with foreign Powers, shall be conducted under the sole advice and through the channel of Her Majesty's Government.

Sultan's Dominions lying between the Umba and Rovuma Rivers.

Art. III.—As regards that portion of His Highness the Sultan's dominions lying between the Umba and Rovuma Rivers, His Highness Seyyid Ali agrees to abide by any equitable arrangement that may be come to by Her Majesty's Government with Germany regarding its retention by the Germans, and his just interests in this question entirely to the care of Her Majesty's Government.

British Guarantee of Sultan's Throne to Himself and his Successors.

Art. IV.—Colonel C.B. Euan-Smith, Her Majesty's Agent and Consul-General aforesaid, hereby guarantees, on behalf of Her Majesty's Government, the maintenance of His Highness the Sultan of Zanzibar's throne to himself, Seyyid Ali, and also to his successors.

Succession to the Throne of Zanzibar.

Art. V.—Colonel C.B. Euan-Smith further guarantees to His Highness Seyyid Ali, on behalf of Her Majesty's Government, the right of nominating his own successor to the Throne, subject to the approval of Her Majesty's Government.

Agreement to be binding permanently.

Art. VI.—His Highness Seyyid Ali hereby declares that the above Agreement shall be for ever binding upon himself, his heirs and successors.

Done at Zanzibar, in duplicate English and duplicate Arabic copies, on the 14th day of June, in the year 1890.

(Signature in Arabic)

Translation: ("This is true. Written by Ali-bin-Said with his own hand.")

Witness to the signature of His Highness the Sultan:

MOHAMMED-BIN-SAEF.

SALIM-BIN-ASSAN.

(L.S.) C.B. EUAN-SMITH Colonel,
Her Britannic Majesty's Agent and
Consul-General

Witness to the signature of Colonel Euan-Smith:

ERNEST J.L. BERKELEY,

Her Britannic Majesty's Vice-Consul.

The Sultan of Zanzibar to the Marquis of Salisbury.
(Translation.)

Zanzibar, 14th June, 1890.

We have heard from our true friend, your Consul-General Colonel Euan-Smith, all that your Lordship proposes to do for our good. And we know, indeed, that the English Government is always desirous of doing good to us, and we are very grateful to your Lordship in our heart, and we accept everything proposed. And now, please God, our interests will be safely in the care of the English.

This is from your friend.

ALI-BIN-SAÏD.

§ See Notification of British Protectorate, 4th November, 1890, p.310.

|| See Agreement, Great Britain and Germany 1st July, 1890, Art. I, §§ 1 and 2, pp. 899, 900. (Hertslet 1967, 308-309)

The Agreement of 14th December 1895

No. 77.— *AGREEMENT between Great Britain and Zanzibar, respecting the Possessions of the Sultan of Zanzibar on the Mainland and adjacent Islands, exclusive of Zanzibar and Pemba. Signed at Zanzibar 14th December, 1895.*

Zanzibar Possessions on Mainland and Islands, exclusive of Zanzibar and Pemba, to be administered by British Government.

His Highness Seyyid Hamedb-in-Thwain, Sultan of Zanzibar, agrees for himself, his heirs and successors, that as regards his possessions on the mainland and adjacent islands, exclusive of Zanzibar and Pemba, the administration shall be entrusted to officers appointed direct by Her Britannic Majesty's Government, to whom alone they shall be responsible.

These officers shall have full powers in regard to executive and judicial administration, the levy of taxes, duties, and tolls, and the regulation of trade and commerce. They shall have control over public lands, forts, and buildings, over all roads, railways, waterways, telegraphs and other means of communication, and shall regulate questions affecting lands and minerals. All custom duties, taxes, and dues shall be accounted for to,

and shall be expended by, Her Britannic Majesty's Government.

All assets purchased by the Sultan's Government from the Imperial British East Africa Company at the time of the surrender of its Concessions shall be the property of Her Britannic Majesty's Government, who shall also retain as their own property all public works of any description which may be constructed by the officers administering under this Agreement.

Her Britannic Majesty's Government shall pay to the Sultan's Government annually the sum of £11,000, as well as of £6,000 representing interest at 3 per cent., on the sum of £200,000 disbursed by the latter for the surrender of the Company's Concessions, and for the purchase of its assets.

This Agreement shall not affect the sovereignty of the Sultan in the above mentioned territories or the Treaty rights of foreign Powers.

Her Britannic Majesty's Government shall have the power of terminating this Agreement on giving six months' previous notice to the Sultan of Zanzibar of their intention to do so.

(Signature of Sultan in Arabic)

ARTHUR H. HARDINGE,

*Her Britannic Majesty's Agent
and Consul-General*

Zanzibar, 14th December, 1895.

(Hertslet 1967, 382)

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Historical and Legal Foundations of the Kadhi's Courts in Kenya

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Introduction

The clamour for a new constitution in Kenya gained momentum in the early 1990s following the repeal of section 2 A of the Kenyan Constitution to allow for multi-party democracy. The inadequacy of the current constitution to manage the affairs of the Kenyan state had been widely recognized and the lobby for a review of the constitution became more pronounced. The main reasons for the clamour for review of the constitution were to check the excesses of the presidency while strengthening the protection of fundamental rights and freedoms from encroachment by the state.

Kenya's independence Constitution in 1963 provided for a decentralized form of government that gave powers to the regions and limited the powers of the central government (Akivaga 2005) (Editor's note – Akivaga not mentioned in bibliography). It provided for a bicameral legislature and a Prime Minister as the Head of Government. Important changes were made in the independence constitution that had the effect of strengthening the presidency and weakening Parliament and other institutions¹. This was followed by systematic constriction of the political space and fundamental rights and freedoms. With the political space narrowed, the church became the voice of political opposition.

The agitation for constitutional change at the beginning of the 1990s forced the Kenya African National Union (KANU) to appoint a Review Committee to improve the image of that party and to accommodate dissident politicians. More pressure from pro-reform groups and the donor community coupled with changes in geo-politics² made the government accept change through the repeal of Section 2 A of the Constitution.³ Further changes came just before the elections in 1997 through an agreement of various political parties represented in parliament in what was known as the Inter-Party

Parliamentary Group (IPPG) agreement.⁴ Three laws resulted from this agreement: one making several minor changes to facilitate a level playing ground in the 1997 general elections. The Kenya Constitution Review Act was enacted to codify the IPPG agreement that the entire constitution be reviewed through an independent commission. After the 1997 elections and with continued pressure for constitutional change, a series of talks was held in the Bomas of Kenya and Safari Park Hotel leading to the enactment of the Kenya Constitution Review Commission (Amendment) Act, 1998 to repeal the 1997 Act and to incorporate a broad spectrum of stakeholders.

Disagreements followed the sharing of the thirteen available slots in the commission, with KANU insisting on keeping seven of the slots. A motion in parliament sponsored by Raila Odinga's National Development Party (NDP) was amended by KANU to lock out civil society from the Review Commission occasioning a split. KANU and NDP supported a process led by a Parliamentary Select Committee (The Parliamentary process). The Civil Society, the Christian groups composed mainly of NCK affiliates, the Anglican and the Catholic churches teamed with the Supreme Council of Kenya Muslims (SUPKEM) and the Hindu Council to form a parallel reform initiative popularly known as the *Ufungamano Initiative*⁵ chaired by Dr. Oki Ooko-Ombaka. Meanwhile the Parliamentary Select Committee after hearing views from a few Kenyans and some foreign experts proposed amendments to the 1998 Act in the form of the Constitution of Kenya Review Commission (Amendment) Act, 2000, which legalized the exclusion of other bodies from nominating commissioners. These powers were vested solely in parliament.

President Daniel arap Moi appointed Prof. Yash Pal Ghai as the chairman of the Parliamentary Commission. In March 2001 after protracted

negotiations led by Prof. Ghai with the Ufungamano Initiative, agreement was reached on the merger of the Commissions. Parliament enacted the Constitution of Kenya Review (Amendment) Bill 2001 to legalize the merger between the Constitution of Kenya Review Commission⁶ (CKRC) and the People's Commission (Ufungamano Initiative)⁷ and allow two nominees of the Parliamentary Select Committee⁸ on the Constitution. The CKRC conducted and facilitated civic education, listened to Kenyans and recommended proposals for constitutional reform. The CKRC report and draft Bill were debated on, amended and adopted in a National Constitutional Conference⁹ held at a cultural centre popularly known as the Bomas of Kenya.¹⁰

The Bomas process was undermined when the government side (the Cabinet) walked out of the talks over disagreements on the system of government. The Cabinet led a process that culminated in a draft Constitution popularly known as the Wako draft that was subjected to a referendum and soundly rejected on 21st November 2010. The Bomas process also saw the break up of the Ufungamano Initiative with the rise of the Kenya Church and the withdrawal from the initiative of the Muslim members over disagreements on the place and status of Kadhi's¹¹ courts in the draft Constitution.

The pursuit of a new constitution has continued for two decades now. Political and ethnic divisions and contests have compromised any meaningful progress towards the attainment of a new constitution. The latest effort at writing a new constitution derives directly from the National Accord and Reconciliation Agreement.¹² A new Constitution of Kenya Review Act¹³ was enacted setting up organs of review and providing a tight roadmap, expeditiously to guide the process of constitution-making.

The subject of Kadhi's courts has been a silent one in Kenya until the process of writing a new constitution commenced in 2001. Given opportunity for the first time to determine how they wished to be governed, the Muslim community asked for an enhanced jurisdiction of Kadhi's courts. The Constitution of Kenya Review Commission in its report, *The People's Choice*¹⁴, states as follows:

“The Commission received a number of submissions on the expansion and reform of their (Kadhi Courts) jurisdiction and structures, primarily from the Muslim communities. They considered that

neither Kadhis nor their courts are given sufficient respect and recognition ... More specifically, the Muslim community asked the Commission to ensure that there were sufficient Kadhi courts throughout the country; that their jurisdiction be extended to civil and commercial matters, that the qualifications of Kadhis should be raised to ensure their competence, and that a separate structure of appeals be established for Islamic law.”¹⁵

Those who opposed the entrenchment of Kadhi's Courts, mainly Christian evangelical groups, argued that the courts are not a constitutional issue and should thus not be in the constitution. Some posit that Kadhi's courts are religious entities and since Kenya is a secular state, they have no place in the Kenyan state structure which serves all people irrespective of religion or creed.¹⁶ Other grounds of objection are examined below.

This paper is an exposition of the historical and legal foundations and developments of Kadhi's courts in Kenya. The paper traces the history of Kadhi's courts from the colonial times to the present and their entrenchment into the Constitution and laws of Kenya. It also examines the legal import of the treaty or exchange of letters that President Kenyatta and the Sultanate of Zanzibar had, on the administration of justice along the ten mile coastal strip and examines, also, the legal underpinnings of the Kadhi's courts with regard to international human rights law.

Religious groups in Kenya play a very important role in the governance and political development of the nation. They are recognized for their role and contribution to the discourse for a new constitution in Kenya (*Njoya & 6 others v. Attorney General & 3 others* (No. 2) (2008) 2 KLR (EP) (Kenya High Court). The largest religious groupings in Kenya are the Christians and Muslims who also have been at the forefront in advocating for a new constitution and laws to guide Kenya to greater prosperity. The Muslim quest for expanded jurisdiction of Kadhi's courts and some Christian groups' opposition even to its inclusion in any future constitution have brought the two groups against one another, (Mwaura n.d.) and threaten the whole constitution-making exercise (Daily Nation 'Ghai Against Referendum On Draft Law' ; Daily Nation 'Kadhi's Courts Will Not Touch Other Faiths, Say Lobbies'). Observers argue that the Kadhi's courts issue will “decide the approval

or otherwise of any draft constitution...whatever its other merits.” (Ngugi and Siganga n.d.) This issue could derail the entire process (Omondo n.d)).

Historical Origins and Development of Kadhis Courts

The history of Kadhi's courts along the East African coast is a long one. It is recorded that Hajj Ibn Battuta, the famous Moroccan explorer found Kadhi's courts in operation along the East African coast (Mogadishu) when he visited around 1331.¹⁷ The history of Kadhi's courts in Kenya may be as old as the advent of Islam along the East African coast. The phrase *Kadhi* is derived from the Arabic word *Qadi* which literally refers to a person who traditionally has jurisdiction over all legal matters involving Muslims and passes judgments based on prevailing consensus (*ijmā'*) of traditional Islamic scholars (*ulamaa*) (Majamba 2007). At the beginning of Islam it was the Caliph himself who administered justice. It was only under the rule of Caliph Umar that judges—referred to as *qadis*—were appointed. A *qadi's* court was usually a single-judge court with general jurisdiction. The *Qadi* was supposed to listen carefully to the evidence given by the witnesses and to encourage compromise between parties as long as the agreement did not violate principles of Islam. *Qadis* were not bound by previous judgments and no rule of binding precedent emerged in Islamic law.¹⁸ Today, the practice pertaining to Kadhi's courts is varied in different countries with some states limiting the jurisdiction of the courts to matters affecting the personal status of Muslims while in others the courts have exclusive jurisdiction over all matters affecting Muslim adherents. This system of dispute resolution among the Muslims was inspired by religion and had therefore taken root long before the colonialists came into the East African coast.

The Imperial British East Africa Company was one of the chartered companies that preceded imperial annexation in Africa. When the Germans, British and the French were partitioning East Africa among themselves, the dominion of the Sultan of Zanzibar over the ten mile (16 km) coastal strip between Tana River and River Ruvuma was recognized. When the European colonial powers came into the territories now known as Kenya, Uganda and Tanzania (then Tanganyika and Zanzibar Island), they found long existing Islamic influence. Kenya came under the influence of the Imperial British East African Company (IBEA) through a Royal Charter in 1888 requiring the IBEA

to administer British East Africa and to build a railway line from the coast to Uganda. In 1895 it was declared a British protectorate, the East Africa Protectorate. In 1920 it became the Kenya Colony and was to remain so until 1963. Tanganyika was German East Africa and later became Tanganyika Territory under the British in 1919. After the First World War (1914-1919), it was administered as a League of Nations Mandated Territory.

The British and Germans found the Coastal areas of East Africa under the dominion of the Sultanate of Zanzibar who had representatives along the coast administering it on his behalf and resolving disputes among his Muslim subjects (Salim 1973). The ten mile coastal strip along the Kenyan coast had two types of representatives of the Sultan; administrators (*Liwali*) (Annual Departmental Reports relating to Kenya and the East Africa High Commission, 1903/4-1963, Publication no. R 97282, p.2) and judges (*Kadhis*). In 1895, Sultan Hamid bin Thuwain (1893-1896) leased to and permitted the British to administer the coastal strip as a protectorate on his behalf, ushering in colonialism over his subjects along the Kenyan coastal region. The Sultan became only a symbol of Muslim political sovereignty without any authority to make decisions (Ndzovu and Hassan n.d.). To smoothen their administration and secure the co-operation of the Muslim Arabs along the coastal region, the British entered into an agreement with the Sultan of Zanzibar in 1895. Through this agreement, the British undertook not to interfere with the Islamic system of dispute resolution in the administration of the coastal strip. The Kadhi's courts, then in existence, were preserved. The British agreed to respect and protect the right of the Muslims to have their personal law matters adjudicated by Kadhi's.

In 1920 when the Kenya Colony was established, the ten mile deep coastal strip was not part of it. That coastal strip was referred to as the Kenya Protectorate. This constitutional change did not however affect the general administration of the territory and both the Colony and the Protectorate continued to be governed as one unit (Annual Departmental Reports, 1903/4). The British also established some Kadhi's Courts in areas outside the coastal strip (in mainland or upcountry) in Isiolo and Mumias (Trimingham 1964). Noteworthy however is that Kadhi's Courts gradually lost authority under British Rule. The type of cases they were allowed to deal with was regulated until they only dealt with family law.

At the imminence of independence for Kenya and as part of negotiations on the nature of the constitution that should be adopted, the Sultan of Zanzibar and the British Government appointed Commissioner James Robertson to examine administration of the coastal strip in the light of the 1895 agreement. Arab-Muslim nationalism was already simmering, advocating that the coastal strip be returned to the administration in Zanzibar with whom they shared a lot in common. The Arab-Muslims had enjoyed privileged positions and treatment during the colonial rule that meant their unity with the rest of Kenya would have led to their loss of privileges (Ndzovu and Hassan n.d.). Besides, they feared the fast rising nationalistic movements dominated mainly by Christians from the mainland. The recommendations of the Commissioner were that the coastal strip be merged with the mainland before independence on the condition that Kadhi's courts be protected in the independence constitution and be subject to the supervision and control of the Chief Justice (Majamba 2007).

The 1895 agreement 'ceased to have effect'¹⁹ at independence and the Governments of Kenya and Zanzibar entered into another agreement through which Zanzibar formally gave up claim over the ten mile coastal strip while Kenya agreed to safeguard the existence of Kadhi's courts at all times.²⁰ The first part of the 1963 agreement consisted of letters exchanged between Prime Minister Jomo Kenyatta for Kenya and Prime Minister M. Shante for Zanzibar on 5th October 1963. The exchange of letters covered five undertakings by Kenyatta in relation to the Kenya Protectorate (coastal strip) in the following terms,

- (1) The free exercise of any creed or religion will (sic) all times be safeguarded and, in particular, His Highness's present subjects who are of the Muslim faith and their descendants will at all times be assured of complete freedom of worship and the preservation of their own religious buildings and institutions.
- (2) The jurisdiction of the Chief Kadhi and of all the other Kadhis will at all times be preserved and will extend to the determination of questions of Muslim law relating to personal status (for example, marriage, divorce and inheritance) in proceedings in which all parties profess the Muslim religion.
- (3) Administrative Officers in predominantly

Muslim areas should, so far as is reasonably practicable, themselves be Muslims.

- (4) In view of the importance of the teaching of Arabic to the maintenance of the Muslim religion, Muslim children will, so far as is reasonably practicable, be taught Arabic and, for this purpose, the present grant-in-aid to Muslim primary schools now established in the Coast Region will be maintained.
- (5) The freehold titles to land in the Coast Region that are already registered will at all times be recognized, steps will be taken to ensure the continuation of the procedure for registration of new freehold titles and the rights of freeholders will at all times be preserved save in so far as it may be necessary to acquire freehold land for public purposes, in which event full and prompt compensation will be paid.²¹

A subsequent agreement was signed on 8th October 1963 to cement the agreement in the exchange of letters. The latter agreement was signed by the two Prime Ministers in addition to the Sultan of Zanzibar²² and Duncan Sandys, Her Majesty's Principal Secretary of State after discussions held at Marlborough House in London. This agreement referencing the exchange of letters, provided that:

- (1) the territories comprising the Kenya Protectorate shall cease to form part of His Highness's dominions and shall thereupon form part of Kenya;
- (2) the Agreement of 14th June 1890 in so far as it applies to those territories and the Agreement of 14th December 1895 shall cease to have effect.

The exchange of letters in themselves and the subsequent agreement between the three States constitute a treaty in International Law. A treaty may be concluded through exchange of instruments whereby their consent to be bound is specifically stated and the instruments declare that to be the intended effect (Shaw 2008). Kenya and Zanzibar have a legally binding treaty to preserve the existence and jurisdiction of Kadhi's courts in accordance with the stipulations of the exchange of letters and agreement of 1963. A treaty is basically an agreement between parties with international legal personality on the international

scene. The fundamental principle of treaty law is the proposition that treaties are binding upon the parties to them and must be performed in good faith (Shaw 2008). This principle, known as *pacta sunt servanda*, is at the core of treaty making and is the rationale upon which states continue to conclude treaties. Kenya may not therefore unilaterally abrogate this treaty and cannot use its domestic law to defeat the object and purpose of the treaty. (Shaw 2008) The only means relevant to the amendment or termination of this treaty in international law is to re-negotiate it or bring it to an end through an agreement with Zanzibar or a successor state.

Noteworthy however is the conduct of the independence Kenya government with regard to the matter of Kadhi's courts. While Prime Minister Kenyatta wrote to the Secretary General of the United Nations expressing independent Kenya's sovereign desire not to be bound automatically by all the colonial treaties and agreements, it is important to note that the agreement between Kenya and Zanzibar was one of those agreements that were immediately honoured when provision was made in the Constitution to establish Kadhi's courts. Subsequently the Kadhi's Courts Act was enacted together with several facilitative legislations.

Constitutional and Legal Foundations of Kadhi's Courts

Following the treaty between Kenya and Zanzibar, legal obligations arose in international law for Kenya to protect Kadhi's courts in accordance with the provisions of their exchange of letters and agreement on the Kenya Coastal Strip. This informed the inclusion of Kadhi's courts into the Kenyan Constitution and law. Section 66 of the Independence Constitution of Kenya provides that:

- (1) There shall be a Chief Kadhi and such number, not being less than three, of other Kadhis as may be prescribed by or under an Act of Parliament.
- (2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless-
 - (a) he professes the Muslim religion; and
 - (b) he possesses such knowledge of the Muslim law applicable to any sect or sects of Muslims as qualifies him, in the opinion of the Judicial Service Commission, to hold a Kadhi's court.

- (3) Without prejudice to section 65 (1), there shall be such subordinate courts held by Kadhis as Parliament may establish and each Kadhi's court shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law.
- (4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being less than three in number) as may be prescribed by or under an Act of Parliament, shall each be empowered to hold a Kadhi's court having jurisdiction within the former Protectorate²³ or within such part of the former Protectorate as may be so prescribed: Provided that no part of the former Protectorate shall be outside the jurisdiction of some Kadhi's court.
- (5) The jurisdiction of a Kadhi's court shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion."

Subsequently, the power vested in parliament under section 66 (1) (3) of the constitution gave birth to the Kadhi's Courts Act (Chapter 11, Laws of Kenya (commenced on 1st August 1967). This Act establishes several Kadhi's courts whose collective jurisdiction covers the entire country (Kadhi's Courts Act, Chapter 4, Laws of Kenya (1967, Sec 4) . Section 5 establishes the jurisdiction of the Kadhi's courts in the following terms:-

A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.

The jurisdiction of the Kadhi's courts therefore only extends to personal law, specifically on matters of marriage, divorce and inheritance and applies only where both parties are Muslims and submit to the courts. The law however does not preclude Muslims from approaching the other ordinary state courts for vindication of their rights neither does it oust the jurisdiction of other courts to hear and determine personal law

issues affecting Muslims.²⁴ The jurisdiction of Kadhi's courts is therefore concurrent with other secular courts. Legally, Kadhis in Kenya have no jurisdiction to hear and determine matters involving non-Muslims or Muslims and non-Muslims. Such matters must go to the ordinary secular state courts which are not bound to apply Muslim law in the course of determining cases brought before them (Harvey 1975 – (Editor: this reference is missing from Bibliography)).

Kadhi's courts are subordinate courts under the supervision of the High Court and the Chief Justice (Kadhi's Courts Act, Chapter 4, Laws of Kenya (1967, Secs 7 & 8). The Chief Justice has the power to appoint Kadhi's (Kadhi's Courts Act, Chapter 4, Laws of Kenya (1967), Sec 3) and to establish Kadhi's courts (Kadhi's Courts Act, Chapter 4, Laws of Kenya (1967), Sec 4).in consultation with the Chief Kadhi (Kadhi's Courts Act, Chapter 4, Laws of Kenya (1967), Sec 4). Kadhis are employees of the Judicial Service Commission and must be persons who profess the Islamic faith and are versed with Muslim law applicable to any sect of Muslims (Kadhi's Courts Act, Sec 4). The law and rule applied by the court are those applicable under Muslim law (Kadhi's Courts Act, Chapter 4, Laws of Kenya (1967), Sec 6). The Act empowers the Chief Justice to establish rules of procedure and practice for the Kadhi's courts and in the absence of any rules requires the court to make use of the Civil Procedure Act (Chapter 21, Laws of Kenya) applicable in all other courts (Kadhi's Courts Act, Chapter 4, Laws of Kenya 1967, Sec 8). Appeals from the Kadhi's courts lie first to the High Court and may proceed to the Court of Appeal. In the High Court, the Chief Kadhi sits during proceedings as an assessor.

A notable deviation from the 1963 treaty is that while the material and geographical jurisdiction of the Kadhi's courts remains as envisaged in the letter of the treaty and the constitution, its geographical jurisdiction has been enlarged. The powers to establish Kadhis Courts have been utilised to set up additional courts outside the former protectorate. The proviso under Article 66 (4) of the constitution only envisages a geographical jurisdiction of the courts limited to the ten mile coastal strip (former Kenya Protectorate). The setting up of Kadhi's courts outside the former protectorate is contested as an enlargement of the Kadhi's jurisdiction beyond the protective purpose envisaged only within the ten

mile coastal strip that was formerly the dominion of the Sultanate of Zanzibar.

The justification for this extension may be found in the practical application of any law in a unified country. With the constitutional right to free movement and to own property anywhere in the republic firmly entrenched in the constitution, it would pose considerable difficulties to Muslims if they were to be required to move from their abodes to seek justice in personal matters in Kadhi's courts only found geographically within the ten mile coastal strip. Besides, there is a significant area outside this strip inhabited by Muslims also keen on accessing the services of Kadhis and Kadhi's courts.

The rationale for the 1963 treaty was the protection of Muslim minorities along the Coast where they were concentrated. This rationale holds to date and has been vindicated in many ways.²⁵ Minorities²⁶ must be protected and not ignored in Kenya's constitutional framework. This principle is at the root of religious and ethnic co-existence recognized in many nations and internationally. It is at the core of national cohesion and peace. The High Court in Kenya correctly noted in *Onyango & 12 others v. Attorney General & 2 others* that:

The whole philosophy which informed the negotiations between the KANU Government ... and the religious leaders ... was that the Constitution review process should ... be inclusive of all shades of opinion ... even if the majority had their way, the minority would have their say (3 KLR (EP) (Kenya High Court, 2008).

It is therefore imperative in democratic societies to recognize minorities and the disadvantages that come with minority status and seek to protect them. This notion informs the trend now gaining currency to recognize the political disadvantage of women in many countries and to seek to address that disadvantage through affirmative action that requires the setting aside of special (Editor: parliamentary?) seats for women. It is recognition that in a democracy, the will of the majority prevails but it is also prudent that the voice and concerns of the minorities be heard and protected. This protection is acceptable if it can be reasonably justified in a democratic society (Constitution, secs 82 (1) (3), 82 (4) (d), 78 (5) (b). The majority of Kenya's legislators are Christian. (Atwoli n.d.). This requires a balancing of rights approach.

Evolution of Kadhi's Courts in various Draft Constitutions

The contestations attending the issue of constitutional protection of Kadhi's courts are better understood by a scrutiny of relevant provisions in the various draft constitutions made since the exercise of reviewing the constitution commenced. The key documents are the Bomas draft, the Kilifi draft, the Ufungamano draft, the Wako draft, the Harmonized draft constitution (HDC) and the Proposed Constitution of Kenya (PCK).

The initial Bomas draft provided for the enhanced jurisdiction and stature of Kadhi's courts. The relevant Article 198 provided as follows:

198. (1) There is established the Kadhis' Court.
- (2) The Kadhis' Court shall -
 - (a) consist of the Chief Kadhi and such number of other kadhis, all of whom profess the Islamic faith; and
 - (b) be organized and administered, as may be prescribed by an Act of Parliament.

Article 199 addressed the jurisdiction of the courts. It stated that:

The Kadhis' Court shall be a subordinate court with jurisdiction to determine questions of Islamic law relating to personal status, marriage, divorce and matters consequential to divorce, inheritance and succession in proceedings in which all the parties profess the Islamic faith.

The above compromise was as a result of enormous hostility to the enhanced jurisdiction of Kadhi's courts in Bomas from the mainly Pentecostal/evangelical churches. The enhancements made to the material and geographical jurisdiction of Kadhi's courts in the "zero draft" were deleted. This hostility marked the break up of the Ufungamano Initiative with the Muslims pulling out of the Initiative.

Despite the controversy surrounding the inclusion of Kadhis' Courts in the constitution, all the drafts developed have included the court. In the 2004 Bomas draft, section 198 (1) provided for Kadhi's courts in the manner and stature of the current set-up. It provided for the Chief Kadhi and such number of other kadhis, all of whom profess the Islamic faith. Their jurisdiction was restricted to personal status, marriage, divorce and

matters consequential to divorce, inheritance and succession in proceedings in which all the parties profess the Islamic faith. After the walk-out from Bomas by delegates sympathetic to the government and the strained relationship between Muslims and the churches under the Ufungamano Initiative, the NCK produced its own draft constitution that completely excluded any mention of Kadhi's courts.

After the Bomas fiasco, the Parliamentary Select Committee retreated to Naivasha to come up with a document produced by consensus. The Naivasha process was disowned by sections of the politicians. Civil society similarly felt excluded. A section of politicians further retreated to Kilifi to iron out issues in the Naivasha draft and reach a compromise document. The Kilifi draft at Article 179 provided the following on Kadhi's courts:-

- (1) The Judiciary consists of the judges of the superior courts of record and other judicial officers.
- (2) The superior courts of record are the Supreme Court, the Court of Appeal and the High Court.
- (3) The subordinate courts are -
 - (a) the Magistrates' courts, Christian courts, Kadhis' courts, Hindu courts and other religious courts;
 - ...

The Attorney General received the Kilifi draft and developed what is popularly known as the Wako draft which was also subjected to the first ever referendum in Kenya on 21st November 2005 and resoundingly defeated. Section 195 of the Wako Draft established Kadhi's courts under the broad umbrella of religious courts, alongside Christian, Hindu and other religious courts and left their actual structure and jurisdiction to be elaborated through an Act of Parliament. Section 195 provided as follows:-

- (1) There are established Christian courts, Kadhi's courts and Hindu courts.
- (2) Parliament may, by legislation, establish other religious courts.
- (3) Christian courts, Kadhi's courts, Hindu courts and other religious courts shall respectively-
 - (a) consist of Chief presiding officers, Chief Kadhi and such number of other presiding officers or Kadhis, all of whom profess the respective religious faith; and

- (b) be organized and administered, as may be prescribed by the respective Act of Parliament.
- (4) Christian courts, Kadhi's courts, Hindu courts and other religious courts shall have jurisdiction to determine questions of their religious laws relating to personal status, marriage, divorce and matters consequential to divorce, inheritance and succession in proceedings in which all the parties profess the respective faith, as may be prescribed by an Act of Parliament.

It is important to note that Christians and Hindus had never agitated for special religious courts. In fact no other group apart from Muslims has ever wanted a religious court. The Attorney General nonetheless chose the appeasement path by creating courts that were neither required nor requested to stem the tide of opposition to the inclusion of Kadhi's courts in the constitution. Sections of Christians and Hindus rejected the structure and the Wako draft was outvoted in the November 21st 2005 referendum. This 2005 referendum was the beginning of the "banana" and "orange" divide. The Electoral Commission of Kenya identified the symbols to represent those who are for and against the constitution respectively.

The Committee of Experts released its Harmonized Draft Constitution of Kenya (HDC) on 17th November 2009. This was a product of a synthesis of the views presented on contentious issues together with previous draft constitutions. Article 208 provided for Kadhi's courts as one of the subordinate courts. Article 209 provided for Kadhi's courts in the following terms,

- (1) There shall be a Chief Kadhi and such number, not being fewer than three, of other Kadhis as may be prescribed by or under an Act of Parliament.
- (2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless the person—
 - (a) professes the Muslim religion; and
 - (b) possesses such knowledge of the Muslim law applicable to any sects of Muslims as qualifies that person, in the opinion of the Judicial Service Commission, to hold a Kadhi's court.
- (3) Without prejudice to Article 208, there shall be such subordinate courts held by Kadhis as

Parliament may establish and each Kadhi's court shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law.

- (4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being fewer than three in number) as may be prescribed by or under an Act of Parliament, shall each be empowered to hold a Kadhi's court having jurisdiction within the former Protectorate or within such part of the former Protectorate as may be so prescribed.
- (5) No part of the former Protectorate shall be outside the jurisdiction of some Kadhi's court.
- (6) The jurisdiction of a Kadhi's court shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.

This provision is almost identical to that contained in the 1963 constitution, the only difference being minor editorial changes. It retains the geographical and material jurisdiction of Kadhi's courts.

The Committee of Experts made changes to the HDC after input from the Parliamentary Select Committee to produce the Revised Harmonized Draft Constitution of Kenya (RHDC).²⁷ The RHDC contained important changes to the provisions relating to Kadhi courts by removing any restriction on the geographical jurisdiction of the courts. The new provisions were contained in Article 155 as follows,

- (1) There shall be a Chief Kadhi and such number, not being fewer than three, of other Kadhis as may be prescribed by or under an Act of Parliament.
- (2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless the person—
 - (a) professes the Muslim religion; and
 - (b) possesses such knowledge of the Muslim law applicable to any sects of Muslims as qualifies that person, in the opinion of the Judicial Service Commission, to hold a Kadhi's court.
- (3) Without prejudice to Article 154, there shall be such subordinate courts held by Kadhis as Parliament may establish and each Kadhi's court shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by law.

- (4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being fewer than three in number) as may be prescribed by or under an Act of Parliament, shall each be empowered to hold a Kadhi's court having jurisdiction within Kenya.
- (5) The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.

The removal of the clause providing "no part of the former protectorate shall be outside the jurisdiction of some Kadhi court" was contested as an enhancement of the jurisdiction and status of the courts. The voices that had consistently opposed the courts continued to voice their resistance to the move.²⁸

Contestations on the inclusion of Kadhi's Courts in the Constitution

Kadhi's courts have existed in Kenya even before the onset of colonialism in Kenya and before the attainment of independence from the British (Constitution of Kenya, section 66: Ngugi and Siganga n.d.). Section 66 of Kenya's independence constitution negotiated in Lancaster House (?) provides for Kadhi's Courts as follows:-

"(1) There shall be a Chief Kadhi and such number, not being less than three, of other Kadhis as may be prescribed by or under an Act of Parliament.

...

(3) Without prejudice to section 65 (1), there shall be such subordinate courts held by Kadhis as Parliament may establish and each Kadhi's court shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law."

There has been no opposition or questions about the Kadhi's courts until the process of writing a new constitution began. Muslims advocated for an enhanced role, jurisdiction and status of the courts nationwide. Muslims from the North Eastern province asked for the full application of *Sharia* Law in their areas (Issack 2010) A section of the Christian community has strongly opposed not just the enhancement of the jurisdiction of Kadhi's

courts but fundamentally their inclusion in the constitution.²⁹

The National Accord and Reconciliation Agreement (NARA) that was signed by the protagonists in the disputed 2007 Presidential Elections agreed to fast-track the review of the constitution of Kenya. Subsequently the Constitution of Kenya Review Act (2008) was enacted providing the organs of review and the roadmap to a new constitution. Among the organs of review was the Committee of Experts which was composed of Kenyans³⁰ and foreign³¹ legal experts with the mandate of harmonizing the views of Kenyans as expressed in the CKRC, the Bomas and the Wako drafts. They were also to identify contentious issues and facilitate consensus on them. While drawing a list of contentious issues for consideration by the public and the Parliamentary Select Committee, the Committee of Experts³² omitted the issue of Kadhi's courts from the list.³³ This meant officially that the inclusion of the courts in the constitution was not a contentious matter, a position that sections of the Christian community does not agree with. This difference of views and beliefs threatens to derail the realization of a new constitution.

Those opposed to the inclusion of Kadhi's Courts in the constitution argue that Kenya is a secular state with a secular Constitution. It therefore provides no room for religious institutions within the state structure. They cite Section 10 of the Harmonized Draft Constitution which provides that the State shall provide equal treatment to all religions, to argue that providing for Kadhi's courts in the constitution favours one religion and elevates that religion into a state religion³⁴ with the potential of dividing Kenyans along religious lines (The Federation of Churches in Kenya, *Christian Concerns in the Constitution* (unpublished document). Further, they are opposed to the exemption of Muslims from the Bill of Rights.³⁵ They opine that this introduces *Sharia* law into matters of state (Ngirachu n.d.). They oppose any justification for having the courts in the Constitution on the basis of historical reasons as having been overtaken by events as the subjects of the Sultan of Zanzibar who would have needed protection when the courts were first entrenched into the Kenyan law are now members of a unified Kenya and protected by the Constitution and laws of Kenya on a uniform basis with everyone else.³⁶ They also oppose the use of taxes paid by non-Muslims to fund what is

essentially a religious institution that they may not agree with or have any utility for (Ngugi and Siganga). Lastly they accuse Muslims of 'seeking to carve for themselves an Islamic State within a State' with Sharia compliant banking, judiciary, insurance and bureau of standards.³⁷

On the other hand, those in support of the Kadhis courts argue that the courts are harmless to non-Muslims as they concern themselves with matters between or among parties who profess the Islamic faith. They firmly hold the view that the courts are indispensable in resolving disputes among Muslims (Otieno n.d.). They want Kadhis courts to continue adjudicating Islamic personal law as doing so in secular courts amounts to secularizing of Islam (Abdi n.d.). According to them, the courts already exist in law and reality and that abolishing them would be unfair, unreasonable and disruptive (Ngirachu n.d; Mathenge n.d)(Editor: no reference to Mathenge in bibliography) and could ignite or exacerbate ethnic and religious conflict. Besides, the courts have played a pivotal role in the administration of justice (Machuhi n.d) and their removal from the constitution would further alienate a marginalized Muslim minority. They argue that since the Kenyan Constitution is based on Christian values, similar recognition should be had to Islamic personal law (Daily Nation. We Are Ready to Draft New Law, Say Experts.).

Experiences in other Countries

There are many countries that have the Kadhi's courts protected in their constitution. The Uganda Constitution provides at art 129 (1)(d) that judicial power shall be exercised *inter alia* by Qadhi's courts for marriage, divorce, inheritance of property and guardianship, as may be prescribed by parliament (Constitution of the Republic of Uganda (1995), art 129 (1)(d).

Zanzibar has the most developed Kadhi courts in the region. Before the emergence of the Sultan empire Islam was the main law administered by the Kadhis in Zanzibar. Kadhi's then had no formal places of hearing and determining their cases and did so from their homes and wherever their services were required. The British did not interfere with the functioning of the courts and instead established a parallel system of common law. The 1895 agreement between the British and the Sultan is instrumental in preserving the courts in Zanzibar.

In Ethiopia, Kadhi's courts existed with no

legal status by virtue of the existence of Islam for hundreds of years. After the Italian war in the 1930's courts known as *shariat* were established, presided over by Kadhi's appointed by the Italian colonial authorities. The Kadi Courts Proclamation of 1944 by the Emperor legally established *shariat* courts after persuasion from the Muslim community (40%). These courts had jurisdiction to deal with matters of marriage, divorce, maintenance, guardianship of minors and family relations concluded in accordance with Islamic law. The Kadhi was appointed by the Emperor after recommendation by the Minister. After the revolution by Mengistu the profile of Islam was raised with the management of the state as a secular entity (the Orthodox Church)weakened. Eventually a compromise was arrived at in 1994 to retain *Shariat* courts while ensuring a choice of forum to would-be litigants. The jurisdiction of the *shariat* court is limited to marriage, divorce, maintenance and matters relating to guardianship of minors and family relations.

The Constitution of the Federal Republic of Nigeria (1999) provides for the establishment of Kadi and Sharia Courts in the States and in the Federation. There is therefore a Sharia Court of Appeal comprising a Grand *Kadi* and other *Kadis*. The jurisdiction of the Sharia Courts is provided for under Sections 262 (2) and 277 of the Constitution. It is limited to Islamic personal law, marriage and guardianship.

International Law on Religious Courts

International law recognizes religious courts and does not forbid their establishment. Article 27 of the International Covenant on Civil and Political Rights (ICCPR) provides for the protection of religious minorities.³⁸ As Kenya is a largely Christian society, the recognition of Islamic personal law and system of dispute resolution seems appropriate and justifiable in a democratic society. What international law requires is that any established court or tribunal conforms with international human rights standards, including accessibility, fairness and effectiveness (International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976., Article 14). The United Nations Human Rights Committee in this regard notes:

Article 14 is ... relevant where a State ... recognizes ... *religious courts* ... such courts

cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of ... *religious courts*.³⁹

International law and practice does not frown upon religious courts. It is concerned with the procedural and substantive justice practiced by such courts. As long as religious courts meet minimum international standards of natural justice and human rights, they could co-exist with secular courts.

Conclusion

The matter of Kadhi's courts in the Kenyan Constitution is a difficult one to handle if viewed from purely a religious perspective. To determine whether there is any justification in constitutionally protecting them, one has to look at the history and legal foundations of the courts. The history of Kadhi's courts is as old as the history of Muslims along the East African Coast. Their protection in the law was by way of an agreement first between the British colonialists and the Sultanate of Zanzibar and then Prime Minister Kenyatta in independence Kenya and the Prime Minister of Zanzibar. These agreements were based on the need for Muslims in the Kenyan Protectorate to feel secure in upholding their religious courts in the wake of independence and a dominant up-country non-Muslim nationalistic movement.

Protection of Kadhi's courts in the constitution may be justified on the basis of the treaty which can only be abrogated through re-negotiation. The minority status of Muslims remains a fact in Kenya's socio-political structure and Muslims need protection especially in the wake of perceived marginalization of areas predominantly occupied by people of the Islamic faith.

The argument that establishment of Kadhi's courts in the constitution amounts to discrimination

fails to recognize that "enjoyment of rights and freedoms on an equal footing, does not mean identical treatment in every instance". The United Nations Human Rights Committee speaking on this issue states:

(P)inciple of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant...not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant (United Nations Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), Paras. 9, 10, 13).

It is therefore sometimes necessary to treat people differently in order to address certain conditions of marginalization. It is upon this basis that affirmative action has been recognized the world over as a legitimate means of ensuring that the voices and needs of marginalised and minority groups are heard and taken into account. In Kenya, conditions and perceptions of marginalization exist to warrant the retention of Kadhi's courts in the constitution. What is critical is the need to ensure that the courts observe certain basic principles in their work and share the same threshold with the secular courts in terms of rules of evidence, respect for basic rules of fairness, access and adequate appeals in order to ensure justice.

The Muslims in Kenya have therefore acquired a vested interest in the continued existence of Kadhi's courts. Their constitutional protection is perhaps more critical now than ever before, noting that the institution has come under increased threat and failure to protect it would be open a window for its annihilation to the detriment of the constituency it serves.

Post Script:

The provisions of the Revised Harmonized Draft Constitution of Kenya were carried with minor drafting changes to the Proposed Constitution of Kenya (PCK) published by the Committee of

Experts on 6th May 2010. The PCK was subjected to a referendum on 4th August 2010 and approved by a super majority of 68% of all votes cast. The new constitution was promulgated on 27th August 2010. The new constitution provides for Kadhi's courts at Article 170 in the following terms,

- (1) There shall be a Chief Kadhi and such number, not fewer than three, of other Kadhis as may be prescribed by or under an Act of Parliament.
- (2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless the person-
 - (a) professes the Muslim religion; and
 - (b) possesses such knowledge of the Muslim law applicable to any sects of Muslims as qualifies the person, in the opinion of the Judicial Service Commission, to hold a Kadhi's court.
- (3) Parliament shall establish Kadhis' courts, each of which shall have the jurisdiction and powers conferred on it by legislation, subject to clause (5).
- (4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being fewer than three in number) as may be prescribed under an Act of Parliament, shall each be empowered to hold a Kadhi's court having jurisdiction within Kenya.
- (5) The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.

It is noteworthy that the opposition from the Kenya Christian Leaders Forum to the inclusion of the new constitution remained until the referendum. The Forum is currently pushing for amendment of the issues they had raised, among them the Kadhi's courts.

Notes

1. Act No. 28 of 1964 created a pseudo-presidential system giving the presidency more powers at the expense of parliament. Act No. 14 of 1965
2. The collapse of the USSR produced a world dominated by Western liberal democracy that had impact in the way world powers like the United States of America related to other countries.
3. Act No. 12 of December 1991 was enacted to reinstate multi-partyism.

4. This resulted in the enactment of the Statute Law (Repeals and Miscellaneous Amendments) Act, 1997, the Constitution of Kenya (Amendment) Act, 1997 and the Kenya Constitution Review Act, 1997.
5. This initiative was formerly known as the People's Commission of Kenya, formed in June 2000.
6. The Commissioners were Prof. Yash P. Ghai (Chairman), Ms. Kavetsa Adagala, Mrs. Phoebe M. Asiyu, Pastor Zablun F. Ayonga, Mr. Ahmed I. Hassan, Mr. John M. Kangu, Bishop Bernard N. Kariuki, Mr. Githu Muigai, Prof. H.W.O. Okoth-Ogendo, Mr. Domiziano M. Ratanya, Prof. Ahmed I. Salim, Dr. Mohamed Swazuri, Mr. Keriako Tobiko, Mr. Paul M. Wambua, Mrs. Alice Yano, Mr. Amos Wako (Attorney General, Ex-officio) and Mr. Arthur O. Owiro (Ex-officio and Secretary).
7. The Ufungamano Commissioners were Dr. Oki Ooko-Ombaka, Mrs. Abida Ali-Aroni, Dr. Charles M. Bagwasi, Ms. Nancy M. Baraza, Mr. Isaac Lenaola, Dr. Wanjiku M. Kabira, Mr. Ibrahim A. Lithome, Ms. Salome W. Muigai, Mr. Abubakar Zein Abubakar and Mr. Riunga L. Rajji.
8. The Parliamentary Select Committee nominated Dr. Mosenik arap Korir and Dr. Abdirizak A. Nunow.
9. The Conference was made up of all Members of Parliament then, members of the CKRC (had no vote), one representative from every political party that was registered when the process began in 2000, three people from every District (only one of these could be a Councillor and one had to be a woman), and representatives from civil society.
10. This gave rise to the Bomas Constitution Draft, the name given to the document that was adopted in Bomas of Kenya.
11. Variations of the word Kadhi are in use in many parts of the world. In some countries and publications, the word used is Qadi, Kadi or Kadhi. For purposes of this paper, we shall use the term Kadhi as has been used in official documents in the East African region and as used by the people of East Africa.
12. Kenya experienced unprecedented violence after the 2007 disputed presidential elections. Calm only returned after international efforts led by an AU-appointed Panel of African Eminent Personalities chaired by former UN Secretary General, Kofi Annan brokered a deal between President Mwai Kibaki of the Party of National Unity (PNU) and Raila Odinga of the Orange Democratic Movement (ODM). The two sides had appointed three representatives to the Kenya National Dialogue and Reconciliation team to dialogue with each other. Agreement was reached on 28th February 2010 when the National Accord was signed. Subsequently, the National Accord and Reconciliation Act (NARA) was enacted to create the Grand Coalition Government (GNU) and amend the Constitution to provide for power sharing and the position of the Prime Minister. The National Accord provided for four agendas that were to be pursued within a set timeframe. Under Agenda 4, the review of a new constitution was one of the items agreed on and pursuant to which the Constitution of Kenya Review Act 2008 was enacted to lay the foundation for yet another attempt at reviewing the Constitution.
13. The Constitution of Kenya Review Act, 2008.
14. The Report of the Constitution of Kenya Review Commission (Short Version) was released on 18th September 2002.
15. The People's Choice, The Report of the Constitution of Kenya Review Commission (Short Version), (2002), p. 54-55.
16. See the contributions of Pastor Oginde at Bomas National Constitutional Conference in the Verbatim Report of Plenary Proceedings Decisions of the Committee of the Whole Conference (11th March 2004), p 11, available at <http://www.constitutionnet.org>, (accessed on 19th September 2010).
17. Ibn Battuta was invited to the 'qadi' of Mogadishu upon his arrival in Somalia. He records that the 'Qadi' heard and resolved disputes of religious law (shari'a) while the

- council of ministers (“waziers” and “amirs”) resolved civil cases. See <http://courses.wcupa.edu/jones/his311/lectures/16battut.htm> (accessed on 18/9/2010).
18. University of London Externship Programme Chapter 4: The Courts and Procedure available at http://www.londonexternal.ac.uk/current_students/programme_resources/laws/subject_guides/islamic/islamic_ch4.pdf.
 19. See Agreement between Kenya and Zanzibar signed on 8th October 1963 signed by Kenyatta, Shamte, Duncan Sandys and Sultan Seyyid Khalifa to the effect that the ‘Agreement of 14th December 1895 shall cease to have effect.’
 20. This was done vide sec 66 of the Constitution of Kenya (1963). Reports indicate that Kenya committed itself before the United Nations to honour the agreement on Kadhi’s courts.
 21. Exchange of letters between Jomo Kenyatta and M. Shamte dated 5th October 1963 (London).
 22. Sultan Seyyid Jamshid bin Abdulla bin Khalifa.
 23. This refers to the ten-mile coastal strip otherwise known as the Kenya Protectorate.
 24. Kadhi’s Courts Act, Chapter 4, Laws of Kenya (1967), Sec 5, “...nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”
 25. In the framework of the Kenya Constitution which the draftsman used in preparing the 1963 Constitution, the constitutional makers stated that “Our objective is a united Kenya nation capable of social and economic progress in the modern world...in which men and women have confidence in ...the proper safeguarding of the interests of minorities.”
 26. Muslims are about 16 per cent of the Kenyan population. J Ngirachu (n 13 above).
 27. Comprising the recommendations agreed upon as a result of the deliberations of the Parliamentary Select Committee on the Review of the Constitution in accordance with section 32(1) (c) of the Constitution of Kenya Review Act, 2008 and presented to the Committee of Experts pursuant to section 33(1) of the Constitution of Kenya Review Act, 2008 on 29th January 2010. See Article 155.
 28. These mainly were the Kenya Christian Leaders Forum consisting the National Council of Churches of Kenya (NCCCK), The Kenya Episcopal Conference (KEC) and The Evangelical Association of Kenya (EAK) among others.
 29. A Statement by Kenya Christian Leaders, Entrench Islamic Sharia Law in the Constitution at your own risk, dated 1st February 2010 (National Council of Churches of Kenya) available at http://www.nccck.org/index.php?view=article&catid=43%3Anews&id=146%3Achristians-statement&format=pdf&option=com_content&Itemid=29
 30. These were appointed by the Grand Coalition partners. They included Nzamba Kitonga (Chairman), Atsango Chesoni (Vice-Chairman), Abdirashid Abdullahi, Njoki S. Ndung’u and Otiende Amollo. Dr. Ekuru Aukot (Secretary) and Amos Wako (Attorney General) served as ex-officio members.
 31. This was appointed by the Panel of African Eminent Personalities that presided over the Kenya National Dialogue. They appointed Dr. Chaloka Beyani (Zambia), Prof. Fredrick Ssempebwa (Uganda) and Prof. Christina Murray (Australia).
 32. Established under the Constitution of Kenya Review Act (2008)
 33. Committee of Experts, Invitation for Proposals on Contentious Issues <http://www.constitutionnet.org/files/Invitation%20for%20Proposals%20on%20Contentious%20Issues.pdf>
 34. A Statement by Kenya Christian Leaders, Entrench Islamic Sharia Law in the Constitution at your own risk, p. 5
 35. Section 26 (3), Report of the Parliamentary Select Committee on the Review of the Constitution on the Reviewed Harmonized Constitution, (29.1.2010) (including input by Parliamentary Select Committee), http://kenyastockholm.files.wordpress.com/2010/02/report_of_psc_naivasha_retreat-final1.pdf (13.3.2010)
 36. The Federation of Churches in Kenya (n 12 above) (“subjects” of the sultan of Zanzibar who needed such courts are now part of a unified Kenya).
 37. Entrench Kadhi’s Courts in the Constitution at your own peril, p.6
 38. United Nations Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007)(hereinafter General Comment 32) para 5.2.
 39. General Comment 32 (n 40 above). (Emphasis added).

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Kadhi's Courts in Kenya: Current Debates on the Harmonized Draft Constitution of Kenya

Dr. Mohamed Mraja

Introduction

Since the release of the Harmonised Draft Constitution of Kenya on the 18th of November 2009, much debate has been generated among Kenyans, including politicians, religious groups and members of civic society. After the defeat of the Wako Draft in the 2005 referendum, the Constitution of Kenya Review Bill 2008 was passed in parliament. This Act of Parliament created a Committee of Experts (CoE) and revived the process of constitutional review. Under this Act, the CoE was given the mandate to identify contentious issues and to invite representations from the public, interest groups and experts and prepare a harmonized draft constitution. Issues that were not contentious had to be identified as agreed and closed, and the issues that were contentious identified as outstanding (Art. 27 (2)). A contentious issue is one for which there is no consensus or agreement in all previous drafts as well as the Independence Constitution of Kenya. According to the chairman of the CoE, there were three contentious issues: the first was the Executive and Legislature, the second was the Devolution (of Powers) and the third was the Transitional Clauses (*Daily Nation*, August 22, 2009). Following the public release of the Harmonized Draft Constitution and the Proposed Constitution, the question of Kadhi's Courts has occupied centre stage in the public discourse and submissions to the CoE, particularly pitting Christian against Muslim groupings. It is imperative to note that not all Christians were opposed to the retention of the Kadhi's courts in the Proposed Constitution of Kenya. Many Christians chose to go against the views of the clergy of the Evangelical, Catholic and Anglican Churches.

This paper examines some of the core issues

surrounding the debates on Kadhi's courts, including why the CoE did not consider the courts as contentious, and the arguments for and against entrenching the courts in the constitution. Given the recent nature of the topic under discussion, the primary source of data used in this paper is newspaper reports.

The Kadhi's Courts in the Constitution

It is not the intention of this paper to look at the historical background to the Kadhi's courts and the various drafts that evolved in the course of the country's review process. Suffice it to say that Muslim judicial officials (kadhis) presided over all matters of Islamic law (sharia) in a number of coastal towns prior to the establishment of British rule in the 19th century (Carmichael 1999, 298-98). The British appointed Arab-Muslim officials, including *liwalis*, *kadhis* and *mudirs*, whose duties were to administer justice, settle disputes, and serve as intermediaries between the coastal people and the colonial government, among others. The courts presided over by kadhis had jurisdiction in all matters relating to personal status, marriage and divorce, and within the Coast districts, over all Arabs, Baluchis and Africans, in all matters in which the value of the subject-matter in dispute did not exceed one thousand shillings (The Courts Ordinance 1931, Sec. 17). Kadhi's courts had also criminal jurisdiction similar to the Liwalis' courts. In practice, though, Kadhi's courts exercised criminal jurisdiction only in places where no Liwali's court had been established (Anderson 1970, 107). Only the institution of the *kadhi* survived Kenya's transition from colonial rule to independence in 1963.

Kenya's Independence Constitution provided for the establishment of Kadhi's courts as part

of the judiciary. Section 66 of the Constitution of Kenya gave these courts constitutional recognition, with the definition of a *kadhi* given as a person who “possesses such knowledge of the Muslim law applicable to any sect or sects of Muslims as qualifies him, in the opinion of the Judicial Service Commission, to hold a Kadhi’s court.” The mandate of the courts was given as “the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion.” The sphere of operation of the Kadhi’s courts was also defined as applicable to areas within the former protectorate or within such parts of the former protectorate as may be prescribed by an Act of Parliament.

The Constitution of Kenya Review Act of 2000 initiated a period of constitutional rewriting. This Act established the Constitution of Kenya Review Commission (CKRC) chaired by Yash Pal Ghai. In 2005 Kenyans voted in a referendum on the Wako Draft. This draft established subordinate religious courts, including Christian courts, Kadhi’s courts, and Hindu courts. Section 195 of the Wako Draft thus stated, *inter alia*, that:

Christian courts, Kadhi’s courts, Hindu courts and other religious courts shall respectively – (a) consist of Chief presiding officers, Chief Kadhi and such number of other presiding officers or Kadhis, all of whom profess the respective religious faith; and (b) be organized and administered as may be prescribed by respective Act of Parliament.

The jurisdiction of these religious courts was similar to that given in the Independence Constitution; that is, matters of religious law relating to personal law, marriage, divorce, inheritance and succession and matters consequential to them in proceedings in which all parties profess the same religious beliefs. Parliament was also empowered to enact legislation to establish religious courts as circumstance and need may arise. Clearly, the Wako Draft aimed at treating religious groups equally by granting them the right to govern their respective personal laws via formal structures within the judiciary. Many Christians, however, did not see the need for Christian courts since the existing Magistrates Courts apply the African Christian Marriage & Divorce Act in resolving disputes relating to marriage and divorce involving

Christians. These courts also apply the Succession Act on matters relating to inheritance. Muslims, on the other hand, were upset by the provisions of the Wako Draft that appeared greatly to weaken Kadhi’s courts and made it easier for parliament to remove the religious courts from the constitution by a simple majority. For this and other reasons, the Wako Draft was rejected at the referendum. The Wako Draft was followed by the Harmonised Draft Constitution. However, this too has generated a lot of debate.

Debates on Kadhi’s Courts as Provided for in Harmonised Draft Constitution and the Proposed Constitution of Kenya

Muslims and Christians were clearly divided on the Proposed Harmonised Draft Constitution. A section of Christians faulted the decision by the Committee of Experts (CoE) for not listing the Kadhis Courts as a contentious issue. The CoE did not consider the Kadhi’s courts as contentious in the statutory sense, meaning that they had been enshrined in the current constitution since independence, and had also been present in earlier drafts. There was no religious bias in this decision, as the members of the CoE consisted mainly of legal experts who professed the Christian faith. According to Nzamba Kitonga, the chairman of the CoE, the decision not to regard the courts as contentious was arrived at out of the many submissions presented to the commission. He asserted that:

A small section of evangelicals (Christian) who are dissatisfied with our failure to categorise the Kadhis courts as a contentious issue made their submissions that, in their view, the kadhi’s courts are a contentious issue.

But that is not our view because we had invited memoranda from Kenyans and received over 12,000 written ones; very few said the issue is contentious (*Daily Nation*, August 22, 2009).

The Harmonised Draft Constitution thus included the Kadhi’s courts among other subordinate courts. Section 209 of the Harmonised Draft Constitution of Kenya, *inter alia*, provided for the following:

- (a) There shall be a Chief Kadhi and such number, not being fewer than three, of other Kadhis as may be prescribed by or under an Act of

Parliament.

- (b) To qualify to be appointed as Kadhi, a person must profess the Muslim religion, and possesses such knowledge of the Muslim law applicable to any sects of Muslims as qualifies that person, in the opinion of the Judicial Service Commission, to hold a Kadhi's court.
- (c) The Chief Kadhi and other Kadhis shall each be empowered to hold a Kadhi's court having jurisdiction within the former Protectorate or within such part of the former Protectorate as may be so prescribed. The part under this clause touching on the former Protectorate was subsequently revised following reservations by Muslims to read, inter alia, in the Proposed Constitution of Kenya as: "The Chief Kadhi and other Kadhis shall each be empowered to hold a Kadhi's court having jurisdiction within Kenya."
- (d) The jurisdiction of a Kadhi's court shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion.

Muslims supported the Harmonised Draft with some reservations. Muslim demands that the Kadhi's courts should have a High Court and Court of Appeal were not included in the Harmonized Draft. Similarly, the Chief Kadhi remains excluded from the Judicial Service Commission. Muslims have also taken issues with the proposal in the draft to limit the operation of the Kadhi's courts to the coastal region (former protectorate area). The Supreme Council of Kenya Muslims (SUPKEM) Coast Chairman, Sheikh Mohdhar Khitam, for instance, noted that the draft should make it clear that the Kadhi's courts will cover the whole country, given that such a right should be enjoyed by all Muslims and not those living in one region only (*The Standard*, November 29, 2009). Despite such misgivings, the Harmonized Draft and the Proposed Constitution were well received by a section of Muslim leaders for retaining the Kadhi's courts in the constitution, among them the Chief Kadhi, Sheikh Hamad Kassim, and the SUPKEM Director-General, Abdulatif Shaaban (*The Standard*, November 18, 2009).

It is imperative to note that not all Church leaders are opposed to the Proposed Constitution. The most visible Church clergy in support of a new constitutional dispensation include former

Anglican Archbishop David Gitari and Rev. Timothy Njoya of the Presbyterian Church of East Africa (PCEA). Using the jurisprudential principle of choosing a "lesser evil rather than the greater evil", the prelate David Gitari urged Kenyans to accept the Proposed Constitution as being far preferable than the current supreme law and warned them against turning the referendum into a battle between Christians and Muslims. He was unequivocal when he argued that "As a Kenyan and a Christian saying "Yes" to the constitution is evil. But saying "No" will be a greater evil. If I was to choose I will go for the lesser evil" (*The Standard*, April 19, 2009).

Nevertheless, sections of the Christian leaders, especially from the Evangelical and the Protestant Churches, have opposed the Harmonized draft on the basis of Kadhi's courts. Bishop Margret Wanjiru led a group of evangelical churches that vowed to have the Kadhi's courts "removed" from the draft. The National Council of Churches of Kenya led by its General-Secretary, Rev. Peter Karanja, also added its voice against entrenching the Kadhi's courts in the new constitution (*The Standard*, December 13, 2009). Karanja's words may have been shared by others: "If the draft presented at the referendum has loopholes for legislation of abortion, exempts Muslims from the Bill of Rights, or includes the kadhi's courts, we shall mobilise Kenyans to reject it." "Our demand for removal of the courts from the constitution is not negotiable" (*Daily Nation*, April 8, 2010).

It should be noted this was not the first time some Christian leaders have taken such outright opposition to the inclusion of the Kadhis's courts in the constitution. In August 9, 2005, Bishop Kihara Mwangi, also the MP for Kigumo, when asked by President Kibaki to close a meeting of MPs discussing constitution-making with a prayer, invoked divine intervention to save Kenya, adding that the "new constitution should not condemn the country into a *sharia* state" (Mwaura 2009, 11). In 2004, a group of Church leaders including the Rev Jesses Kamau (then Presbyterian Church of East Africa moderator), Bishop Silas Yego of the African Inland Church and Bishop Margret Wanjiru of the Jesus is Alive Ministries filed a case against the Attorney General and the Constitution of Kenya Review Commission for, among others, the extension of the jurisdiction of the Kadhi's courts beyond the 10-mile coastal strip, and sections of the current constitution that provide for their introduction. It was not until 2010, and long after the 2005 referendum had rejected the Wako

Draft, that three High Court judges ruled that the Kadhi's courts were unconstitutional and funding them amounted to favouring one religion. Such provisions, they argued, contradicted the principle of separation of State and Religion (*Daily Nation*, May 26, 2010; *The Standard*, May 26, 2010). The decision by the judges was declared by the Attorney General, Amos Wako, as "itself unconstitutional". He opined that "The court lacked jurisdiction, (and) the judgement is wrong in law." Muslims have argued that the Constitution does not regard family matters such as those under the purview of the Kadhi's courts, discriminatory. Abdulhafur Al-Busaidy, Chairman of SUPKEM, finds fault in the decision by the judges on the courts arguing that "They conveniently ignored sub-section 4 of the same section (Sec. 62 of the Constitution) which says that matters of divorce, adoption, marriage and inheritance are excluded from the definition of discrimination" (*The Standard*, May 26, 2010).

It has been argued that the judges overstepped their mandate, since the court had no jurisdiction to grant the orders sought (*Daily Nation*, May 26, 2010). According to Ben Sihanya, the dean of the School of Law University of Nairobi, the Kadhi courts are constitutional and recognise the need to protect minorities and historical agreements, and that the judges arrived at the decision without considering historical circumstances (*Daily Nation*, May 25, 2010). Martha Karua, a Member of Parliament and the immediate former Minister for Justice and Constitutional Affairs, declared the ruling as "legally and socially unsound."

The latest bid by another group of Church leaders under the auspices of Mombasa Pastors Fellowship asked the High Court in 2009 to declare illegal the Kadhi's courts in the Proposed Constitution. They wanted the review process stopped because they alleged that their rights would be infringed upon by, among other things, the inclusion of Kadhi Courts in the new law. In the middle of 2010, the presiding judge ruled that the High Court had no mandate to determine the case, arguing that the courts had no jurisdiction to deal with any matter touching on the Constitutional Review Process. He pointed out that the High Court lacked the power to decide whether sections of the Constitution were legal or illegal. As though making reference to the earlier ruling by the three judges, the judge of the High Court in Mombasa pointed out that any attempt by the Court to question and interpret the constitutionality of the Constitution itself "would

be the height of judicial arrogance and usurpation of the supremacy and legislative functions of Parliament" (*The Standard*, June 7, 2010). The implication of this ruling is that the Judiciary had no powers to declare any section of the Constitution to be unconstitutional (*Daily Nation*, June 1, 2010).

Catholic leadership, headed by the Cardinal John Njue, also added its voice against the Proposed Constitution, expressing "gravest reservations" on the articles touching on Kadhi's courts and abortion. *The Standard*, May 12, 2010, reports that although the Catholic clergy agreed that the Proposed constitution was better than the current one, they remained adamant in opposing it at the referendum, pointing out that "the constitution is not a bag of potatoes, which you can remove five bad ones and retain the 95 that seem to be good. It is like an egg. If it begins to go bad, it goes bad wholly."

Some public figures and Christian leaders have described the opposition of a section of Church leaders to the Proposed Constitution as unfair and misguided. For instance, Mutula Kilonzo, the Justice Minister, posits that "Christians opposed to this wonderful draft are unfair...The current constitution is silent on abortion but the new draft is clear that abortion is illegal...it holds responsible doctors who illegitimately terminate pregnancies..." (*The Standard*, April 6, 2010). The Churches have been accused of serving the interest of evangelicals in the United States, particularly on their stand on the Kadhi's courts and abortion. Regarding the issue of abortion, some within the religious ranks have argued that issues such as abortion are moral subjects that the Church should have effectively dealt with at the congregational level (*Sunday Nation*, April 18, 2010). According to *The Standard* (April 6, 2010), Kiraitu Murungi, the Energy Minister, accused the Church of goal-shifting and argued that "During the 2005 referendum Catholic bishops told their faithful to vote with their conscience while the provisions on abortion (and Kadhis' Courts) were not any different from today. Why can't they ask them to vote with the same conscience now?"

A Synthesis of the Arguments for and against the Kadhi's Courts

The Christian arguments against entrenching these courts in the constitution may be summarized as follows:

- (a) The constitution declares that the state and

religion shall be separate and that there shall be no state religion. The Kadhi's courts in the draft implied the favouritism of the Muslims by the state, or primacy of Islam above other religions.

- (b) Though nowhere stated in the Constitution, some Christians and other Kenyans have argued that Kenya is a secular state and no religion should be embedded in the constitution.
- (c) The Bill of Rights already provides for the freedom of conscience, religion, thought, belief and opinion (Section 49 of the Harmonized Draft). Why should Muslims have such "religious" courts which are already catered for in the Bill of Rights?
- (d) The Kadhi's courts are a burden to the exchequer and tax payer. As one reader puts it: "Remove the kadhis' courts, the exchequer cannot use public resources to satisfy a section of religions" (*Sunday Nation*, February 7, 2010).

In response to these sentiments, the Muslims and a number of non-Muslim writers and commentators have advanced the following views to defend Kadhi's courts:

- Mwaura (2009) argues that the Kadhi's courts are part of Kenya's judicial system, subordinate to the High Court and the Court of Appeal. Though presided over by the Chief Kadhi and Kadhis, these courts, like the rest of country's courts are all under the ambit of the Chief Justice. The Kadhi's courts are thus not a religion.
- The constitution is a document that addresses the needs of all citizens, including those of the minorities and special interest groups who ask for such interests to be provided for and protected by the constitution. Muslims in Kenya have always felt the need for the courts and have asked for them. It would be unfair for the government to deny the Muslims such courts on the ground that other communities or religious groups have not asked for them.
- The notion that the country must separate state matters from religious ones in a secular frame has been unconvincing. The current constitution and the Harmonized draft have a national anthem which recognizes God as the Originator of all creation. Moreover, Sunday, a Christian day of worship, not Friday,

is recognized by the state as a holiday. The separation of state and religion is an idealistic concept and practice has shown that many nations try to accommodate the religious needs, rights and freedoms of their citizens.

Muslims do not get the services offered by the Kadhi's courts free of charge. Muslims also pay taxes like any other Kenyans. According to Lethome (2009), "the court is part of the judiciary, a public office serving a special interest group of the Kenyan tax payers who happen to be Muslims, without infringing on the rights of others in any way." Similar sentiments have also been echoed by Mwaura (2009): "Kadhi's courts are part of the Judiciary and tax payers, including Muslims, are already paying for them, and will continue to do so regardless of whether they are entrenched or not."

- The process of re-writing the constitution does not involve taking away already existing rights enjoyed by a group of people. As Abdullahi (2010), the former chairman of the Law Society of Kenya puts it: "Constitutional making is a progressive process that makes what we already have just better. It is not about the curtailment of rights that are already in existence." Muslims in Kenya have had constitutional rights to have their matters and disputes on law of personal status decided by these courts since the time of independence in 1963, and in some parts of Kenya long before the coming of the British colonialists.

Some writers have considered the hard-line position take by Christians as immoral and a sign of intolerance. Wambilyanga (2009), the Chief Sub-Editor of the *Standard (Weekend Editions)*, writes:

Intolerance has never been a virtue. Church leaders do not want to hear anything about Kadhi's courts in the new constitution. Not even if the word comes from the experts. Is their call genuine? Will it be of national good to rally faithful to shoot down a new constitution on the premise of one idea viewed as giving prominence to one religion?...

The Church should be at the forefront in fighting for a new constitution. For the Church to threaten to marshal faithful against the new constitution on the basis of Kadhi's courts is immoral.

If the new document will ensure development of the whole country and seal avenues that the politically-correct use to make illicit money, we should support it. It is wrong for the clergy to incite the faithful to reject it because Kadhi's courts have been acknowledged.

Aol (2009) also considered the statement by the evangelical churches against the Kadhi's courts as unwarranted. He accused the group of acting in ignorance and asserted that there are adequate provisions in the Constitution and international law – treaties and conventions that the Government has signed and ratified – to protect Christians and non-Muslim faiths from being subjected to Kadhis courts or 'sharia law'. In view of this, the (Christian) clergy should use their energy to strengthen existing relations between Christians and Muslims instead of provocations in a manner akin to political activism.

The support for the inclusion of the Kadhi's courts in the constitution should not be construed as a concern of Muslims only. A number of NGOs have voiced their support for the entrenchment of Kadhi's courts. For instance, the Centre for Multiparty Democracy – Kenya (2010), on a statement on the work of the Parliamentary Select Committee on the constitution at Naivasha, wrote: "We fully support retention of the Kadhi's Courts and call upon the church leaders to avoid extremism and be magnanimous. Kadhi's Courts are a judicial and not a religious matter."

Need to Entrench the Kadhi Courts in the Constitution

As a unitary state, Kenya cannot allow a judicial system such as the Kadhi one to operate separately outside the watchful eye of the state. Such a state of affairs may lead to "Taliban-styled" courts or an extremist interpretation of the Muslim law. Entrenching the Kadhi's courts in the constitution thus gives the government some leverage to control and regulate the operations of such courts, while at the same time safeguarding the genuine concerns of a section of its citizens. Indeed, one such safeguard is the supremacy provision under Section 2 (4) of *The Proposed Constitution of Kenya* (2010), which states that "Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid."

It should be noted that aspects of the Islamic law applied in the Kadhi's courts are not an exception to this provision.

While many aspects of the Sharia are daily observed by Muslims without the trappings of the state machinery, some require the safeguards of the state. For instance, there is nothing that a local Sheikh can do to compel a husband to answer charges raised by his estranged wife in relation to the provision of maintenance to the divorced wife, or over a dispute on the custody of children following divorce. The state, however, has the power to do so under the law of contempt of court and thus ensure justice to the aggrieved party.

In the Kenyan context, moreover, entrenching the Kadhi's courts in the new constitution is necessary given that Muslims are a minority. According to the 2009 National Census, the total population of Muslims is 4.3 million while that of Christians including Catholics and Protestants number about 32 million. The country's population stands at 38.6 million (*Daily Nation*, September 1, 2010). Mwaura (2009) asserts that unlike their Christian counterparts, Muslims do not constitute a politically, educationally, or economically dominant group. Without any constitutional safeguard, such courts could also be easily expunged by an overzealous Christian-dominated Parliament.

Conclusion

This paper has shown that the Kadhi's courts have been in Kenya long before and since independence, and have not breached any of the rights or freedoms of Christians. Having been entrenched in the Independent Constitution and other drafts in the course of Kenya's constitutional review process, the Kadhi's courts have been seen as part of the country's judicial system serving genuine interests of a section of the population. Muslim and a section of Christian leaders as well as those drawn from the civic and political groupings have supported the provisions of the Proposed Constitution catering for the Kadhi's courts. Efforts by a number of Church clergy to use the High Court to contest the constitutionality of entrenching the Kadhis courts in the constitution have not been successful. The Kadhi's courts have thus been retained and entrenched in the proposed supreme law.

An analysis of the workings of the CoE shows that despite the many submissions made by Muslims demanding some reforms on the Kadhi's courts, the committee simply retained the status of

the courts as they are in the current constitution of Kenya. Perhaps the CoE in so doing wanted to respond to the sensibility of the Christians by only accepting from the Muslims the least irreducible minimum, namely retaining the courts as they were before. The accusations levelled against the CoE for ignoring the views of the Church to treat the Kadhi's courts as contentious were found to be unjustified.

A "Yes" vote at the referendum will have the implication of retaining and entrenching the Kadhi's courts in the new constitutional dispensation. A "No" vote will be of no consequence to the fate of the courts as they will still be provided for by the current constitution. Thus for Christians opposed to the Proposed Constitution, the above scenario presents a lose-lose situation. This position is shared by Archbishop Eliud Wabukala, the Head of the Anglican Church of Kenya, who reasoned that even if Christians gang up to defeat the Proposed Constitution at the referendum because of the clause on Kadhi's Courts they will still have lost the war as the courts are in the current Constitution. In addition, Christians will be blamed for failure to pass new laws that would do away with an imperial presidency among other positive aspects (*The Standard*, April 4, 2010).

While a section of Christian leaders has rejected the possibility of amending the Proposed Constitution after it is passed into law, the document itself provides for a mechanism through which an aggrieved party can seek redress. Section 257 (1) of the proposed law gives the Church the option to change a section of the Constitution by raising one million signatures from among registered voters. The onus is thus upon the Church leaders, not to stand in the way to a new constitution because of

the Kadhi's courts but to endorse it and rally their support to garner the requisite numbers to effect the changes they desire.

If the entrenchment of the Kadhi's courts is the main bone of contention against the adoption of a new constitution and Christians feel disadvantaged and discriminated, then, instead of demanding the removal of the courts – a move which will certainly be rejected by Muslims – Christian leaders may demand a provision in the proposed law or an amendment of the constitution once it is passed that grants any religious group the right to establish courts of their own to govern matters of personal status. Only when Christians make such a demand and is rejected would the provision on Kadhis courts be seen as discriminatory.

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Anglican Responses to Kadhis Courts in Kenya

Joseph Wandera

Introduction

The Anglican Church of Kenya (ACK) was founded by the Church Missionary Society (CMS) and is the oldest Protestant Church in Kenya. The history of the Anglican church dates back to 1844 when the first missionary from the Church Missionary Society (CMS), Dr. Johann Ludwig Krapf, arrived in Mombasa. With a membership of over four million, the ACK is the largest Protestant Church in the country. There was a close relationship between the Anglican Church and the colonial state in Kenya to the extent that the church was the official church of the colonial government. Most of the early missionaries sent to the Anglican Church were evangelicals who typically stressed personal conversion to Christ. This historical heritage of the ACK may be a significant contributing factor to its engagement in public debate at present. Some of the early Anglican missionaries were quite critical of what they saw as unjust practices of the colonial government. Thus David Gitari, a retired ACK Archbishop has observed:

The early CMS (Church Mission Society) missionaries were well grounded in their theology and did not refrain from commenting on sensitive political issues. Archdeacon W.E Owen of Kavirondo (Western Kenya) helped to found the Kavirondo Taxpayers Welfare Association (KTWA) to articulate the political and economic interests of the Luo. The colonialists disliked Owen so much that they derogatively referred to him as 'Archdemon'. Archdeacon (later Archbishop) Leonard Beecher represented the interests of indigenous Kenyans in the Legislative Council. This spirit of political prophetic witness continued after independence through the Church leaders who took over from the missionaries (Karanja, 2008, 72).

In the mid-1950s, two Anglican missionaries, Andrew Hake and Stanley Booth-Clibborn, came to Kenya to work in the then Christian Council of Kenya (CCK), now National Council of Churches of Kenya (NCCCK). It was Booth-Clibborn who recruited Henry Okullu as editor of *Target* newspaper, which succeeded *Rock* (Okullu 1997, 48–55). Okullu, later was appointed as the first indigenous Provost at All Saint's Cathedral in Nairobi in 1971 and subsequently became Bishop of Maseno South Diocese (1974–1994). Candid and soft spoken, Okullu became one of the most fierce critics of the government. His commentaries on political issues were born out of his past experience in Uganda in the era of dictator Idi Amin where he had previously worked as a clerk. His ability in research coupled with a natural wit contributed to his effectiveness in public engagements. Other key Anglican players in the church's contestation with the state included Bishop Alexander Kipsang Muge of Eldoret Diocese (1983–1990), Bishop David Gitari of Mt Kenya East Diocese (1975–1990) who later served in Kirinyaga Diocese (1990–1996) and later became Archbishop of the Anglican of Kenya (1997–2002) and to a lesser extent Archbishop Mannasses Kuria. There were church leaders from other denominations who by 1985 had already been identified as critics of the ruling party. Notable among them were Timothy Njoya of Saint Andrew's Church, a major Presbyterian congregation in Nairobi and Bishop Ndingi Mwana wa Nzeki of the Catholic Church, Nakuru Diocese. Thus, the public engagement of Anglican Church leaders in the 1990s had an earlier missionary impetus and also an ecumenical approach, although the context had greatly changed from the colonial one.

Several factors led to the increased public role of the Church in the 1990s, including the availability of greater space for dissent in society. The latter result of a global democratic inspiration that swept

the world following the collapse of the Berlin wall on October 3, 1990. The opening up of democratic space in Kenya in 1992 followed this trend. Such factors have made people more critical of the church and its leadership. Paradoxically, while such developments have increased space for political participation in general, including religious ones, it has also placed a spotlight on the weaknesses of the church.

This contribution looks at the engagement of the ACK in three public discourses in Kenya and seeks to show how the present discourse on Kadhis courts reflects a shift in the Church's public engagement. While in the past, the church has spoken out on real issues facing society such as corruption, bad governance, and poverty, its focus today on Kadhis courts, an essentially marginal issue, has reduced the moral standing of the Church. The position of the Anglicans on Kadhis courts has also divided the Church.

I. Anglicans Engage the State: Queue Voting Debate (1986–1990)

On August 19, 1986, the national executive committee of the Kenya African National Union (KANU) made a proposal to the ruling party's annual delegates' meeting that elections to the National Assembly should be reformed. The most controversial aspect of the proposal was the abolition of the secret ballot in the first round of voting and instead, voters would have to queue behind the candidate of their choice. The ruling party KANU argued that the new voting system would be faster and more transparent than the secret ballot. During the 1987 elections this method of voting was used. This new method of voting threatened to disenfranchise sections of the population such as civil servants who feared that an open ballot would jeopardize their careers (Karanja, 2008, 77). However, observers saw the new system of voting as an indication of the increasing authoritarianism of the Moi government (Thrup and Hornsby, 1998, 39). The KANU delegates' conference coincided with a meeting of pastors organised by the National Council of Churches of Kenya (NCCCK) of which Anglican Bishop David Gitari was chairperson. Under Gitari, the gathering opposed the new system of voting. In a statement drafted by Gitari and signed by the General Secretary of NCCCK, the gathering asked the ruling party to "to find an alternative method in which church leaders can

exercise their democratic rights as members of this nation" (*Weekly Review*, August 29, 1986, 3), without alienating members of their flock because of their political position. Theological argumentation also played a role in the Anglican opposition to voting through queuing. The then Archbishop Manasses Kuria described the proposed new voting method as 'unchristian' and cited the election of Matthias to replace Judas (Acts 1:25–26) to back his position (*Weekly Review*, August 25, 1986). Later, President Moi announced that clergymen, civil servants and members of the armed forces would be exempt from queuing and would be permitted to vote in primary elections by proxy. With the holding of the general elections in 1988, the question of queuing was brought back to the forefront of political debate. Bishop Alexander Muge claimed that the general election in Nandi district, which had unseated moderate Cabinet Minister Henry Kosgey, had been rigged. This seemed to vindicate the concerns raised by the church on the new voting system (Githiga 1997, 165).

In this public discussion, Anglican bishops were seen as the champions of the voiceless. In a country where freedom of expression was limited, the church remained virtually the only means of expressing dissent. This role by the church won them overwhelming support from Kenyans.

II. The Multi-Party Debate

After Kenya gained independence in December 1963, the first government led by the Kenya African National Union (KANU) invited the opposition, Kenya African Democratic Union (KADU) to merge with it in 1964. This effectively transformed Kenya into a single party state. In 1966, Jaramogi Oginga Odinga formed the Kenya People's Union (KPU) after "losing" the vice presidency of KANU. This temporarily returned Kenya into a Multi Party state. In 1969, however, KADU was banned by the Kenyatta government. These changes were later to be enshrined into law under President Moi's regime. On June 10, 1982, changes were made to the Constitution of Kenya, Section 2A, as well as Sections 5(3) and 5(5) a. It was henceforth illegal for anyone who was not a KANU member to participate in competitive politics (Sabar 2002, 204). Moreover, Section 39(1) required members of parliament who defected from KANU to vacate their seats in parliament.

During the term of the first president, Jomo Kenyatta (1964–1978), and during the initial years

of the second president, Daniel Arap Moi, (1978–2002), the church was generally silent (Chesworth, 2009, 157). This may be explained by the great hopes which Kenyans placed for the country. Kenyatta, a Kikuyu, was seen by many as an independence hero who meant well for the country. His age, charismatic personality and leadership style also made it difficult for most politicians to express dissent towards government policy. President Moi, a Kalenjin was equally revered during his first early term in office and his cry embraced for ‘peace, love and unity’. His ethnic affiliation to the Tugen group of the Kalenjin was interpreted as an underdog one who would redeem the rest of the Kenyans from what was hitherto seen as Kikuyu political hegemony. His image as a God fearing man, who attended Church each Sunday earned him admiration from many. An active member of the theologically conservative Africa Inland Church, Moi strictly adhered to the disciplinary code of the church, which forbids smoking and alcohol intake. Each Sunday, the state-run Kenya Broadcasting Corporation presented its lead item: the president at a church service.

On August 1, 1982, after an attempted coup against the government, Moi became increasingly autocratic and hostile to any form of political dissent. The President also continued to reduce the influence of the Kikuyu in the civil service and the army and shifted state resources from Central Kenya to the Rift Valley from where he originated. There was an increase in cases of corruption and a general economic decline.

In this context of reduced space for free political participation in the late 1980s, the Anglican Church (then known as Church of the Province of Kenya (CPK), began to speak out. As with the previous subject of queue voting, Bishops Henry Okullu, David Gitari and Alexander Muge began to call for opening up of democratic space through the re-introduction of multi-partyism. The local debate in Kenya for multi-partyism was not taking place in isolation but in tandem with events elsewhere in the world. Thus, Throup, (1995, 163), observes that the end of the communist rule in Eastern Europe and demands in other parts of Africa for the ending of one-party rule pushed KANU leadership at the end of February 1990 to consider a public discussion on multi-party politics. Towards the end of April 1990, Bishop Henry Okullu critiqued one-party rule, calling for free debate on Kenya’s economic and political future (Throup, 1995, 163). The bishop’s call was supported by Bishop

David Gitari, Canon Gideon Ireri (then provost, Embu Cathedral) and Revd. Dr Timothy Njoya, a Presbyterian minister. Other support was received from an ex-detainee and prominent constitutional lawyer Gibson Kamau Kuria and Gitobu Imanyara, the editor of the Nairobi Law Monthly.

On May 10–11, 1990, President Moi, addressing the public in Kirinyaga and Kamukunji respectively, denounced Okullu and Gitari, who had supported Okullu. The president asserted that the Anglican Church was involved in a plot to undermine the government. This was refuted by Archbishop. Manasses Kuria.

In 1990 under the chairmanship of George Saitoti, (the Vice President of Kenya), KANU conducted an inquiry into multi-partyism. Both Bishop Gitari and Bishop Muge appeared before it to argue the case for multi-partyism. In their evidence to the committee, the Anglican Church argued that queuing should be abandoned, and election-rigging reduced through the establishment of a credible electoral commission. The Anglican Church’s memorandum repeated the call for a national conference in which there would be debate on proposals to return the country to multi-party politics. The Anglican bishops clearly did not consider the KANU Review committee sufficiently impartial and hence credible. Subsequently, the committee reported that there was no justification for a change of status quo.

International pressure in the early 1990s together with internal pressure by Churches and other civic groups eventually forced the government to remove the Section 2-A of the current constitution in December 1991. This allowed the registration of opposition parties and multi-party elections in 1992. Mainly because of divisions among opposition parties in their quest for power, KANU won the election. The Anglican Church, led by its Bishops, remained a critical voice in the pursuit for democratic space. In conjunction with civil society and international pressure, the church demanded a comprehensive review of the Kenyan constitution.

III. Anglicans, the Constitutional Review Process, and the debate on Kadhis Courts.

The process of reviewing the constitution started in earnest in 1998 with the passing of the *Constitution of Kenya Review Commission (Amendment) Act*. While KANU, the National Development Party (NDP), and

some opposition legislators argued that the process should be directed by parliament, religious groups, most opposition legislators and civil society were sceptical that the government would spearhead the process with impartiality (Andreassen and To-stensen 2006, 1). The groups argued that the process should be composed of representatives from the main religious groups, opposition legislators, civil society and others. On December 15, 1999, a committee consisting of fourteen KANU legislators and thirteen members of the opposition was set up to lead the process. The following day at *Ufungamano* House, near the University of Nairobi, Kenya's main religious groups (the Catholic Church, member churches of the NCCCK, the Supreme Council of Kenya Muslims (SUPKEM) and the Hindu Council of Kenya) convened. The ecumenical significance of this grouping was unmistakable. For the first time, differing religious groupings were coming together to fight for democracy. This group with the backing of opposition legislators and non-governmental organizations, set up a parallel group to lead talks on constitutional reforms. In June 2000 the group announced the formation of a People's Commission that would put across its own proposals for the Constitution. Chesworth rightly argues that 'the establishment of the People's Commission impelled the government to start the long-expected process of establishing an official commission' (2009, 164). On the government side, the Parliamentary Select Committee on Constitutional Reform put in place an Enabling Act through Parliament in October 2000. Thus, the Constitution of Kenya Review Act Commission was established with Prof. Yash Pal Ghai as the head (CKRC 2002b, 2). As head of CKRC, Yash Pal Ghai, demanded a Joint process with the *Ufungamano* Initiative of the People's Commission. Thus, in March 2001 there was an agreement on merging of the two commissions, and in June 2001, the Constitution of Kenya Review Act was amended to take care of membership from the People's Commission. From early December 2001, the commission began receiving submissions in Nairobi and provincial capitals. From late April to early August 2002, the commission visited every constituency.

A report and draft constitution was subsequently published, followed by a series of its deliberations lasting from April to June 2003, August until September 2003 and January until March 2004. These deliberations have been referred to as *Bomas* I, II and III in reference to a cultural centre by that name where the meetings took place.

A. The Discourse on the Place of Kadhis Courts in the Constitution

The main purpose of this constitutional review was to decentralize power, inherited from colonial times and entrenched by the post-independence political leadership. The matter of religious courts in the constitution did not feature as key in the preliminary agitation for democratic reforms in Kenya. However, in the 1990s, the provision of Kadhis (Islamic Judges) in the country's legislative framework became a major issue of contestation between Muslims and some Christian groups. This specific issue became so contentious that it led to the collapse of the multi-faith aspect of the *Ufungamano* Initiative. In particular, Mutava Musyimi, General Secretary of NCCCK resigned as a commissioner. A section of the Christian community argues that these courts privilege one religion (Islam) over others. On the other hand, Muslims argue that some legal adjudication is absolutely necessary in the practice of their religion. But what is the specific provision in this draft on the Kadhis courts?

1. *Bomas Draft (2004)*

Kadhis Court 198.

1. There is established the Kadhis's Court.
2. The Kadhis Court shall:
 - a. consist of the Chief Kadhi and such number of other Kadhis, all of whom profess the Islamic faith; and
 - b. be organized and administered, as may be prescribed by an Act of Parliament.

The subsequent clauses then provide in greater detail the jurisdiction of the courts.

2. *Referendum on the New Constitution*

Following the various *Bomas* meetings, a final draft Constitution was produced by the Attorney General Amos Wako, which became known as the *Wako* draft. Whereas the clause concerning Kadhis Courts in the earlier drafts had kept closely to the existing Constitution, the *Wako* Draft provided for religious courts in general and not just Kadhis courts. This suggestion seemed to appease religious groups other than Muslims.

The referendum was held on November 21, 2005, with the results indicating a strong rejection of the draft Constitution. Although other reasons caused the defeat of that draft, it can be posited that the place of Kadhis courts, for both Muslims and

Christians was a strong factor its rejection. Other provisions in the draft such as devolved power, bill of rights, gender balance etc were not taken into account in voting. Of course the nation was also polarised along ethnic lines on key aspects of the proposed law.

Following the December 2007 elections and the post-election violence in which thousands were killed and hundreds of thousands displaced, an agreement was brokered by the international Community led by Kofi Annan and others. Several steps were put in place and among them was the need for constitutional review, as a way of rebuilding Kenya towards a stable and secure future. The public role of the Anglican Church in the period leading up to the general elections in 2007 has been criticised severely. This is because the Church appeared to play a partisan role in the political campaigns. Some bishops from western Kenya, where Presidential candidate Raila Odinga hails from, openly voiced support for his party while those from Central Kenya rallied behind Mwai Kibaki and his PNU party. Reflecting trends in the rest of Kenya, the affairs of the Anglican church, including the election of its leaders, are to a significant extent influenced by ethnic dynamics. As a result of its partisan role, the voice of the Church was barely audible during the violence, death and destruction which followed the disputed 2007 Presidential election results. Although the present Anglican leadership is seeking to build on the legacy of their predecessors, the context and moral standing of the Church has greatly been challenged. There is generally suspicion and even contempt against Church leadership. Perhaps it is for this reason that Paul Gifford observes that: “The Church’s current attempt to reinvent itself is part of a dangerous trend where leaders and institutions fail to read the signs of the times or to accept that their time is up, because citizens have lost faith in them” (Gifford, 2009b, 201-221).

3. Anglicans and the Current Discourse

Even before the new harmonized draft was produced, the clause on Kadhis courts was causing contestation as could be seen in various media coverage:

Anti-Kadhis Courts fuelling Islamophobia.
Weekly Bulletin, November 6, 2009.

Clerics dig in for fight against Kadhis courts.
Daily Nation, November 10, 2009.

The leadership of the Anglican Church in Kenya has generally taken a critical stance towards the provision of the Kadhis Courts in the Constitution. There are other Christian churches who are equally vehement against the constitutional provision for the courts, while a few, notably the Seventh Day Adventists, have remained silent on the matter. The “Kenya Church,” composed mainly but not exclusively of Charismatic Pentecostal groups, argues that Kadhis Courts can no longer be accommodated in the constitution as the draft clearly provides for a separation between state and religion. Thus, they argue that article 10(3) of the harmonised draft states that “State and Religion shall be separate”; “There shall be no state religion”; and “All religions will be treated equally.”

The arguments presented in the early period of the review process resonate with current arguments. The Anglican voice on Kadhis courts has not been unanimous, however. There are church leaders and adherents who have broken ranks with the bishops of the Anglican Church in support of the constitution and the provision Kadhis courts. David Gitari, the retired Archbishop, earlier quoted as objecting to Kadhis courts in the constitution in a recent sermon at All Saints Cathedral, Nairobi, supported the draft law and cautioned Christians that the constitution should not be a contest between Muslims and Christians (*Daily Nation*, Monday April 19, 2010). Other bishops in recent times have expressed their support for the draft constitution even while showing discomfort with the provision of Kadhis courts including Bishop Beneah Salala of Mumias Diocese and Bishop Mwai Abiero of Maseno North Diocese.

On the November 27, 2009, the Anglican House of Bishops released a Press statement concerning the Harmonized Draft Constitution which included a resolution on Kadhis Courts. The resolution stated: “Remove the Kadhis Courts from the constitution in total since Parliament has the power to create any other courts through legislation” (“Justice Be Our Shield and Defender,” Nairobi, November 27, 2009). It is worth noting that the bishops were calling for Kadhis Courts to be removed from the Constitution, they were not calling for their removal. As already observed, other church leaders especially from the Pentecostal churches have raised concerns about the courts. Muslim leaders have in turn raised concern of Islamophobia.

Between December 2009, and February 2010, I interviewed five Anglican bishops and a senior

clergy on the debate on Kadhis Courts and the position of the Anglican Church. The following views, recorded digitally and later transcribed, serve to show the various underlying reasons for the Anglican stance against Kadhis Courts in the constitution. Bishop Joseph Wasonga of Maseno West Diocese stated:

The constitution should simply say there will be religious courts which then an act of parliament can bring into being because we were seeing although for now we see only Kadhis. The Muslims are the ones asking for them but we think there is wisdom in making provision for religious courts; for instance, most Christians we do weddings but when there is annulity we cannot annul any marriage, we have to go through the secular court and then when it is annulled, then the Bishop's court will eventually accept offers from the secular court but we think if there were religious courts, issues like marriage where we have actually been the officiants then we could judge and then register whatever it is we think with the High Court or whatever courts, so we think in future there is wisdom for religious courts which would cover Muslims, Christians and Hindus. But the reason we were feeling it shouldn't be in the constitution is because we feel it is like a contradiction. The philosophy [of the constitution] is that Kenya is a secular state, there shall be separation between religion and state, no religion would be favoured, then in the same constitution in a section you say Kadhis will be there and for you to be a Kadhis you must be a professing Muslim. Because a Christian can read Kadhis law and become a Kadhis, why should it be a professing Muslim? So that is why we are saying to avoid that contradiction we say there will be religious courts which will be created by an act of Parliament then the act of Parliament can give details saying it is because of these special circumstances we will allow religious courts.

The second [reason for objecting against the inclusion of Kadhis courts], many people are saying that because it was an international treaty between Kenyatta and Sultan but that treaty was only concerned with the ten mile coastal strip not Kisumu or Kakamega or

anywhere else so to me that argument does not arise because if we agree that we'll put it in the constitution but limit it to the ten-mile coastal strip, will that serve the interests of the Muslims? It will not serve the interests of the Muslims. (Mumias, December 22, 2009)

From the above quotation, the constitutional provision of Kenya as a secular state and the need for equal treatment of religions is advanced for the opposition to Kadhis courts in the draft. These same reasons were advanced by Anglicans and other religious leaders in past discourses between 2004 and 2005. However, the discourse on Kadhis courts is also opening space for discussion on the place of religion in a secular dispensation. Thus, while Bishop Wasonga contests the place of Kadhis courts in a secular state, he at the same time suggests that religions should have a place in the national constitution.

Bishop George Mechumo of Bungoma Diocese observed:

The draft itself was inconsistent. It was not clear because it says that all religions shall be treated equally, also Kenya shall be a secular state, so we are asking why is Islam being given this preferential treatment? Also the religion itself is coming out openly to say we want this preferential treatment? Also the religion itself is coming out openly to say we want this to be there, so when we looked at it, we talked about a few things, one, if Kadhis Courts are to be there at all, the way they were at independence then the best way is not to have it the way it is but to have, you remember the previous drafts, it had a clear arrangement with a provision for religious courts so that every religion, if they want to have religious courts can have. If not, then we would rather have no religious courts at all. If they say "No", then we shall come and suggest, we as the Anglican Church are supposed to be the state church because we had our place in parliament, we had our seat there from the colonial times, we want that reinstated. It should be added in the constitution, then we shall demand that bishops and clergy be paid by the state because Muslims are going to benefit from the tax payers money. So we stood at that. So we decided to say, let us do away with Kadhis courts ... Whether they are

a minority, they are Kenyans, we know one tribe which is a minority and its on Mt. Elgon and it has a religion. Every minority has their religion. And even the African people who pray in Parliament have not had their religion included in the constitution. We know Muslims; Muslims have caused a lot of damage everywhere in the world. (Mumias, December 22, 2009)

The above sentiments are evidence of a general fear of Muslims based on negative events elsewhere in the world in which alleged players have been Muslims. Such events may include the September 11, 2001 attacks in the United States of America. However local tragic events such as the bombing of the American Embassy in Nairobi and the attack on the Israeli owned Kikambala hotel play a role in what others have referred to as 'Islamophobia'. Thus global and local events play a role in these perceptions against Islam and Muslims.

Bishop Josiah Were of Nambale Diocese reasoned:

When you read the constitution, there is state and religion. The reason why we are saying, historically, the kadhis were supposed to be on the ten mile Coastal strip, the coast was mostly dominated by Muslims; now to accommodate them and their religion, *wakapewa iyo* [they were given that] ten mile Coastal strip which was to cover Zanzibar and parts of Kenya. So that was meant to be at the coast, not all over Kenya. So that is why we are saying *hio ilikuwa wakati wa ukoloni* [that was during the colonial period] so we don't have to ... Catholics, Anglicans are here. So we are not claiming anything. How can we take one religion to be superior than others *wapewe* [let them be given] kadhi, you know the government pays the Kadhis, so should one religion benefit from government tax and not the other? We should be given equal rights. *Sasa kama* [now if] Anglicans, Roman Catholics, *hawana mambo ya* [they do not have Bishop or Archbishop] mentioned, why *Kadhi's Courts*? To balance the whole thing, let us do without it. And you know if people would not have made noise. With these Muslims, you never know. In future *wanaweza ingiza hiyo iwe kadhi na baadaye iwe sharia law inaanza kuingia*. [They might introduce sharia

law]. And I think that was the agenda, it is the agenda even now. Because *walikuwa wanataka kuongeza mengine* [because they wanted to add other issues] on top of these social, ethical issues such as marriage. I think they must have had something. *Hapo ndipo wakristo wakasema hapana* [that was when the Christians objected] It cannot be. So that is why we are saying, we better do without it, we don't need it in the constitution, so that all religions are the same. Yes, it has been there but now we are looking at a new constitution. *Ile ilikuwa ya wakoloni* [The previous constitution was for colonial ties] to accommodate them, so that they can colonize well (Mumias, December 22, 2009)

In the above reasoning by Bishop Were, there are fears about the introduction of *Sharia* laws in Kenya and that introduction of Kadhis courts is a mere stepping stone. The matter of the equality of all religions in a secular dispensation is also raised as is the historical contingency of Kadhis courts and the need for a new constitutional order.

Bishop Beneiah Salala of Mumias Diocese argued:

The draft separates clearly the state and religion. As Christians we are not against Kadhis courts. We are not against Muslims. But it is the contradiction[s] we find in the draft which makes us question what is so special with a particular religion. The same constitution allows, if there is any other courts or tribunal to be set, it can be set through an act of Parliament. So if at all the Muslims will want special courts to address their personal issues relating to marriage, divorce or inheritance, why don't we set up that kind of Court through an act of parliament. Why we entrench a religion in a constitution which says there shall be no state religion, all religions will be equal. By setting Kadhis in the constitution we are removing the equality of religions in this country, we are elevating one religion; that is what we are questioning. Muslims have asked a number of times: that this thing has been in the constitution since independence. Why is it that Christians are advocating against it? But why are we reviewing the same constitution and how

did the same constitution come into being? Did Kenyans participate in making this constitution? This is a constitution we were given by colonialists. Furthermore, how did the Kadhis courts enter the constitution? This was a personal arrangement between Kenyatta and Shamte, the Sultan of Zanzibar. And in fact it is unconstitutional to set Kadhis courts outside the ten-mile Protectorate. (Mumias, December 22, 2009)

The question about the legitimacy of the current constitution which was negotiated with the colonial government is presented for the position against Kadhis courts.

According to Archdeacon John Ajiba:

It is very unfair for one religion to be considered in a Kenyan constitution. Why we feel it is risky is for one, we know that Muslims are penetrating in very intricate ways. They in future will want another thing to be added and then if we are not keen enough, they will have to rule this country with *Sharia* kind of constitution. That is why we are trying to avoid them from the word Go because if we don't, they are going to overtake Christians. We are not just seeing here. Abraham was told by God to see yonder, that means Christians are the lineage of Abraham. Unless we see far, Muslims are seeing far. These politicians are not interested about Christianity, they are serious about their own positions as PNU and ODM. That is why Christians are saying No to *Sharia*. These people are coming in slowly and they are going to develop because this is like a process, they want to say these courts were there but now you see how they have agitated and how serious they have become. If it was not a serious matter, even on their side, this debate that has gone on would have helped them to withdraw and say we don't need *Sharia*. If the word *Sharia* can cause a problem, then let us as Muslims withdraw and leave it out of the constitution but you see how they have agitated. And it is just like when the government wanted money from outside to come and count people who don't exist here –gay and we said no because once you count them even if they are four they will need their rights in

the constitutions. Muslims will need their right as Muslims because they will say we existed in the constitution of this country from independence and that is why we are saying No, if ours is not there... But if they want Muslims to be in the constitution, something about Christianity should also be in the constitution. (December 22, 2009)

In the above interview with Archdeacon Ajiba, Islam is feared to be spreading fast in Kenya and poised to 'rule Kenya' if nothing is done. The notion of the spread of Islam may be related to the much talked about Abuja Declaration in Nigeria which allegedly sets the background for the Islamization of the African continent³. The fear of the introduction of *Sharia* law in Kenya is also advanced for the opposition to Kadhis courts.

B. Commentary on Emerging Themes in Bishops' Opposition to Kadhis Courts

An important concern raised by the bishops is that of the need for equality for all religions as implied in the constitutional provision, 'There shall be no state religion'. What seems to lack in this discourse is a recognition that granting 'legal accommodations' to religious convictions may not be a breach of the argument, invoked regularly, that there should be one law for all. On the contrary, it may actually be an affirmation of this principle of equality. It is a *specification* of how the principle of equality might apply to a diverse citizenry who happen to have intensely held religious loyalties as the case is in Kenya. Thus, the point here is for the principle of equality to "underpin" not "supersede" our plural identities.

It seems to me that the basic argument of those in support of Kadhis courts in the constitution is that to be a citizen is not necessarily to be guided by a uniform law of a sovereign state, in such a way that any other relations, commitments of behaviour are left to the private realm. The secular law is just one part of a religious believer's identity and the believer has other rules of engagement in public life.

Further, this principle of equality before the law is not in any way compromised by recognising the independent jurisdictions (i.e spheres of authority) of non-governmental institutions, such as churches, trade unions etc. It is an essential feature of a free society that there should be many self-governing institutions able to resist the tendency of the state

to exceed its mandate, a possibility which resonates with Kenya's past history.

Perhaps the following biblical texts might serve to show a basis for such religious laws: "We must obey God rather than men!" (Acts 5.29) or Paul's rebuking of Corinthian Christians (1 Cor. 6.1.8) for the way in which some of them sought recourse to their secular courts: "if any of you has a dispute with another, dare he take it before the ungodly for judgement instead of before the saints?" Its wider social and political implications and deeper theological basis are seen in Paul's letter to the proud Roman colony of Phillipi, "our citizenship is in heaven" (Phil. 3.20).

Whether or not such provisions should be placed in the constitution may be answered by the specific contexts of the countries. Muslims, a minority in Kenya, have the fear and perhaps legitimately, that letting Kadhis courts be regulated by an act of parliament would expose them to being removed in future in a Christian dominated parliament.

An important reason for the adverse and fearful reaction of some Anglican bishops to Kadhis courts is that they have been associated with *Sharia*, which is popularly used as a synonym for the penal law with its fixed penalties that can involve capital punishment. However, there has so far not been any Muslim representative body in Kenya advocating Islamic penal law in Kenya. Furthermore, the term "*Sharia*" itself is an umbrella concept that includes criminal and civil law, ethics, personal morality and conduct and matters of worship. Therefore, due to this semantic confusion, attacks on the *Sharia* can often be misconstrued by Muslims as an attack upon their core values. There is dire need for clarity about what *Sharia* actually means in order to move the discourse forward constructively.

Conclusion

The Anglican Church spoke out against the Moi regime in the early 1990s, leading to the introduction of multi-partyism and eventually regime change. Once that was achieved the Church seemed to lose its ethical and moral focus. This was seen in the division within the Church during the period leading to the 2007 election and the failure to speak out against the post election violence. The Church has campaigned for a new constitution and for the improvements in human rights for the Kenyan people. Once the constitutional review

was under way, it has allowed itself to be diverted from a close scrutiny of the whole constitutional process, in order to focus on what are essentially marginal issues.

The public discourse about Kadhis courts has pitted Christians and Muslims in an adversarial way and is likely to influence negatively the relations between members of the two traditions. As I wrote this paper, leaflets, texts-messages, e-mails are in circulation vilifying one tradition and raising alarm over the consequences of passing a law that provides for Kadhis courts.

Commenting on the whole process and the Church's involvement, Gifford observes that "these courts seemed to become a major issue especially for the newer churches whose agenda was adopted by the Catholics and NCKK;...much Christian activity against the new constitution revolved around narrowly evangelical concerns rather than the broad human rights issues that initiated the drive for a new constitution" (Gifford 2009, 41).

The theological leaning of the churches, which tends to be generally conservative with regard to the other traditions, may also be playing a role in the position which the Anglican Church has taken. Most of the Anglican missionaries were evangelicals who typically emphasise the centrality of individual conversion to Christ. Such missionaries may feel closer to fellow Evangelical Christians from other churches, than to non-evangelical Anglicans. Perhaps, it is this affinity that may partly explain the common ground taken by Anglicans and Pentecostals on the issue of Kadhis courts.

A significant development in the public discourse on Kadhis courts is the interest generated in re-thinking about the place of religion in a secular state. Thus, Bishop Joseph Wasonga has suggested that there might be good reasons for providing for religious courts in the constitution, including some for Anglicans to assist in arbitration on matters such as marriage.

The tension generated in the country over Kadhis courts may also be blamed on the failure of the colonial and post-colonial state to build a national identity that can act as its political and social basis. The consequence of such failure is the construction of various interest groups, including religious and ethnic. In this scenario Kenyan Muslims perceive themselves as an endangered group who must be protected from the majority Christian state.

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Islamophobia among Christians and its Challenge in Entrenchment of *Kadhis* Courts in Kenya

Kahumbi Maina

Introduction

The issue of the *kadhi* courts has been a bone of contention in Kenya's constitutional reform process. It has generated a lot of debate and controversy within a cross section of the Kenyan populace, both Muslims and Christians, clergy and lay people, members of parliament and a cross section of scholars and legal experts. The debate polarized Christians and Muslims and further strained their relations on the eve of the National Referendum set on 4th August 2010. The mainly Christian clergy perceived the retention of the courts in a new constitution as a pointer towards giving Islam a privileged status vis-à-vis other religions. Consequently, these clergy wanted to have the courts expunged from any new constitution.

The *kadhi* courts debate produced extreme forces on either side of the Christian-Muslim religious divide. The Christian side disregarded the historical place of the courts in the old constitution. This paper shows that entrenching the *kadhi* courts in the constitution generates a sense of Islamophobia among Christians. The paper posits that Islamophobia fundamentally informed the Christians' attitude and response towards the entrenchment of the *kadhi* courts in the Kenyan constitution.

The Church response to the *Kadhi* Courts in the constitution

It would be presumptuous to argue that the Church in Kenya approached the issue of *kadhi* courts in one voice as a united body of Christians. There is no empirical evidence to show the number of Christians who were opposed to the inclusion of

the *kadhi* courts in the constitution. However, it is on record that the Seventh Day Adventist Church unequivocally supported the *kadhi* courts (Seventh Day Adventist Church in Kenya statement on *kadhi* courts n.d). An item in the *Saturday Nation* (February 6, 2010) also reported that some Christian leaders in the North Rift and western parts of the country supported the courts.

There were many voices of opposition to the *kadhi* courts in the top leadership of the church and church organizations. The Church was represented by the "mainline churches" including the Catholic, Anglican and Methodist churches, and the Evangelical and Pentecostal churches represented by the Deliverance Church, Reformed Church and a motley of other small church forums and groups. The main face of Church organizations in the debate was the National Council of Churches of Kenya (NCCCK), the umbrella organization of the "mainline" Protestant churches – such as the Anglican and Methodist churches – and the Kenya Church, an umbrella of 40 groups comprising among others: Christ is the Answer Ministries (CIAM) of the Baptist Church, Jesus Is Alive Ministries (JIAM), and *Neno* Evangelical Ministries. The other church organisation was the Evangelical Christian Churches of Kenya which brings together the evangelical churches not represented by the NCCCK. While Cardinal John Njue was undoubtedly the voice of the Catholic Church, Rev Canon Peter Karanja, the General Secretary of NCCCK, was the most visible figure and arguably emerged as the *de facto* leader of the entire Kenyan Church's opposition to the *kadhi* courts.

We cannot explore the individual church or group responses to the issue of the *kadhi* courts. There was an apparent unanimity or at least a facade of unity of purpose among the church leaders in their opposition to some clauses in the various drafts of the constitution. Apart from the *kadhi* courts which are our concern, there were other contentious issues in various clauses that the churches opposed in the drafts. These included: Articles: 26 (4) on Abortion; 27 (4) on Equality and freedom from discrimination; and 66 on Regulation of land use and property (Republic of Kenya 2010).

The reasons for the Church's opposition to the inclusion of the *kadhi* courts in a new constitution were many and varied, but the main ones are hereby identified and discussed.

Kadhi courts give Islam precedence over other religions in the constitution

Christian leaders alleged that the establishment of the courts is tantamount to giving precedence to Islam and Muslims over other faiths and religious groups. Accordingly, this makes Islam the official religion in the country as no other religious institution is recognised in the draft. They further argued that the inclusion of the *kadhi* courts into the draft constitution conflicted with Article 8 of the Constitution which stipulates that: "there is no state religion" (Republic of Kenya 2010). The leaders were adamant that no religion in the country should have a privileged status and demanded the courts' removal from the draft constitution. They cited the cases of Tanzania and Zanzibar where Muslims are in the majority yet religion and state are separated with the *muftis* (jurists) running religious issues that are outside legislations (Muindi 2010). This position was maintained by a pastor of the Deliverance Church who observed:

All religions are equal, there is no state religion... religion and state are separate. Why would Kenya as a sovereign state make for the Islamic religion to have *kadhi* courts? Like all other religions, Islam should support their own agenda without involving the state. Revoke the entire or any related clause on *kadhi* courts from the constitution. Let the interested parties know that the contention of this issue is real and draws more attention and concern than can be ignored and these voices cannot be silenced (Personal communication 2009).

Based on the arguments postulated above, church leaders accused the Committee of Experts that was mandated to draft a new constitution and the Parliamentary Review Committee on Constitution, of favouring the Muslim community by campaigning for the *kadhi* courts, while ignoring the views of Christians opposed to their inclusion. Items appearing in the Daily Nation (February 2, 2010) and Saturday Nation (February 6, 2010) demonstrate the strongest concerns of the General Secretary of the NCKK on behalf of the Christian community in the country and various churches and Christian organisations over the *kadhi* courts. He is reported to have said that their inclusion was a prelude to religious division in the country:

We are extremely opposed to the inclusion of *kadhi* courts in the constitution ... the move is tantamount to dividing the nation on the basis of religion, and that it is a dangerous trend.... We should learn from the nations that have moved in that direction and suffered instability (Muindi 2010).

Kadhi courts will introduce *Shari'ah* and Islamic rule in Kenya

Despite the *kadhi* courts being in the old constitution, their inclusion in a new constitution was perceived by Christian leaders as an attempt to introduce the *Shari'ah* in Kenya. This, they argued, was a prelude to the establishment of Islamic rule in the country. In the mind of some clergy, the retention of the *kadhi* courts in a new constitution is a long term plan of Muslims to establish Islamic law in Kenya. This was captured by Rev. Peter Karanja in the following:

It is possible to think Christians are being sensational, but if you look ahead at the next 50 years ...100 years ... or couple of centuries, when none of us is working on a new constitution, ... or the full impact of this decision is experienced, people will look back and ask: Were Christians so naïve to allow this to happen (Anglican Journal 2010)?

Rev. Karanja's argument struck the same chord as that of a prominent legal scholar Kibe Mungai who asserts that:

Those opposed to the retention of the *kadhi* courts in a new constitution were partly motivated by fears that with passage of

time the courts may turn out to the fertile ground for introduction of other aspects of Islamic law in Kenya. And if Nigeria and Sudan are anything to go by, the prospect for introduction of *Shari'ah* law in our country is indeed scaring (Maina 2008).

These arguments were supported by the fact that Muslims wanted the role and status of the *kadhi* courts to be enhanced. In some cases like in North Eastern Province, Muslims asked for the full application of *Shari'ah*. This demand was unacceptable to Christians. Consequently, the *kadhi* courts were lumped together with Christian, Hindu, Traditional and other religious courts in the “Wako draft” which was subjected to the 2005 Referendum. According to reports from the *East African Standard* (30 April 2003; 2 May 2004), some Muslim clerics saw this move as downgrading the *kadhi* courts, since they had enjoyed special status in the old constitution. They threatened armed conflict if the new constitution did not enshrine the *kadhi* courts:

We should try to mobilise Muslims countrywide for jihad if anyone will try to intimidate us and provoke our religion... we shall fight up to the end with all ways to retain the *kadhi* courts in the constitution even if it means to seek help from our fellows around the globe (Maina 2008).

These threats confirmed Christian fears about the intentions of Muslims. This was aggravated when the then Chairman of the Council of Imams and Preachers of Kenya (CIPK) Sheikh Ali Shee threatened secession of the Muslim areas of Coast and North Eastern provinces if there was no provision for the *kadhi* courts in the new constitution.

It should be pointed out that the link between *kadhi* courts and the introduction of the *Shari'ah* either in the long term or short term is however contested by many Christians. Indeed, according to some opinions, this view is considered farfetched and perhaps a product of ignorance of, and phobia for, Islam. According to the President of the National Civil Society Congress (NCSC) Morris Odhiambo, “Kenyans know that *kadhi* courts do not translate into *Shari'ah*.” The Chairperson of Kenya National Commission on Human Rights, Florence Jaoko termed as “totally unfounded” the fear that *kadhi* courts will introduce Islamic law into the country.

She further noted that the history of the courts should be taken into account (Shiundu 2010). In this view, Muslim personal status law under the *kadhi* courts does not lead to the introduction of *Shari'ah*:

There will be no stoning to death for adultery or cutting of hands as this is covered by Islamic Criminal Law which is not permitted in Kenya, either in the present constitution or under the new draft constitution (Hassan 2002).

Kadhi Courts in the independent constitution was a historical wrong

Given that the *kadhi* courts have been in operation in Kenya since independence and Christians did not disapprove them, there arises the question why Christians suddenly realised that the courts should not be in the constitution. Some Christian leaders advanced the argument that the introduction of the *kadhi* courts in the independent constitution was a historical wrong that the constitution continues to perpetuate. According to Gerry Kibarabara, Chairman of the Kenya Christian Constitutional Forum and Joseph Methu of the Evangelical and Indigenous Churches of Kenya, the inclusion of the *kadhi* courts was not “agreed then by the people of Kenya. It was the mind of an individual... their inclusion was a mistake in the first place” (Kenya: Church leaders threaten to reject new law over *kadhi* courts n.d). This is in reference to the agreement signed in 1963 between founding father, Jomo Kenyatta and the Prime Minister of Zanzibar, Muhammad Shante.

The agreement between Kenyatta and Shante in two letters signed and exchanged became one focus of the *kadhi* courts debate. According to some Christian leaders, the letters signed on October 5 1963, did not spell out categorically legislation of the courts because:

They only refer to the application of the Islamic personal law for Muslims along the 10 miles coastal strip, not throughout the country. The letters never said *kadhi* courts will be in the constitution. The fact that it was entrenched in the constitution does not close the door for its revision. Whatever happened in the past, Kenyans need to expedite the resolution of this potential conflict about the *kadhi* courts in the new constitution (Lagho 2010).

The Kadhi courts should not apply outside the 10 mile coastal strip

Kenyatta – Shamte letters were used by Christian leaders to buttress their argument against the *kadhi* courts. This is in view of the proposals for five undertakings that Kenyatta made on behalf of the Kenya government in respect to the future of the Kenya Protectorate or the 10-mile coastal strip. The two points in the letters that relate to the *kadhi* courts debate are hereby reproduced:

The free exercise of any creed or religion will at all times be safeguarded and in particular, His Highnesses' present subjects who are of Muslim faith and their descendants will at all times be ensured of complete freedom of worship and the preservation of their own religious buildings and institutions.

The jurisdiction of the chief *kadhi* and of all other *kadh*is will at all times be preserved and will extend to the determination of questions of Muslim law relating to personal status (for example, marriage, divorce and inheritance) in proceedings in which all parties profess the Muslim religion (Kenyatta-Shamte letters 2010).

Islamic personal law was to be applied only to the Muslims in the Protectorate and not the rest of the country. It is in this regard that some Christian leaders argued that the historical reasons that led to the *kadhi* courts being enshrined in the constitution no longer hold. What was then a concession to a small part of the population has brought a demand for special treatment of all Muslims throughout the country. A church leader observed:

Christians are not opposed to the *kadhi* courts. Muslims could have them up to the 10 mile coastal strip ... but they have slowly and slowly covered the rest of the country and now there are 18 (sic) *kadhi* courts in the country (Sermon notes 2010).

This argument is based on the original intent of the letters mentioned above and which has limitation in view of the current debate. Undoubtedly, the *kadhi* courts were a political compromise between the Sultan of Zanzibar and Kenyatta so that Kenya had access to the Indian Ocean (Maema 2010). Over the years, the Muslim population outside the coastal strip and the interior of the country has grown by leaps and bounds necessitating the services of the *kadhi* courts:

The number of *kadh*is has continued to increase as demand for services increases. The Kenyan population at independence is different from that of today, the people are now more enlightened and they know their rights (*Friday Bulletin* 2009).

The words of the Chief Justice, Evans Gicheru, may be seen as an indictment of the weakness of the Kenyatta-Shamte agreement that limited the operations of the *kadhi* courts to the Muslims of the coastal strip without regard for future Muslim populations outside the Protectorate.

Christian taxpayers should not pay for Muslim religious practices

Another reason behind the clergy's opposition to the *kadhi* courts in a new constitution was that the taxes that Christians pay to the government will and are used to pay the *kadh*is instead of their own clergy. This is a view that was shared by a cross-section of Christian leaders:

Initially when they were only a few, the *kadh*is were not paid by the government. Why should they be paid by the government now...how many bishops and pastors are being paid by the government...The draft requires the state to use tax payers' money and resources to fund what is essentially a religious practice. Referring a dispute to a *kadhi* court is essentially observance of a religious practice, ritual and duty (Sermon notes 2010).

The foregoing argument is strengthened further by Erick Simiyu, a preacher with the Evangelical Association of Kenya, who said: "the use of taxpayers' money to run the *kadhi* courts favours Islam ... Christians are being taxed to run *kadhi* courts and pay their salaries, which is unfair" (Bocha 2009).

Kadhi Courts should continue under the Judicature Act

Some Christian leaders argued that the *kadhi* courts should be placed under the Judicature Act; that is, the law under which other similar courts are established. This is because the conditions and status of Muslims in the country have changed:

Unlike in 1963, Muslims are today fully integrated into the Kenyan society and it

would be unthinkable for any government to ever contemplate antagonising them needlessly by denying them the right to have *kadhi* courts even if they were not enshrined in the constitution (Maema 2010).

Kadhi Courts should be under Chapter 4 – Human Rights

Some Christian leaders argued that the *kadhi* courts should be under Chapter Four on Human Rights in the draft constitution. This Chapter has several sections guaranteeing and protecting the freedom of religion for all.

Kadhi courts are discriminatory

Another reason that Christian clergy advanced in opposition to the *kadhi* courts is that they discriminate against non-Muslims, thus contravening the very essence of the constitution as found under Chapter Four of the Bill of Rights which guarantees rights and fundamental freedoms. This is because the application of Muslim law only applies to persons who profess the Muslim faith and a *kadhi* must be a Muslim (Republic of Kenya 2010). This implies that Christians and Kenyans of other faiths who may have the requisite expertise and knowledge of Islam and Islamic law could never ascend to the office of the *kadhi*.

Issues of Muslim Family (Personal) law should be resolved in the mosque

According to some clergy, a *kadhi* is a religious officer similar to a pastor, priest or vicar but not a judicial officer whose area of jurisdiction is a mosque. Accordingly, clergymen like Jembe-wa-Mumba of the East Africa Pentecostal Church argued that since Christians solved their marriage and divorce disputes in their churches, Muslims should do the same in their mosques. “We use our churches to resolve marriage and divorce cases and Muslims should follow suit” (Bocha 2009).

The underlying fear of Islam: Islamophobia

Islamophobia is an irrational or perceived fear of Islam and Muslims which is predicated on past activities and incidents allegedly linked to some Muslim extreme groups and/ or individuals either in Kenya, neighbouring countries or other parts of the world.

Islamophobia thrives on propaganda and is perfected through the media, both print and

electronic. The internet has been a fertile breeding ground for Islamophobia. The churches, especially the Evangelicals and Pentecostals, have used their pulpits to spread this phobia against Islam and Muslims in their sermons. Although Islamophobia is not a common phenomenon to all Kenyans, owing to the media and other sources, some Christians have come to have an inherent phobia for Islam and Muslims.

It has not helped matters that since extreme Muslim groups invoke the name of Allah, the general Christian populace has developed a fear of Islam and Muslims. Islamophobia is founded on past and current events perpetrated by Muslim extreme groups such as Al-Qaida and Al-Shabab such as the following: the August 1998 twin bombings of USA embassies in Nairobi and Dar es Salaam; the September 11, 2001 attacks in the USA; the co-ordinated attempt to shoot down an Israel jetliner at Mombasa Airport with the bombing of an Israeli owned hotel at Kikambala in Kilifi District in 2005; the petrol bombing of Hope FM Radio Station in the heart of Nairobi in 2006 which is owned by Christ Is the Answer Ministries (CITAM), and the 11th July 2010 bomb attacks in Uganda which killed about 80 people.

Islamophobia has become a socio-religious discourse that some Christian leaders of the Evangelical and Pentecostal churches employ to warn their followers about the menace of Islam. The warning about the danger of Islam derives from a perception that Islam is competing with Christianity. Statements and sermons from Christian religious leaders point to this scenario. In the nineties, the Archbishop of the Catholic Church in Kenya, the late Cardinal Otunga called for “Christians to stand up and fight the spread of Islam in Africa” (Maina 2009, 91). While Bishop Kewasis of the Anglican Church of Kenya, Diocese of Eldoret reportedly urged Christians to intensify evangelism in North Eastern and Coast provinces. He argued that spreading Christianity to the strongholds of Islam through building of churches was the best method of meeting the challenge of Islam (Maina 2009, 92). The competition between Christianity and Islam has therefore provided fodder for propaganda purposes, hence more Islamophobia.

The media also plays a tremendous role in furthering Islamophobia through stereotypical and negative portrayal of Islam as an inherently intolerant, brutal, militant, irrational, fanatical,

violent, extremist, terrorist and menacing religion (Maina 2003, 175; Kimball 1991, 3). The media portrays Islam as a threat to Christianity, and stability and order in the world (Kimball 1991, 1). This threat is subsumed under the growing fear of “Islamic fundamentalism”. Indeed the terms “Islamic fundamentalism” and “fundamentalist” have become catch phrases to describe Islam and Muslims (Maina 2009, 94; 2001, 290-291). The mere mention of the terms causes phobia in the minds of some Christians. The latent fear of Islam and Muslims borders on paranoia for anything Islam and Muslim.

Islamophobia influenced the Christian position on the *kadhi* courts. Some Christian leaders fear that the *kadhi* courts would propagate Islamic extremism. In a forum organised by Coast Interfaith Council of Clerics, the Coast branch chairman of NCKK Bishop Pius Kagwe, was categorical that the events of September 11th influenced the Christian position on the *kadhi* courts for fear that: “the courts would propagate extremism, leading to anarchy” (Bocha 2009).

“An Islamic Agenda for Kenya?”

Islamophobia is also tied to a belief of an “Islamic agenda.” Indeed, the propaganda about the “Islamic agenda” was rife among Christian clergy during the debate on the proposed constitution. Muslims were seen to be furthering this agenda, hence the more reasons why Christians were prepared to vote against the draft constitution. They also made much of the fact that the people heading the constitutional reform agencies were Muslims: Issack Hassan of the Interim Independent Electoral Commission (IIEC); Abdikadir Mohamed of the Parliamentary Review Committee on the Constitution; and the chairman of the Committee of Experts were all Muslims.

According to opinions that have gained currency among some Christian sources, this “agenda” is based on the Islam in Africa Organization, a movement whose brain child was the Abuja Declaration of 29th November 1989, whose aim is to make Africa the first all-Islamic Continent (Personal Communication with clergy 2010).

Regarding the *kadhi* courts, the opinion of some Christian clergy is that efforts to entrench them in the constitution are part of a long term plan to impose Islamic law in order to lay the foundations for the Islamic Republic of Kenya. For some clergy, this is a cause of worry for Christians

because reports from other parts of the world where Islamic law is applied shows its eventual hegemony. This is apparent in the Northern states of Nigeria and the Sudan where Islamic law has been implemented. The opinion of some Christian clergy is that Muslims in Kenya have embraced the “Islamic Agenda” as demonstrated through their leaders’ call for secession and establishment of a federal Islamic state in the Muslim predominant areas of Coast and North Eastern provinces. Such calls tend to confirm to the Christian leadership that the “Islamic agenda” is real. A few examples are worth mentioning. In the wake of the Christian opposition to the *kadhi* courts, an unnamed Muslim leader was reported to have said in Mombasa on 28th July 2009: “if they think we are few, we are ready to break [a]way from the country (Kenyan Christians and Muslims clash over courts in constitution n.d). In addition, the Secretary General of Supreme Council of Kenya Muslims (SUPKEM), Adan Wachu has in the past threatened secession (federalism) if Muslims are pushed to the wall, arguing that it is the only way Muslims would be in a position to tackle their problems (Okora 2003).

The phobia of establishing a *Shari’ah* governed Islamic federal state in North Eastern and Coast provinces occupied the minds of some Christians on the eve of the 2007 general elections. This resulted from the leaked details of a surreptitious and controversial Memorandum of Understanding (MoU) purportedly signed on 29th August, 2007, by Hon. Raila Odinga of the Orange Democratic Movement (ODM) and by the National Muslim Leaders Forum (NAMLEF), which represents and articulates the aspirations and concerns of Muslims in Kenya. Although this could have been a campaign tool to woo the Muslim vote, the MoU confirmed the “Islamic agenda” in the minds of some Christians.

Conclusion

The *kadhi* courts debate provided a theatre of contest between Christians and Muslims. This contest which disregarded the merits and (or) demerits of the courts underlined the competition that characterises the relations between Christians and Muslims in Kenya. This competition is the bedrock of *Islamophobia* and informed the Christian opposition to the *kadhi* courts in the proposed constitution.

The climax of the debate was the National Referendum held on 4th August 2010. The clergy

represented by the mainline churches under the NCKC, Evangelical and Pentecostal churches had galvanised their followers with a plea to vote against the proposed constitution over the *kadhi* courts and other contentious issues. Whether Christians heeded the appeal or not is a matter of conjecture, in view of lack of empirical evidence to support any such a claim. The status quo regarding the *kadhi* courts, however, stands, and will remain a focus for Christian clergy as they engage their followers and Islam.

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Muslim Responses to Kadhis Courts as part of Kenya's Constitutional Review

Abdulkader Tayob

The debate over Kadhis Courts in the constitutional review process was led by some Christian leaders who were vociferous in their condemnation of the special recognition given to Islam and Muslims in both the old and the draft proposals. Not all Christian leaders and certainly not all Christians were in agreement with these objections. However, this Christian response was loud enough to suppress the silent majority until the referendum in 2010. More significantly, it also suppressed the various and varying reactions of Muslims to the Kadhis' courts in general, and the review process that touched on the Kadhis court in particular. In public forums, Muslims often appeared only to react to the Christian objections, and did not seem to have their own perspective and view of the Kadhis courts, their history, present and future.

This article argues that there were a number of Muslim perspectives to the Kadhis Courts. They were expressed in various manners to the Kenya Constitutional Review Commission during its national consultation, and subsequently incorporated in the first draft proposal. Muslims wanted an appeals process within the Kadhis Courts before cases were taken to higher national courts; they wanted more training for Kadhis (judges) and some also wanted the jurisdiction of the Kadhis extended to include small claims involving financial transactions. A few Muslims wanted the jurisdiction of Kadhis courts to include criminal matters (Hassan 2002). This article presents the views of a sample of Muslims who were interviewed in 2003 and 2010, on their personal involvement in the Kadhis' courts, and their views on the role, meaning and future of Kadhis courts in Kenya. Of

the more than 40 interviews conducted, this article presents an analysis of four individuals from diverse backgrounds. Eventually only interviews from 2003 were chosen, but they were interpreted in the light of the 2010 interviews as well. They do not represent the views of all Kenyan Muslims, but bring up common issues and present unique perspectives. The analysis balances between the common and the idiosyncratic dimensions. I begin with the presentation of two individuals who may be characterized as religious activists in Nairobi and closely connected with the central mosque in the city. They are followed by the perspectives of an attorney and then the Chief Kadhi at the time, Qadi Hamed.

From these interviews, I argue that the Kadhis Courts dispute should be located within the broader history of Muslims in postcolonial Kenya. Muslim responses should not be limited to their reactions to Christians, but to their own diverse attempts at representing Muslims in national politics and in the public sphere. These positions have varied considerably from the foundation of independent Kenya when secessionist movements on the coast and the north-east rejected incorporation in a unified Kenya. These were not Islamic religious movements, but they may be seen as representing the attitudes and interests of Swahili and Somali Muslims respectively (Mazrui 1993; Oded 2000). The Muslims have since come to be part of an imagined nation, but with an uncertain membership according to most commentators.

One of the first observations made by many scholars is that Muslims are marginalized in the body politic of Kenya from different perspectives. Alamin Mazrui's provocative assessment of Moi's rule

argued that he employed an idiosyncratic Christian symbolism to inscribe the nation and support his authoritarian rule. In this national imagination, according to Mazrui, religious minorities could not be accommodated (Mazrui 1993). From a different perspective, Kresse has confirmed this perception of Muslims suffering marginalization (Kresse 2009). Interestingly, Kresse relates the threat of former President Moi made to Muslims in the early 1980s to eliminate the Kadhis courts.

Others have agreed with this marginal position of Muslims, but they have pointed how some Muslims benefited from the post-colonial state, or at least took advantage of authoritarianism where possible. The dominant Christian symbolism did not completely emasculate Kenyan Muslims. Constantin and Haynes have documented a common pattern of Muslim accommodation to post-colonial East African states. They argued that the various national Muslim organizations worked with ruling governments and parties, irrespective of their political philosophies and ideologies. Following the example of the national leaders, however, Muslim leaders were also partial to their own groups and constituencies (Constantin 1988, 1993, 1995; Haynes 2006). The national Muslim organization in Kenya leading this political accommodation was the Supreme Council of Kenya Muslims (SUPKEM) which was founded in 1973¹, and officially recognized by the Kenyan government as the representative of Kenyan Muslims in 1979 (Oded 2000).

Oded and Haynes have confirmed the resilience of this approach to politics even after 1992 when multiparty politics was inaugurated (Haynes 2006, 2005; Oded 2000, 1996). Both have studied more recent developments since the 1990s when a global revival of Islam impacted more noticeably on Kenyan Muslims. An assertive approach to politics challenged the politics of accommodation led by SUPKEM and other national Muslim leaders. Oded focussed on the rise and fall of the Islamic Party of Kenya, tracing its inspiration to the influence of religious scholars trained outside Kenya. The latter offered a more antagonistic approach to politics to Kenyan Muslims who felt deeply aggrieved of their marginalization. Refused registration by the Moi government, the supporters of the Islamic Party took their frustrations to the streets of Mombasa. There they were eventually quashed by the state. The memory of the IPK looms large in Kenyan politics, but Oded found that the older model of

accommodation continued to dominate Muslim responses to the state. Haynes has examined the extent of the threat to Kenya from religious militancy within Islamic groups in the region. The focus of his study turned attention to the tragic attacks on U.S. Embassies in Daressalaam and Nairobi in 1998, and against Israeli targets in Mombasa in 2002. As elsewhere, these events have raised questions about the extent of Kenyan support for militancy. Haynes found limited support for militancy among Kenyan Muslims. It seems that the studies by Oded and Haynes pointed out that this greater assertiveness or militancy did not represent a shift in Muslim politics or public engagement in the region in general, or in Kenya in particular.

Muslim views on Kadhis courts become more salient when placed within this longer history of public engagement with the state and public life. The Kadhis Courts issue did not by itself result in a new political culture for Kenyans. Muslims hardly expected negative response to Kadhis Courts in the first decade of the twenty-first century. Nevertheless, the interviews presented here suggest a search for an alternative to both the politics of accommodation and the politics of resistance. Both these options are reflected in the interviews, but another path is being developed in a state in which Muslims are marginalized, dominated by Christian symbolism and a weak state.

From marginalization to civic engagement

I begin with Abdul Hamid Slatch and Abdulrahman Wandati², who were leading members of activist organizations in Kenya. At the time, they were members of the Muslim Consultative Council founded in 1997 to represent Muslims in Kenyan public life in general, and in the constitutional process in particular. Slatch was born in Nairobi in 1942, and studied Business and Management Studies in Kenya, and Islamic Studies in Kenya and Malaysia. He was one of the founders of the Young Muslim Association first registered in 1964.³ He was an executive member of central mosque in Nairobi. Wandati (born 1961) hails from Western Kenya, and completed high school in Uganda. He followed these studies in Pakistan (Islamabad), Portugal and the USA as Democracy Scholar at Les Aspin Centre for Government in Washington D.C. Both Slatch and Wandati hold positions in various Islamic and Kenyan public bodies.

Slatch and Wandati were deeply involved in the constitutional review process from 1996. They recognized the review process as an opportunity for Muslims to escape their marginalization in Kenya since independence. They believed that Muslims should accept some of the responsibility for marginalization by refusing secular education and failing to acquire the necessary skills for a modern state. But the situation at the end of the 20th century was different, and Muslims had no excuse to (fail to?) assert themselves this time around.

Slatch and Wandati, in fact, believed that they were the first religious activists to approach Anglican and later other Christian leaders to form a civil society group for a new constitution. They developed their civic engagement that later came to be known as the Ufungamano initiative and recognized by state and society. From 1996, they believed that they were making a constructive contribution to the future constitution of the country. In 2003, however, Slatch and Wandati were devastated when their Christian comrades rejected Kadhis courts in the new constitution. With other Muslims, they then withdrew from the Ufungamano, but kept a vigilant presence in civic and public life. They co-operated with Christian groups, but witnessed the rise of a strong Christian presence in Kenyan politics. In search for votes and support, they saw how politicians turned even government activity into Christian gatherings as the following quote from Slatch illustrates:

... last week Tuesday there was breakfast prayers meeting for the city council, the councillors, organized by the mayor. Again, it was this Christian Leadership Development initiative ... Fortunately I was invited to attend, but unfortunately I told them I could not go. Because we discussed, me and Wandati ... he said 'No, this is a political process, you [should] go!' [But I said] 'No, it's not a political process, it is a prayer meeting'. How do you expect me to stand and you know sing hymns with them, and ... the program said first reading from the Old Testament, second reading from the New Testament, singing of hymns, I will be very uncomfortable... So I decided not to go. So I received a message from the deputy who happens to be a Muslim, they said, oh there has been some kind of talk [on political matters].

This lengthy quote relates how Slatch and Wandati

saw government activity closely related to Christian symbols. At the same time, it shows how Muslims were struggling to find a way of negotiating their political engagement with it.

With this understanding of politics in Kenya, Wandati offered his reflections on the Kenyan state. He suggested that, given the strong religious conviction of Kenyans, a secular state was not an option. Kenya should rather define itself as an ecumenical state, a concept first proposed by the internationally renowned Kenyan scholar, Ali Mazrui. An ecumenical state, according to Wandati, was one wherein "benefits that accrue from the state ... should not be based on the fact that these individuals, or this community of citizens are subscribed to a particular religious order." An ecumenical state "recognizes" the particular worship in which religious groups engage in, and then "goes out of its way to facilitate all its infrastructure" so "that all the different religious groupings within the country ... enjoy ... religious worship or practice to the fullest extent." Wandati was adamant that the Kadhis courts could not be removed from the new constitution.

Interestingly, Wandati did not regard the service offered by Kadhis courts as part of the religious needs of Kenyan Muslims: "we do not regard ... the Kadhis court in Kenya as a religious institution. We regard it as part of the judicial ...". Wandati was aware of Kadhis performing a range of religious activities, in addition to their judicial duties. He thought, however, that such functions should henceforth be performed by a new office within the Muslim community:

Now all the things the Muslims are toying with, is that we then need to have a *mufti* [jurisprudent in Shari'a]. And if they do have a mufti then what will be his role, we have never experienced this. I know that in Uganda they do have a *mufti*.

Summing up his thinking, Wandate went on:

That's my understanding ... the *mufti* will be a people's leader, if we do have a *mufti* here, he will that one who we regard as the *Shaykh* [an elder or recognized religious leader].

The ecumenical state of Kenya would support all religious activities, but Wandati also revealed a distinct understanding of the Kadhis courts. They were clearly part of the judiciary, while

Kenyan Muslims needed a different religious representation for the Kenyan nation and state. His last remark seemed to lead in the direction of the Supreme Council of Kenya Muslims. Wandati did not discuss the umbrella organization, but here seemed to suggest that an alternative organization be founded to engage the state and represent Muslims in Kenya.

In summary, we see Slatch and Wandati diving into civil activism for a new constitution that would end the marginalization of Muslims in the country. However, they were shocked by how the political space was overtaken by Christian leaders, with the collusion of Christian political leaders. They offered the ecumenical state as an alternative to both the secular and the Christian dominated state. Equally importantly, the idea of an ecumenical state was also an opportunity to rethink established Muslim approaches to the state. And one of these was a redefinition of the Kadhis courts as part of the judiciary, excised from its religious function.

I turn now to Muhammad Khamis⁴ who studied Islamic law in the Sudan, and then completed his legal training in Nairobi. He has a successful legal practice in Nairobi, and occasionally represents clients at Kadhis courts. Khamis's interview covered a range of aspects, including some of those raised by Slatch and Wandati. He discussed the issue of the Kenyan state as well, but also reflected on the reforms required of the Kadhis Courts. With regard to the latter, he believed that lawyers and attorneys should take some of the responsibility for how the courts function: "we are really heavily to blame for the state that the Kadhis courts find themselves in today." In light of the improved function of the courts, Khamis also turned to the distinction between the religious and legal function of the Kadhis courts. Understandably, given his legal background, he did not propose the appointment of a Mufti to take over national religious decisions for Muslims but pointed to a concrete problem faced by Kenyans.

Khamis was not in favour of an ecumenical state, but veered towards support for a secular state under the particular circumstances facing Kenya. He began with a likely response expected of a Muslim that he would like to live in an Islamic state in Kenya. Upon probing the question in the interview, he revealed some interesting reflections and reversed his first response. He could not imagine living in an Islamic state such as Saudi Arabia. Iran was more a likely

possibility: "Iran, maybe, maybe, but right now I have not really focused my attention on living, living outside this country." When asked about a secular option, he responded that both Christian and Muslims would not support such an idea. Secularists in both communities would be isolated, even though there were many such individuals in Kenya. He then added that the secular option was inevitable in Kenya. He was critical of the secularism supported by Christian leaders, though. It was a ruse to oppose the Muslims: "Christians are pushing for a secular state just to counter the Muslim position as far as the Kadhis courts are concerned." What they really wanted was contained in a document that the Kenya Church, a coalition of Christian Evangelical Churches opposed to the Kadhis courts, issued in 2002. This document declared that the Kenya Church wanted to "ensure that that the final Constitution not only reflects the wishes of Kenyans, but also the eternal purposes of God" (The Kenya Church 2002). In light of these developments, Khamis believed that a secular state was the best option for Muslims: "the reality is that we are better off as compared to living in a strictly Christian state - we are better off living in a secular state than living in a Christian state as such."

Khamis believed that Kadhis courts should be reformed. There were two areas of reform required. Firstly, the "structures and the jurisdiction of the Kadhis courts" needed to be enhanced. On one level, this was related to the training and appointment of the Kadhis which the Kenya Constitutional Review Commission heard in general: "on qualifications of the Kadhis, and they [Muslims in Kenya] think that you know, the current crop that we have is not really up to date". This sentiment came up frequently in a number of my interviews as well, and was in some respects supported by Kadhis. Khamis himself specified his remark by mentioning the need for training in reforms in Islamic law. I particularly asked him if the issue of human rights was relevant in the discussion on Kadhis courts. His responses may be divided into two. Firstly, he argued that the right to go to the Kadhis was guaranteed for Muslims only. Non-Muslims were never going to be impelled to live under *Shari'a*:

The law applicable as I said in the Kadhis court would be Islamic law, and as a Muslim you are supposed to ... to be happy that the law has been applied ... but if you are not a Muslim and law is applied onto you, you

could talk about infringement of your right ... in my in my entire practice I have not come across a case where a party has claimed that their rights are being infringed in the Kadhis court, just because they don't profess the Muslim religion.

Khamis seemed to take the view that Islamic law was a matter of horizontal civil relations, in which human rights did not apply. The state was not imposing Islamic law on its citizens. Muslim citizens were turning to the Kadhis to seek redress against other Muslims who were depriving them of their rights in terms of Islamic law.

But Khamis did explore a second dimension of rights in terms of the interpretation of Islamic law. Here he was clear that Muslims in general and Kadhis in particular needed to think about the application of Islamic law in modern contexts. Since social contexts had changed, some of the rules in Islamic law needed to change as well: "I think there ought to be development of ... law, Islamic law, in the sense that ... we are living in a different, completely different world from the world that the prophet lived in". Specifically, he mentioned two examples in this regard. The first was the law of evidence in which, according to certain issues in Islamic law, for "the evidence of one man, you have to have the evidence of two women." In Kadhis courts in Kenya, however, Khamis quickly reminded me that the law of procedure followed on this issue did not disadvantage women:

... the present system according to the Kadhis Act, it, it clearly states that there should be no discrimination on the evidence, the evidence is not based on the number of people that give the evidence... it basically means that the evidence of a man is the same as the evidence of the woman.

On this point, at least, it seems that the *Shari'a* as followed in Kenya had in fact already developed for Kenyan Muslims. On the second issue, Khamis referred to the social discrimination faced by some Kenyan Muslim women. He mentioned a custom in the North East where women were not supposed to sit on chairs. He accepted that this was a cultural practice restricted to this region, but admitted that it could be an interpretation "of a certain verse of the Quran which says that men, for example, are superior to women." This second example was not specifically related to Kadhis courts, but suggests

that the latter could not easily be extricated from Islamic practices in general.

The final issue raised by Khamis related precisely to the possible judicial limitation of Kadhis courts raised by Wandati. As mentioned earlier, Khamis expanded on the recommendations heard by the Kenya Constitutional Review Commission. These recommendations seem to bring up the entanglement of religious and judicial matters, some of which needed to be separated, according to Khamis. Muslims of Kenya recommended that the appointment of Kadhis should be clarified and the requirement for a Kadhi, particularly Chief Kadhi, be upgraded. At the time, Kadhis were appointed by a Judicial Services Commission which seemed an anomaly to Khamis. He framed this situation in a rhetorical question: "Muslims as I said have held the Chief Kadhi to be a spiritual leader at one time and a judicial officer at another time, so if he is going to be a spiritual leader, what role should the government have in appointing that spiritual leader?" This is an important question that can be equally directed at Muslims. Like Wandati, Khamis believed that some of the functions performed by the current Chief Kadhi, like the confirmation of the sighting of the moon for Kenyans at the end of Ramadan, caused confusion. Perhaps it was even bringing the position into disrepute. The first step toward a solution seemed to lie in recognizing that judicial and spiritual matters had to be divided.

In summary, then, Khamis revealed the views of a Muslim legal professional. He too was grappling with the viability of an Islamic state, and tended to prefer a secular state in the face of an ascendant Christian Church. Kadhis' courts served only Muslims, but perhaps Khamis was also alluding to changing social relations within Muslim families. Moreover, according to Khamis, the development of Kenya society, and the impact of modernization as evidence in the sighting of the moon, called for a differentiated approach within the public sector.

I turn now to Chief Kadhi Hamad whom I met in Mombasa in 2003.⁵ Kadhi Hamad had recently taken on the position, after having served as a Kadhi for about 10 years. He conducted most of his studies in Kenya, with his father Muhammad Qasim who was Kenya's Chief Kadhi from 1963 to 1968, and other scholars. He was then sent to Iraq to further his studies, but studied physics there instead because he found the college teaching Islamic sciences to be attended mainly by dropouts. He had to leave

Iraq because of the outbreak of the Iran-Iraq war, and then turned to Saudi Arabia where he studied science education. He finally completed a Masters degree in Islamic law in Nigeria, at the Ahmadu Bello University in Zaria.

The Kadhi reflected mostly on the required reforms in the Kadhis courts, revealing both the strengths and weaknesses of the existing system. These reforms also turned to the relationship between Islamic law and Kenya's national laws. He then turned to the public perception of Kadhis courts, divided between Christian opposition and growing Muslim support.

Kadhi Hamad opened immediately with his desire to develop rulings within Islamic law that would support victims of the AIDS virus. He commented on cultural practices among Muslims in Kenya that made women and children particularly vulnerable.

AIDS is a very serious problem among the Muslims. And what pains me a lot is that many of the victims are innocent.

And what pains me even more is that because of... traditions that we have, of usually pointing fingers at the women ... mostly it is the women who are accused.

The usual response to the HIV and AIDS pandemic is to focus on sexual promiscuity in society. In the Kadhis's words, Muslims "still insist that it is *zinaa*, *zinaa*, *zinaa* [sexual promiscuity] that causes it." In response to this situation, he would like to train other Kadhis to be attentive to the harm caused to the innocent. For Kadhi Hamad, this was not a complicated matter within Islamic law. The legal tradition of injury could be expanded quite easily to apply to cases of AIDS infection.

There were also cases in the practice of Islamic law where the tradition was silent, and which also needed to be changed. Thus, Kadhi Hamad appealed to his colleagues for taking into consideration the rights of children in cases. The following quote makes this very clear:

... a Kadhi in Lamu made the ruling of such a nature, where he allowed the woman to give away her infant child, in exchange for a house. So things which are there sometimes in ... books, but these books have been written or the scholars who have been commenting on such issues lived ... a hundred years [ago, when] there were no discretions about rights

of children also ... the father might be having these rights, the mother might be having these rights, but the child also has rights, has rights also. Will the child really be better off in the hands of the father than in the hands of the mother?

Clearly, Kadhi Hamad's views are in line with major modern reformist scholars of Islamic laws who favour the adaptation and even development of rulings in contemporary society.

The Kadhi reflected also on the need for a better appointments system. However, he did not see the need for Muslims to sit on the Judicial Service Commission, as many other Muslims had asked. He thought that interview process for new Kadhis was far too simplistic, and did not provide a sound basis for evaluating the qualification of a Kadhi. He also did not see the need for further legal training of the Kadhis. However, Kadhis courts were not following procedure in a systematic and consistent manner which, according to Kadhi Hamad, often led to grave injustices. The following quotes illustrate Kadhi Hamad's train of thought on training in procedure, adopting procedure from Kenyan law and serving the ends of justice:

... I believe they should be trained in the civil procedure. Because the civil procedure is the tool that is used now to, to file cases, evidence... and most of the things agreed totally with ... Islamic law

Islamic law might not be talking a lot about those things, but we as Muslim scholars, we can also come up with those things which agree ... with Islamic law.

... the Kadhi himself also should be, should be well trained so that something should not happen that is unjustified according to the procedure, and it ends up with somebody losing his rights, or something.

From an Islamic legal point of view, judicial procedure was open to development and adaptation. In many respects, then, the Kadhi was supportive of measures to improve the system by adopting values and measures in modern legal thought, and incorporating them in the practices of the Kadhis courts.

The Kadhi, however, did not see the eventual amalgamation of the Kadhis courts into the judicial system of Kenya. This can be seen on his views on

one particular recommendation proposed to the Kenya Constitutional Review and that received a lot of attention. I am referring to an appeals process within the Kadhis courts, which has been eventually left out of the final constitution. Kadhi Hamad was concerned that the lack of an appeal process did not allow judicial pluralism to work efficiently. Litigants who lost their cases in Kadhis courts were forced take their appeals to a court where the full impact and implications of Islamic law were not considered. Moreover, the Kadhis courts were not able to develop and address problems:

The people have themselves agreed that they are Muslims and they want to be judged Islamically, then there should be no allowance to go and be heard by another law just because he lost the case in the first. He should be heard again by another Islamic court that will see to it whether the Kadhi really did a mistake. It could be that he made a mistake, it could be that he did not consider part of the evidence that was given, it could be that he was biased, it could be that he was corrupt, you know there are so many things that could happen.

This was a hypothetical example, but seems to reveal some of the problems that the Chief Kadhi recognized in the application of Islamic and state law. It also perhaps revealed the challenges facing Kadhis courts. Kadhi Hamad, for one, believed that the problems could be addressed within the system.

This last point was also related to his view on the interface between the Islamic court as applied in the Kadhis courts, and Kenyan national law. The Kadhi was clearly supportive and open to the impact of new ethical directions on Islamic law. The example of children's rights given above makes this very clear. However, he was clear that the distinctiveness of Kadhis courts from other courts should be maintained:

We believe that if somebody is appointed as a Kadhi he should only be [a Kadhi] of Islam. You know it shouldn't be that he wears one hat at one time then wears another hat at another time.

He was particular concerned that Muslims coming to the court should always make a distinction between Islamic and national laws. Commenting

on a case where Kadhis were asked to judge case in Kenyan law, he referred particularly to its impact on Muslims: "And the Muslims said that they had no confidence with these Kadhis anymore, because they were hearing cases that were un-Islamic so it means that they believed in these other laws also to be applicable even to the Muslims." This comment raises an important question of how Kenyan Muslims accept national laws passed by the parliament, if these have not been adjudicated by Kadhis courts. In this short quote, it would appear that the application of personal law in Kadhis courts might be creating a particular attitude towards national laws. Whilst focussing on personal law, Kadhis courts were perhaps alienating Muslims from other laws.

This last point is clearly related to emerging religious identities raised by Khamis, Slatch and Wandati. Turning to the public perception of the Kadhis courts, the Chief Kadhi reflected on the polarization between Muslims and Christians in the public sphere. According to Kadhi Hamad, Christians were afraid of the growing Islamic presence in Kenya: "I visited Nairobi twenty years ago, you could hardly find a woman in Hijab, but now it's the opposite." This presence was matching a general Islamic revival globally, but it was supported by the desire of Kenyans who "find Islam to be more agreeable to their own traditions and customs." Since Christians were concerned about conversion as much as Muslims, the Kadhi argued, they were using the Kadhis courts to undermine the national profile of Islam. At the same time, Muslims were becoming sensitive to any encroachment to the application of Muslim personal law. He specifically referred to demonstrations in Mombasa when a higher court reversed a decision in a Kadhis court on a custody case.

Kadhi Hamad then presented a perspective on Kadhis courts that seemed to go in two directions. On the one hand, reforms in Kadhis courts were vital to take into considerations changing mores and values. These could be developed within Islamic law, or they could be drawn from general ethical and legal considerations. There were also other more technical areas that needed attention in the Kadhis courts. On the other hand, the Kadhi favoured a clear separation of the systems of Kadhis courts and national courts. Apart from preserving the integrity of Kadhis courts, Kadhi Hamad pointed to how this separation matched polarization between Muslims and Christian within public life.

Conclusion

The interviews illustrate a range of discussion among Muslims on Kenyan politics and Kadhis courts. It is not possible to generalize from these remarks to Kenyan Muslims in general. However, the interviews suggest some aspects of Kadhis courts that have been suppressed in antagonistic posturing between Muslim and Christian representatives. The interviews very clearly reflect some Kenyan Muslim positions on the general nature of the state, the place of Muslims therein and the particular role and function of the Kadhis court. There is a clear perception of the marginalization of Muslims from Kenyan society. This marginalization comes from two sources. Firstly, Muslims believe that they had not embraced modern education and allowed themselves to be excluded from the fruits of state power and the capitalist economy. And secondly, the Kenyan state was dominated by politicians who were using Christian symbols to support their policies and their electoral base. The deliberation over ecumenical or secular state options was a response to this status quo. In a positive sense, the discussion moved away from antagonistic positions between Muslims and Christians.

Closely related to this political discussion was a realization that the Kadhis courts needed a different justification than before. The agreement between the new Kenyan state and the Sultan of Zanzibar in 1963 was a distant memory. The Kadhis courts were there because of Muslim citizens in the Kenyan state. More importantly, the Kadhis courts were addressing the judicial needs of a section of Kenyan citizens. This transformed perception of Kadhis courts was necessary to justify them in a public discussion. More importantly, they reflected developments within Kenyan Muslim societies on how to represent themselves in Kenyan public life. The Kadhi were recognized as state functionaries who could not represent the Muslims as part of the civic sphere.

Interestingly, the interviews also included

considerable discussion on the reforms necessary within Kadhis courts to maintain their ability to address the needs of litigants. The courts were clearly popular in their ability to deliver decisions and justice, but there were concerns on procedures and interpretations that did not necessarily lead to desirable results. Khamis and Kadhi Hamad revealed two important but different dimensions of these reforms. Khamis was concerned about the judicial operations of the courts, while Kadhi Hamad reflected on the extensive reforms needed within Islamic legal thinking to address new challenges within society. The public debate had clearly suppressed both dimensions of reforms within Kadhis courts that had been brought to the attention of the review commissions. Discussions on reforms were pushed to the background as Muslims and Christians took antagonistic positions towards each other.

Closely related to the public antagonism from some Christian leaders was an indication that Muslims regarded the public sphere as a site of competition with Christians. This seems evidently the case with Christians as well. In spite of the healthy signs for different political options, the public sphere was characterized by competition as far as religious activists were concerned. As represented by Slatch and Wandati, Muslims and Christians made a significant contribution to pressure the Moi government in the 1990s to review the constitution. However, given the desire to infuse the public space with its own symbols, Christians could not cooperate with Muslims who were not prepared to compromise on Kadhis courts. Similarly, Kadhi Hamad revealed some of the spirit with which Muslims see the revival of Islamic practices in Kenya. With a deep sense of satisfaction, Muslim symbols were read in a competitive spirit. Whilst Muslims and Christians may continue to make a constructive contribution to public life, their efforts may also be limited by their desire to see their respective symbols dominate the public sphere.

Notes

- 1 *Jamia Masjid Nairobi*, <http://www.islamkenya.com/html/supkem.html>, accessed November 7, 2010.
- 2 Slatch, A. H., and Wandati, A. Interview by A. I. Tayob. Nairobi, June 17, 2003.
- 3 <http://tymagmch.blogspot.com/2006/07/yma.html>, accessed 4 November 2010.
- 4 Khamis, Muhammad (Original name changed). Interview by AI Tayob, Nairobi, June 19, 2003.
- 5 Hamad, Qadi. Interview by AI Tayob, Mombasa, June 6, 2003.

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