ANGLICAN RESPONSES TO *KADHI'S* COURTS[1] IN KENYA

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PRECIS

This contribution seeks to show the role of the Anglican Church of Kenya (ACK) leadership to the current discourse on whether or not there should be a provision for *Kadhi's* courts in the Kenyan constitution. The Anglican Church is the largest and oldest Protestant Church in Kenya. With a strong record of public engagement since the colonial times to the present, an analysis of the Church serves to show the changing role of religion in the public sphere within various contexts. As a background to the Anglican Church's involvement in the present discourse, this essay examines the contribution of some Anglican bishops in three discourses namely: the queue-voting controversy (1986-1990); the multiparty debate (1990-1991); and the constitutional review process (1999 to the present). The present discourse on *Kadhi's* courts falls within the constitutional review process. In order to interrogate the reasons behind the Anglican position on *Kadhi's* courts, I interviewed five Anglican Bishops and a senior cleric from western Kenya. This essay argues that while the past public engagement of Anglicans in fighting for democratic space in Kenya is significant, their discourse on *Kadhi's* courts has polarised the Kenyan people and diverted attention from the pressing need for continued political economic and social reforms in Kenya. Such polarization must also be viewed from the context of the colonial and post-colonial state which failed to mould a national identity above religious and ethnic considerations. The polarization in the Kenyan society has not spared the Anglican Church of Kenya and its leadership. Thus the Church seems to be fighting a complex war in seeking to re-invent its image and public effectiveness.

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 Ludwing 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 refered 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 (NCCK). It was Booth-Clibborn who recruited Henry Okullu as editor of *Target* newspaper, which succeeded *Rock* (Okullu 1997, 48–55). Okullu, later was appointed the first indigenous Provost at All Saint's Cathedral, Nairobi and subsequently became Bishop of Maseno South Diocese. 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 Idd 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, Bishop David Gitari of Kirinyaga Diocese who later become ArchBishop of the Anglican of Kenya and to a lesser extend 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 was 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 1990's

[1] *Kadhis'*(*qathi*) is an Arabic term which designates a Muslim judge or magistrate who adjudicates on matters according to Islamic law. In the Kenyan context, *Kadhi'*s are civil servants renumerated and regulated by the state.

had an earlier missionary impetus and also an ecumenical approach, although the context had greatly changed from the colonial one.

The public role of the Anglican Church in the period leading to the general elections in 2007 has severely been criticised. 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 extend 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 predecessor's, 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, 2009:).

Several factors led to the increased public role of the church in the 1990's, including the availability of greater space for dissent in society—a result of global democratic dispensation that has swept the world following the collapse of the Berlin wall in October 3 1990. This was closely followed up by the opening up of democratic space in Kenya in 1992. Such factors have made people more critical of the church and its leadership. Paradoxically, while such developments have increased space for political participation by civil society, including religious ones, it has also led to increased 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 *Kadhi's* 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, today its focus is on *Kadhi's* courts—an essentially marginal issue that has reduced the moral standing of the church. The position of the Anglicans on *Kadhi's* courts has further 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 to the effect that elections to the National Assembly should be reformed. The most controversial aspect of the proposal was the abolishment of the secret ballot in the first round of voting so that voters would have to queue behind the candidate of their choice. 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). On the other hand, the ruling party, KANU argued that the new voting system would be faster and more transparent than the secret ballot. However, observers saw the new system of voting as an indication of the increasing authoritarianism of the Moi government (Throup and Hornsby, 1998:39). The KANU delegates' conference coincided with a meeting of pastors organised by the National Council of Churches of Kenya (NCCK) 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 NCCK, 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. During the 1987 elections this method of voting was used. The then Archbishop Manasses Kuria described the proposed new voting method as 'unchristian' and recited 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 discourse on 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 Kenya African National Union (KANU) invited the opposition, Kenya African Democratic Union (KADU) for a merger 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 Multi Party Politics. In 1969, KADU was banned by the Kenyatta government. This changes were later to be enshrined into law under President Moi's regime, when on June 10, 1982, changes were made to the Kenyan Constitution of Kenya, in Section 2A , as well as Sections 5 (3)a and 5(5)a. The changes made it illegal for anyone who was not a KANU member to participate in competitive politics (Sabar 2002:204). For example, 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 in the face of oppression (Chesworth, 2009:157).This may be explained by the great hopes for the country and its leadership which Kenyans had after *uhuru* (independence). 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 rallying cry for 'peace, love and unity' embraced. His ethnic affiliation to the Tugen group of the Kalenjin presented him as one coming a small tribe, hence who would redeem the rest of the Kenyans from what was hitherto seen as Kikuyu political hegemony. His image as a God fearer, 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, had as its lead item, the president at a church service.

On August 1 1982, there was an attempted coup against Moi's government. From this time, Moi became increasingly autocratic and was 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 his Rift Valley other parts of the country. 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 1980's, the Anglican Church (then known as Church of the Province of Kenya (CPK), began to speak out. Like on 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 multipartism. The local debate in Kenya for multipartism 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 the 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 Manasses Kuria, the church's Archbishop.

In 1990 under the chairmanship of George Saitoti, the Vice President, KANU conducted an inquiry into multi-partism. Both Bishop Gitari and Bishop Muge appeared before it to argue the case for multi-partism. 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'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 Dec 1991. This allowed the registration of opposition parties and multi-party elections in 1992. Mainly because of division between 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 made calls to carry out a comprehensive review of the Kenyan constitution.

III. Anglicans, the Constitutional Review Process, and Kadhi's *Debates*

The process of reviewing the constitution started in earnest in 1998 with the passing of the *Constitution of Kenya Review Commission (Amendment) Act*. This process has been characterised by deep polarization within the Kenyan society. This section will highlight one such area of contestation- the place of *Kadhis* Courts. 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 (Andrearssen and Tostensen 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 opposition was set up to lead the process. The following day at *Ufungamano* House, near the University of Nairobi, Kenya's main religious groups (Catholic Church, member churches of the NCCK, the Supreme Council of Kenya Muslims (SUPKEM) and the Hindu Council of Kenya convened. The ecumenical significance of this grouping was that for the first time, differing religious groupings, including Islam 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). However, Yash Pal Ghai, as head of CKRC, demanded for a Joint process with Ufungamano Initiative's 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 for hearing.

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 refered to as *Bomas* I, II and III because of the venue where they took place- a government cultural centre called *Bomas*.

A. The Discourse on the Place of Kadhi's Courts in the Constitution

As discussed in the previous sections, since the 1990's Kenyans have been engaged in the struggle to have a new constitutional order. As argued, 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 1990's, the provision of *Kadhi's* (Islamic Judges) in the country's legislative framework become 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 members who were nominated through the *Ufungamano* Initiative and Mutava Musyimi, General Secretary of NCCK 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 *Kadhi's* courts?

1. Bomas Draft (2004)

Kadhis' Court 198.

(1) There is established the Kadhis's Court.
(2) The *Kadhi's* Court shall
a.) consist of the Chief Kadhi and such number of other *Kadhi's,* 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.

In an interview in 1994 with David Gitari, the former Archbishop, Kanyoni quotes the prelate's saying: "The personal laws of all minority groups cannot be given a constitutional recognition to 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, 6/1/2004).

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 *Kadhi's* Courts in the earlier drafts had kept closely to the existing Constitution, the Wako Draft sought to appease Christian and other non-Muslim stakeholders, by providing for religious courts in general and not just *Kadhi's* courts.

The referendum was held on November 21, 2005, with the results indicating a strong rejection of the Draft law. Although other reasons caused the defeat of the draft law, it can be posited that the place of *Kadhi's* courts, for both Muslims and Christians was a strong factor for the rejection of the proposed law. Other provisions in the draft which the Church and civic society had fought for many years 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 that ensued 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, among them the need for constitutional review, as a way of rebuilding Kenya towards a stable and secure future which is the immediate context for present efforts.

3. Anglicans and the Current Discourse

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

> "Anti-*Kadhi's* Courts fuelling Islamophobia," *Weekly Bulletin* (November 6, 2009)
>
> "Clerics dig in for fight against *Kadhi's* 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 *Kadhi's* Courts in the Constitution. There are other Christian churches who are against the constitutional provision for the courts while a few notably the Seventh Day Adventist have remained silent on the matter. The "Kenya Church," composed mainly but not exclusively of Charismatic Pentecostal groups, argues that *Kadhi's* 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) states that "State and Religion shall be separate"; "There shall be no state religion"; and "All religions will be treated equally."

Clearly, the arguments presented in the early period of the review process resonate with current arguments. The Anglican voice on *Kadhi's* courts has not been unanimous. There are other church leaders and adherents who have broken ranks with the Bishops of the Anglican Church in support of the constitution and the provision *Kadhi's* courts. David Gitari, the retired Archbishop, early quoted as objecting to *Kadhi'*s 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 19th 2010).

On the 27th November 2009, the Anglican House of Bishops released a Press statement concerning the Harmonized Draft Constitution which included a resolution on *Kadhi's* Courts. The resolution stated: "Remove the *Kadhi's* 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 *Kadhi's* 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 *Kadhi's* 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 *Kadh'is* 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 *Kadhi's,* 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 annuled, 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 section you say *Kadhi's* will be there and for you to be a *kadhi's* you must be a professing Muslim

> because a Christian can read *Kadhi's* law and become a *Kadhi's,* 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.
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> The second [reason for objecting the inclusion of *Kadhi's* 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 well 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 *Kadhi's* 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 *Kadhi's* courts is also opening space for discussion on the place of religion in a secular dispensation. Thus, while Bishop Wasonga contests the place of *kadhi's* courts in a secular state, he at the same times suggests that religions should have a place in 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 *Kadhi's* Courts are to 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 stood at that. So we decided to say, let us do away with *Kadhi's* 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 *kadhi's* 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 *Kadhi's,* 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.

In the above reasoning by Bishop Were, there are fears about the introduction of *Sharia* laws in Kenya and that introduction of *Kadhi's* 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 *Kadhi's* 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 *Kadhi's* 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 *Kadhi's* 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 *Kadhi's* courts enter the constitution? This was a personal arrangements between Kenyatta and Shamte, the Sultan of Zanzibar. And in fact it is unconstitutional to set *Kadhi's* 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 *Kadhi's* 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 Canon 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 continent[2]. The fear of the introduction of *Sharia* law in Kenya is also advanced for the opposition to *Kadhi's* courts.

B. Commentary on Emerging Themes in Opposition to *Kadhis* Courts

The themes emerging out of my interviews with Anglican Church of Kenya church leaders are to a large extend consistent with the position of the church between the period 2004 and 2005.

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 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.

The basic argument of those in support of *Kadhi's* 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 that 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

[2]There have been discussions by some Christians of a 'clandestine'meeting held by Muslims in Abuja,Nigeria in 1998. In this meeting, it is alleged that a resolution was passed to make Islam the official religion in the whole of Africa. Discussions on this 'meeting' serve to spread fear and discord among Muslims and Christians in Kenya.

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 their 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 so that letting *Kadhi's* 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 *Kadhi's* courts is that they have been associated with *Shariah* what is popularly used as a synonym for the penal law with its fixed penalties that can involve a capital punishment. However, there has so far not been any Muslim representative body in Kenya advocating Islamic penal law in Kenya. Furthermore, the term "*Shariah*" 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 *Shariah* can often be misconstrued by Muslims as an attack upon their core values. There is dire need for clarity about what *Shariah* actually means in order to move the discourse forward constructively.

Conclusion

The public discourse about *Kadhi's* courts has pitted Christians and Muslims in an adversarial way and is likely to negatively influence the results of the referendum and relations between members of the two traditions in the post-referendum period.

As I write 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 *Kadhi'*s courts. This reveals the inability of our society to think soberly about an important issue and to understand the importance of religious commitments and communities in and for our public life.

The role of the Pentecostal churches in shaping public perception of *Kadhi's* courts cannot be underestimated. This appears to have considerably influenced the Anglicans and other mainline churches on the matter.

Commenting on 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 NCCK;....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).

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. According to Benson (2009: 97–98), the Anglican Church was established in Kenya largely by missionaries of the Bible Churchmen's Missionary Society (BCMS), now crosslinks). Most of the Anglican missionaries sent 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 this affinity that may partly explain the common ground taken by Anglicans and Pentecostals on the issue of *Kadhi's* courts.

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

The Anglican Church spoke out against the Moi regime in the early 1990s, leading to the introduction of multi-partism and eventually regime change. Once that was achieved the church seemed to lose its ethical and moral focus. This is seen in its failure to speak out against the post election violence. The Church has campaigned for a new constitution, for 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 tension generated in the country over *Kadhi's* 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.

Because of the general thirst for a new constitutional dispensation among Kenyans coupled with reduced trust and respect for church leadership, the church may not succeed in defeating the draft law. Such an eventuality will significantly shape the public role of the church in future discourses.

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