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AN ARTICLE

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MUSLIM-STATE RELATIONS IN KENYA
AFTER THE REFERENDUM ON THE CONSTITUTION

Religio-state encounter between Muslims and the Kenyan government since independence can be traced in three phases. The first phase commenced with Muslim efforts prior to the independence to entrench their religious status in the Constitution of Kenya. These efforts culminated in securing Muslims religious courts (Kadhi Courts) and establishing them in the Kenyan Constitution. The next phase started soon after independence when the whole of East African region embarked on reforming its personal laws. Kenya, like her neighbours, established commissions to review and reform marriage and succession laws. Muslims, among others, were in the forefront in opposing these reforms. As a result of political pressures, Muslims were exempted from these reforms. The third phase was triggered by the constitution review process that started in the year 2000 and was concluded on 21st November 2005 when Kenyans went to the ballot box for the referendum on the constitution of Kenya. A majority of Kenyans, including Muslims, rejected the proposed constitution. This paper will trace the trends of these events and explore the causes and its consequences.

Background to the colonial constitution making process
Before independence, Kenya was ruled by two monarchs, the Queen of England and the Sultan of Zanzibar. The coastal strip was under the reign of the Sultan who later sought British protection. The interior of part of Kenya was a British colony. The relationship between the British and the Sultan pertaining to the coastal strip was governed by a treaty that was signed on 14th December 1895. The agreement was entitled the ‘1895 Agreement between Great Britain and Zanzibar respecting the possession of the Sultan of Zanzibar on the mainland and adjacent islands, exclusive of Zanzibar and Pemba’. The pact declared that the coastal strip would still belong to His Highness the Sultan, though it would be administered by the British. This in turn assured that the subjects of the Sultan in the coastal strip would enjoy prosperity and freedom of religion and worship.

In early sixties, struggle for independence was looming in Kenya and fears emanated as to the future course of the country. The British administration favoured the up-country ethnic groups which led to a shift in power towards the uplands.4 This led Muslims to solicit for self-rule along the 10 mile Coastal Strip which was championed by

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the Mwambao movement. Muslims were given assurances by the Governor of Kenya, Sir Evelyn Baring on 4th November 1958 that "the 1895 Agreement would remain the basis of the administration of the Protectorate". Due to discontent with the situation, representatives of the Coastal people went to meet the Sultan of Zanzibar in May 1960. Their main concern was that if the coastal strip would become part of an independent Kenya, they would be subjugated by an upcountry government that would compromise their culture and religion.

At the request of the Sultan of Zanzibar, the British government appointed a Commissioner, James W. Robertson in September 1961 and charged him to report on the 'changes considered to be advisable in the 1895 Agreement relating to the coastal strip, as a result of the course of constitutional development in Kenya'. In his report submitted to the British Government and the Sultan of Zanzibar, Mr. Robertson recommended incorporation of the coastal strip into Kenya before independence subject to certain safeguards being given to the coastal people which should be entrenched in the constitution. The Sultan of Zanzibar was prepared to relinquish his sovereignty on the coastal strip on the condition that he would be assured that the religious persuasions of his subjects would be safeguarded as set out in the Robertson's Report. On 8th October 1963 an agreement was signed by Duncan Sandays, Sayyid Jamshid, Jomo Kenyatta and Sheikh Muhammad Shamte to surrender the ten mile coastal strip to Kenya.

Among the safeguards included in the agreement was freedom of worship for all people living in the strip and more in particular for the citizens of Sultan and its future generations. It also provided that powers of the Chief Kadhi and other Kadhis should be protected and that they should judge according to Sharia in matters of marriage, divorce and inheritance. This paved the way for the Kadhi courts to be enshrined in the 1963 Constitution of Kenya. On 14th June 1967, the Kadhis' Courts Act was promulgated 'to prescribe certain matters relating the Kadhis' Courts under the Constitution, and for purposes connected therewith and incidental thereto'. Some members of Parliament opposed the principle of separate courts and laws for Muslims. This was rejected on the ground that Kadhis' Courts were provided in the Constitution hence an amendment to the Constitution would be required to effect the change.

Post independent reforms on personal laws
East African countries were dissatisfied with the state of their personal laws in the post-independent era. Colonial experience called for the need to restructure the applicable laws and remove the various forms of conflicts and discriminations that have been caused by the colonial legal set up. In Kenya, the Government set up two Commissions in 1967, one on the Law of Marriage and Divorce and the other on the Law of Succession. The terms of reference for these Commissions were 'to make recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform code applicable to all persons in Kenya, which will replace the existing law on the subject comprising customary law, Islamic law, Hindu law and relevant Acts of Parliament and to prepare a draft of the new law'. Several attempts were made to enact a Bill on mar-

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riage and divorce drafted by the Commission but they all failed. The last Bill was forwarded to the House in 1979. The male dominated Parliament rejected the Bill on the ground that it was too western and gave too many rights to women. On the other hand, the Commission on the Law of Succession drafted a Bill of the Law of Succession and forwarded it to the Parliament in 1970 but failed. However, the Bill was passed in the second attempt and paved the way for the Law of Succession Act 1972. Kenyatta kept the Bill pending his assent and ‘thought it prudent not to hurt Muslim sensibilities or those of the majority of Africans’. 8

The Commission on the Law of Succession was of the view that ‘the existence of different laws of succession within the same territorial legal jurisdiction necessarily causes problems’. 9 The Commission cited defects found in the Islamic Law of Succession such as its ‘failure to cater for non-Muslim relatives who cannot inherit the property of a deceased Muslim’. It further noted that ‘The Mohammedan Marriage, Divorce and Succession Act (Laws of Kenya Chapter 156) considers marriage as the only basis for one’s qualification to inherit in relation to Islamic Law of Succession’.

Muslims on the other hand opposed the Bill on the ground that according to the provisions of sec. 5 (1) ‘Muslims were required to make wills in order for them to have their property devolve according to the Islamic Law of Succession’. They further pointed out that the Bill allows adopted children to inherit and provides for equal division of assets of the deceased among heirs regardless of their sexes. Due to political reasons, the Act remained inoperative until 1st July 1981 when it was gazetted. Thereafter, Muslims continued to campaign against the Act. In 1990, voices of multi-party politics were gaining momentum in Kenya. Moi’s single party regime was facing a lot of opposition from several pressure groups. In this atmosphere, Moi wanted to ‘win the hearts of the Muslims’ and gain their support. Due to Muslim political pressures, Moi ordered in 1990 that Muslims be exempted from the application of the uniform Law of Succession Act and provided for the devolution of testate and intestate succession in accordance with Islamic law.

Constitution of Kenya review process
Debates on reviewing the Constitution of Kenya started in mid-1990. They engaged political as well as religious circles. Main concerns of the stakeholders in various forums included the proper representation of marginalised ethnic groups, an equitable share of power and resources, and religious as well as gender equality. The review was geared towards the protection of human rights and ensuring people’s participation with transparency and accountability. Public debates on the constitutional reforms exerted pressure on the government. Moi announced on 1st January 1995 of the Government’s plan to invite foreign experts to draft a constitution but the idea never materialised. 10 Due to the lack of government’s commitment to the review process, civic groups supported by op-

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position political parties pressured the government for a comprehensive review of the constitution. This resulted in the political parties commencing inter-party negotiations within the framework of the Inter-Party Parliamentary Group (IPPG) in August 1997.

On the other hand, the government reacted by enacting the Constitution of Kenya Review Act in 1997 to provide the legal framework for the constitutional review. The Review Act 1997 was rejected due to lack of due consultation with the stakeholders. This led to negotiations in Bomas of Kenya and Safari Park Hotel between June and October 1998 with the aim to identify an acceptable framework for the process. A committee of 12 persons was nominated by political parties, civil society, women and religious organisations. The result was that the Act was amended in 1998 to reflect the consensus reached during these negotiations. The various stakeholders could not agree however on the nomination of the commissioners. This stalemate resulted in two parallel review initiatives. The first was the Parliamentary initiative supported by the then ruling party KANU among others. The other was the Ufungamano initiative, backed by national religious organisations, opposition parties and the civil society.

The Ufungamano initiative appointed the People’s Commission of Kenya to collect and collate views from Kenyans. The Parliamentary initiative established a Parliamentary Select Committee on the Constitution review to consider further the question of how to restart the stalled review process. The proposals of the Parliamentary Select Committee led to further amendments to the Review Act in 2000 that reflected due consideration to ethnic and social diversity during the selection of the commissioners. The Constitution of Kenya Review Commission (CKRC) was finally established in November 2000. In an effort to bring about the merger of the two processes, the Constitution of Kenya Review Commission mandated its chairperson, Prof. Yash Ghai to facilitate negotiations between the Ufungamano initiative and the Parliamentary Select Committee that led to a merger in December 2000. The review Act was again amended in May 2001 to incorporate the terms of the merger agreement. Membership of the Constitution of Kenya Review Commission accommodated ethnic as well as religious backgrounds. A striking feature is that one quarter of the commissioners appointed were Muslims. For the first time, in post-independent Kenya’s history, Muslims were privileged to have such a representation in a statutory body.

The Constitution of Kenya Review Commission went round the century to collect and collate views of Kenyans on the constitutional review. Efforts of the commission culminated in the publishing of its recommendations in a report entitled ‘The People’s Choice’ on 22nd September 2002. The final Draft Constitution was adopted by the National Constitutional Assembly and was published on 15th March 2004 and verified and confirmed by the Constitution of Kenya Review Commission. Among proposals recommended by the document was devolution of power at the provincial and district level. It also provided for sharing of power between the president and the prime minister in running the affairs of the state. It further secured social and economic rights to the marginalised ethnic groups. With regard to Muslims’ position, the Commission recommended retaining the status quo of the Kadhi’s Courts as provided in the 1963 Constitution.

The recommendations presented by CKRC led to a lot of controversy that set an arena for political debates. The draft proposals went through several stages of discussions. Later, a Parliament Parliamentary Select Committee was established to present its proposals in the form of the Proposals of the Parliamentary Select Committee on the Re-
view of the Constitution of Kenya July 2005. As far as Muslims are concerned, the Committee adopted the proposals made by the Constitution of Kenya Review Commission. The government was dissatisfied with the proposals forwarded by both the Constitution of Kenya Review Commission and the Parliamentary Select Committee. In order to streamline these proposals, the government forwarded them to the Attorney General to be put them in ‘a proper legal format’. Finally, the Attorney General published the Proposed New Constitution of Kenya on 22nd August 2005. This brought the constitution review process to an end awaiting the people of Kenya to voice their views. The Electoral Commission of Kenya announced the date for referendum to be on 21st November 2005. Kenyans had the option of either adopting or rejecting the proposed constitution drafted by the Attorney General.

Referendum on the Constitution of Kenya
The release of the draft constitutions swerved opinions of Kenyans and divided their stand across the country. The referendum took a political profile and the atmosphere was set for political commotion. The government with all its machinery urged Kenyans to approve the proposed draft by the Attorney General. On the other hand, several Ministers appealed to their countrymen to reject it. Division of opinions did not spare the religious circles. Most Christian churches adopted a middle path by calling on its adherents to study the proposed constitution drafted by the Attorney General and make their ‘own choice’. This included the Kenya Episcopal Conference (KEC) and the National Council of Churches of Kenya (NCCK). On the other hand, the Kenya Church called on its faithful to reject the document. The Church had earlier on presented its views to the Constitution of Kenya Review Commission in a detailed document.11 The Kenya Church pointed out that ‘the personal laws of these two minority religions (Muslims and Hindus) 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 population’. Muslims countered this argument by stating that ‘the Constitution and laws of Kenya reflect the Judeo-Christian origins and beliefs of the colonial masters. Indeed the conduct of state is manifestly Christian in nature. Christian law is the basis for the practice of family law in Kenya’.12

The draft proposed by the Attorney General provided for a sweeping section in the constitution that established religious courts including Christian courts, Kadi’s courts and Hindu courts. Jurisdiction of these courts was however confined to the determination of matters related to personal status as may be prescribed by an Act of Parliament. The Attorney General’s efforts to provide courts for all faiths served as a double edged sword in that on one hand it responded to the call of the Church of Kenya in treating all religions equally. On the other hand, the Attorney General managed to shrink the status of the Kadhis courts to avoid favouring the Muslims alone.

A majority of Muslims pleaded that the proposed constitution be opposed. This ‘No’-stand, which was supported by the Majlis Ulamaa-Kenya,13 came to the public for

12 "The Muslim Position: A Response to the Kenya Church Concerns", Muslim Task Force on Constitutional Review, Nairobi, January 2003
13 The Majlis Ulamaa-Kenya is an umbrella body of Muslim scholars that represents all the provinces of Kenya. A group of Muslim professionals visited South Africa in 2003 and benefited from
the first time and appealed to Muslims to reject the document. The Majlis Ulamaa-Kenya was officially inaugurated on Sunday 17th April 2005, after a culmination of efforts that brought together more than 300 Muslim scholars in the single biggest gathering of its kind in Nairobi from 15th to 17th April 2005. After a day long consultative meeting held at Jamia Mosque Nairobi, the Majlis noted: ‘We are satisfied that, as it currently stands, the Wako Draft must not become the constitution of the country’. Conversely, the Supreme Council of Kenya Muslims adopted a middle stand by urging Muslims to go for civic education before making their informed choice.

*Reflections on the aftermath of the referendum*

The results of the Referendum were released on Tuesday 22nd November 2005. It proved that 57% of the Kenyan voters had rejected the proposed constitution. Muslim dominated constituencies in the Coast Province voted against the document by a margin of 80%, and that of Northern Eastern Province rejected it by a majority of 75%. The rejection of the proposed constitution has had repercussions beyond the document itself. Columnists in the daily newspapers analysed the results from different perspectives and noted that the government ‘failed to study the mood of the people’. This was evident from the fact that even the strongest dignitaries surrounding the President had failed to deliver votes in their own constituencies. The Majlis Ulamaa-Kenya in a press release pointed out that ‘apart from the outright danger the proposed constitution poses to the Kadhis courts, it did not reflect the wishes of Kenyans’. It further accused the Attorney General of ‘mutilating the people’s choice which had guaranteed the fundamental rights of Kenyans. Of particular concern were provisions regarding the devolution and rights of the minority and marginalised communities’. The results of the of the referendum have reiterated the unified stand of the majority of Muslims against State policy similar to the case of rejecting the Law of Succession Act as mentioned above. The rejection of the proposed constitution was supported by Muslim leaders such as the Majlis Ulamaa-Kenya and the Chief Kadi of Kenya, Sheikh Hammad Muhammad Kassim.

President Kibaki was forced to adopt unprecedented measures of dissolving his cabinet and suspending the parliament. In taking such a stern step, the President argued that he needed to reorganise his cabinet and assure its efficient running. He promised to appoint a new cabinet that would ‘serve the interests of the country’ within two weeks from 23rd November 2005. A notable feature in this political stalemate is the engagement of the Church by President Kibaki despite his earlier inclination not to involve religion in politics. The State House has opened its doors to seek consultation from the clerics in a bid to create a new look for the anticipated cabinet. Adherents of other religions may view this privilege as a State favouritism of fellow faithful. The head of the Catholic Church met the President and welcomed the initiative noting: ‘The Church will be more than willing to share with the President on matters like this when called up-

the experience of the Majlis Ulama in Transvaal, hence adopted it as a model. It has been established after a series of meetings between Muslims scholars and legal experts held in Nairobi between August and October 2003. Among its objectives is to bring Muslims in the country to be united and issue Islamic verdicts (fatawa) on emerging contemporary issues

14 *The Friday Bulletin*, Issue No.124, Shaban 05 1426/September 09, 2005-11-30 (a publication of Jamia Mosque Committee, Nairobi)

15 *Supra* Note 11
On the other hand, the Protestants under the umbrella of National Council of Churches of Kenya presented a memorandum to the President on 30th November 2005 advising the State on ways to come out of the ensuing stalemate.

During the referendum campaigns, the President promised the coastal people that he would tackle the teething problems facing the region. This included development programs such as the overdue establishment of a university and lessening the rigid procedures in obtaining documents of identity. After the referendum, the National Chairman of the Majlis Ulamaa-Kenya, Sheikh Khalfan Khamis, reminded the President ‘to fulfil his promises made to Muslims and to other communities and urged him to ensure that his next government reflected the diversity of the people of Kenya’.

Incidentally, the Mombasa Anglican bishop Julius Kalu said: ‘Coast people had been peaceful, loyal and patient for long time and it was time they were rewarded with significant ministerial positions and not just with being in the Cabinet’. Muslim grievances have triggered the establishment of the Islamic Party of Kenya in January 1992. Subsequently, the government denied its registration on the ground of it being a religious party. This together with other factors led Muslims to go on rampage in Mombasa on 19th May 1992 paralyzing the whole city. Muslims have demonstrated since independence that their voice counts when it comes to policy issues affecting them. This has been reflected in the results of the referendum. The government is therefore expected to honour Muslim sentiments and discontinue the inherited legacy of disregarding their grievances. In a thanks giving speech to Muslims for their united stand in rejecting the proposed constitution, six Muslim MPs urged the President to ensure proportionate Muslim representation in the new cabinet and all sectors of the government so as to reflect their 30 percent of population in Kenya. Addressing the gathering, the former Heritage Minister, Najib Balala, said: ‘the unity exhibited by Muslims in the referendum campaign showed that Muslims were a united force to reckon with’. He further warned ‘from now never [to] ignore the power of the Muslims’.

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16 *Daily Nation*, Nairobi, Friday, December 2, 2005-12-02 p.1
17 *The Friday Bulletin*, Shawwal 30 1426/December 02, 2005-12-02, p.1
18 Supra Note 12, p.4