CHAPTER FOUR

Muslim Politics in the Legislative, Judicial, and Constitutional Arenas

The Equality Bill 2002: Women’s Emancipation in Kenya

The phenomenon of the politicization of Islam has become so entrenched that Muslim leaders tend to weigh every government decision in terms of their faith, thereby calculating possible gains and loses. In this chapter, I focus on the constitutional debate and public laws that were politicized by Muslims and thereby became the subject of a religio-political conflict. Kenya has a significant record of legislation that has been met with strong Muslim opposition: the Succession Act (1972), the Marriage Bill (1985), the Equality Bill (2002), and the Anti-Terrorism Bill (2003) together with the Kadhi courts as entrenched in the Independence Constitution and recommended in the Bomas Draft Constitution. These are particularly significant issues for Kenyan Muslims, since they determine their development in the country. Reasons for their rejection varied, with some of the legislation viewed as a direct affront to their religious beliefs or interfering with their individual liberty as Kenyan citizens.

More recently (from 2003), the controversy surrounding the relationship between Muslims and politics in Kenya has come to focus on the centrality of the sharia through the Kadhi courts. The acrimonious debate over the Kadhi courts among Muslims, and between Muslims and non-Muslims, has raised several important issues bearing on (a) the religious status of Muslim personal law, (b) to what extent Muslims can claim zones of legal autonomy in a secular state, and (c) how Muslim personal law can be made compatible with the Kenyan constitution. This tension is the predictable situation of a national minority negotiating with a dominant majority in both religion and politics (parliamentary representation). These intense dynamics have a crucial role in influencing the politicization of Islam in Kenya.

The Equality Bill was drafted in early 2000 as a response to the Beijing gender conference. The conference addressed gender equality issues in many
areas, followed with a declaration that called for action to promote gender equality in human rights, domestic responsibility sharing, participation in public life and decision making, access to health services and education, and the eradication of poverty and all forms of violence against women. The Attorney General’s Office in conjunction with Federation of Kenya Women Lawyers (FIDA), introduced the bill to parliament, which intended to promote “the welfare of all Kenyans and to outlaw discrimination based on gender, race, ethnicity, citizenship, creed, marital status, disability, family status, sex, age or colour.” Despite this broader scope of the bill, its main focus was to protect Kenyan women against discrimination. Ever since it was proposed in 1999, the bill had caused political and religious controversy. In support of the bill were the civil and human rights groups, women’s organizations, donors, and opposition politicians. While President Moi and some churches were opposed to the bill, the strongest reaction to the document came from sections of Kenyan Muslims, precipitating a religio-political conflict. Though the bill was intended to promote gender equality, Muslims rejected it as soon as it was published. Their objections centered primarily on the marriage, divorce, and inheritance clauses of Part II, Section 4, of the bill that states:

Every person is entitled to equality with respect to the following without discrimination:

a) acquisition, change or retention of nationality and change of domicile;
b) access to financial credit without requirement for guarantee by a spouse;
c) rights and responsibilities during marriage and its dissolution and in all partnerships and unions;
d) use, distribution and disposal of property acquired during marriage;
e) inheritance.

Despite stating a diversity of reasons for the rejection of the bill, the main grounds for the rejection of the Equality Bill was that it was a gross abuse of the fundamental right of Muslims in Kenya to be guided by the Islamic legal code on matters of personal law. While this was the case, some Muslims charged that the bill intends to “make men and women the same,” which according to them is contrary to Islamic teachings. Even without accurate knowledge of the bill, many interviewees readily spoke of it as being “against the Islamic faith” because of its portrayal of men and women as the same.

The defense of Islam was presented by the opposing Muslims as the reason for their objection to the Equality Bill. According to them, they did not need new laws since the sharia was enough as it has stipulated proper guidance for Muslims. As a result, most Muslims, both male and female, denounced the
Equality Bill as irrelevant for the community and, consequently, appealed to the government not to include them in the bill. They argued that if included, it would violate their fundamental rights to be guided by the sharia on matters of personal law. Their position generally strengthened the customs of conservative religious society arguing that Muslim women do not need to be liberated by the bill because the sharia has clear stipulations to safeguard the interests of both sexes. Such a view does not critique the social provisions that place women within the Islamic tradition in a subordinate position. It emerged that most of the Muslims irrespective of their sex were advocates and not opponents of the existing Islamic social system. Clearly, this request by Muslims ran counter to the spirit of the bill, which sought to remove exclusion and discrimination. To show their dissatisfaction, protest marches were held in both Nairobi (October 2000) and Mombasa (November 2000), where Muslim women presented a memorandum of objection to the bill. Their rejection of the bill portrayed the concept of gender equality as foreign and a blind imitation of other cultures that are not in harmony with the stipulations of their faith.

The notion of equality, which was captured in the title of the bill, raised suspicion among Muslims as to the intention of the bill. The issue of equality was passionately discussed by Muslims, and in that respect a question could be asked: does Islam recognize equality between sexes? This question was interpreted differently by the respondents. There are those who understood “equality” to mean “sameness,” and they responded in the negative because to them Islam does make a distinction between men and women. This position is supported by a Muslim scholar who argues that “from the Islamic point of view, the question of the equality of men and women is meaningless” because “men and women are not the same”; rather, “Islam envisages their roles in society not as competing but as complementary.”

Amin Wadud has criticized this notion of complementary roles that places “a man to be on a vertical line vis-à-vis the woman,” which goes against the spirit of reciprocity as envisaged in the Quran. She contends that both the man and the woman are “equally essential in creation” and consequently “reciprocally responsible for [their] relations with others.”

To avoid such an understanding of the Islamic viewpoint on the issue of equality, Muslims need to interpret various Islamic texts in a dynamic and not static way. More so, the “equality” intended by the bill is equality in rights and duties, and not “sameness.” This is why those who answered in the affirmative interpreted the issue of equality to mean justice and fairness in Islam. According to them, Islam does not prefer men over women, but both have equal roles, obligations, and rights that are stipulated in the Quran. The defense for this interpretation is traced to Quran 33:35, which exhorts both men and women to do good and promises them the same reward, thereby often cited as proof of equality between men and women in Islam.
At this juncture, it is significant to understand that most Muslim ulama supports polygyny, invests the unilateral power of divorce in man, and sanctions the unequal sharing of inherited wealth between the sexes. Therefore, Muslim opponents of the bill regard parts of it to be in contravention of the widely held views of many Muslims on marriage, divorce, and succession as provided in Kenyan law under the Mohammedan Marriage, Divorce and Succession Act. I will now return to these three issues (marriage, divorce, and inheritance), which influenced Muslims’ opposition and find out if the Equality Bill could be related to the spirit of the Quran.

Polygynous Marriage in Islam

Marriage is an important institution in Islam, and unlike in Christianity where it is considered as a sacrament, in most understandings of Muslim ulama, it can easily be regarded as a matter of social contract even though it is fully invested with all the religious meanings. At one level, marriage sanctions relations between human beings, while at another it symbolizes interaction between human beings and God. According to the views of many Muslim ulama, it is through marriage that men and women are able to guard themselves against indecency, reproduce children for maintaining humanity, and satisfy their sexual urges. Under certain circumstances, the Quran allows a man to marry up to four wives at the same time. Despite providing conditions under which a man can marry additional wives, indulgence in multiple marriages is one of the most abused practices by Muslim men worldwide. Polygyny is observed by some Muslim men with lust rather than family welfare as their overriding motive. This is contrary to the Quranic position on the issue that is reflected in the verse “marry women of your choice, two, three or four. But if you fear that you will not be able to deal justly (with them), then only one, or that which your right hands possess. That will be more suitable, to prevent you from doing injustice.” This verse essentially provides a Muslim man with the freedom of choice to have more than one wife at the same time, with a maximum of four. However, this freedom is circumscribed by a condition that has to be fulfilled before a man can indulge in a polygynous marriage. The polygynous man is expected by the Quran to deal justly and equitably with all his partners in all aspects of their marital life.

The debate over the issue of polygyny among Muslims in various parts of the world is whether practices explicitly declared acceptable by the Quran can be considered erroneous and subjected to alteration. Several postcolonial Muslim states in Africa like Tunisia, Egypt, and Sudan embarked on reforming the Islamic family law in their respective countries in the early twentieth century. In these countries, some parts of Islamic family law were more easily compliant to legal change than other sections. On the issue of polygynous relations, Tunisia was the only country that candidly abolished the practice
and imposed a penalty on individuals found engaging in it. Apart from being confined to feminist discourse, the abolition of polygyny in Sudan has not occupied the plan for legal reform in the country. In Egypt, the debate on restricting the number of partners in a marriage has been approached with prudence, divulging the sensitive nature of the matter. Though the debate on whether to abolish, restrict, or retain polygyny appears symbolic, the popularity of this form of marriage is noted to be waning in all these three countries.\(^\text{14}\)

With regard to the Quranic condition on polygyny, it is the position of some analysts like Alamin M. Mazrui that maintaining comprehensive equality and justice between one's spouses is an impossible task.\(^\text{15}\) Given the limitation of human beings, it will be difficult for man to treat all his partners with equity without showing some hints of favoring a certain side. It is clear that the spirit of the Quran has been inclined toward monogamous relationships, and on the basis of the Quran 4:3, one can argue that Islam does not require polygyny. Its permissibility under strict conditions is an implication that the practice is a limited freedom for men and not a duty. Perhaps some Muslims in Kenya have come to this realization. A study on a section of the Muslim population, the Digo, indicated that monogamous marriage is the widely practiced form of marriage among the group despite the permissibility of polygyny in Islam. A number of women involved in that study stated their unwillingness to stay in a polygamous marriage for various reasons, whereas most of the males “cited lack of adequate financial ability (\textit{uwezo}) as the main reason for not engaging in polygamy.”\(^\text{16}\) Since the Equality Bill was advocating monogamy, it could be argued that it was in accord with the spirit of the Quran.

**Divorce by Repudiation**

Like polygyny, divorce is also one of the most abused practices by Muslim men.\(^\text{17}\) Though permitted in Islam, divorce is an act detested by God. Mere pronouncement of the words “I divorce you” in the presence of witnesses is enough to dissolve one’s marriage. This power of divorce by repudiation, without compulsion to show cause for the action, is entirely endowed in man.\(^\text{18}\) Arguably, it is as a result of this provision of unilateral right to divorce by repudiation that the frequency of divorce cases is reported to be high in the contemporary Digo society.\(^\text{19}\) A study conducted among the Digo Muslims observed:

The most widespread type of divorce in Digo society is repudiation (\textit{talaka}) pronounced or written by a husband. A Digo man may repudiate his wife by telling her “\textit{nkakuricha siwe mchetu wangu}” (I have released you, you are no longer my wife) or “\textit{nkakuricha phiya kaya}” (I have released you, go back to your home). A man does not have to state the reason for the divorce nor is the presence of the
wife necessary. Indeed, it is common for a husband to send a written divorce deed to his estranged wife when she is already back with her relatives.20

On the other hand, a woman who seeks divorce must acquire a judicial pronouncement from the Kadhi (Islamic judge). Muslim women have to appear before a Kadhi and request the court to grant a divorce under one of the several available categories.21 These classifications can be either taliq talaq, where the wife claims that the husband committed an act that according to the marriage agreement calls for talaq to be effected, or as faskh, where arising conditions merit the dissolution of the marriage. In the process, the woman would be required to submit valid reasons for seeking the termination of the marriage. Before I make any conclusions, let’s examine the position of the Quran on the matter:

When ye have divorced women, and they have reached their term, then retain them in kindness or release them in kindness. Retain them not to their hurt so that ye transgress (the limits). He who doth that hath wronged his soul. Make not the revelations of Allah a laughing stock (by your behaviour), but remember Allah’s grace upon you and that which He hath revealed unto you of the scripture and of wisdom, whereby He doth exhort you. Observe your duty to Allah and know that Allah is aware of all things.22

It is clear that men are supposed to enter into marriage with women on equitable terms and similarly dissolve their unions with women on equitable terms. According to Alamin Mazrui, this equitability of terms is in reference to substance as much as to procedure.23 From the premise of Mazrui’s position, only a court of law as an independent party can determine whether the terms of divorce are genuinely equitable. Against the backdrop of the Quran 2:231, one can reason that Islam accepts the establishment of alternative structures that will eliminate the abuse of the power of divorce by repudiation. The Equality Bill’s intention of restoring justice among partners during the dissolution of their marriage accords with the Quranic spirit of promoting equitability of terms at the point of divorce.

The Law of Succession

I have shown in chapter 3 that the Islamic law of succession is the most sensitive area when it comes to reforms. Muslims in Kenya were against efforts to reform the Islamic laws of succession during the early 1970s. Muslims’ reaction is attributed to the formula laid out in the Quran that can be used in settling matters of inheritance. In simple terms, the Quran enjoin:
Allah commands you regarding (the inheritance for) your children: To the male, a portion equal to that of two females: If only daughters, two or more, their share is two-thirds of the inheritance; If only one, her share is half. . . . For parents a sixth of the inheritance to each, if the deceased left children; If no children, and the parents are the (only) heirs, the mother has a third; If the deceased left brothers (or sisters), the mother has a sixth. (The distributions in all cases is) after the payment of legacies or debts. You know not, which of them, whether your parents or your children are nearest to you in benefit. These are the portions settled by Allah; And Allah is ever All Knowing, All Wise.

In that which your wives leave, your share is a half, if they leave no child; But if they have a child, you get a fourth of what they leave; After payment of legacies or debts. In that which you leave, their share is a fourth, if you leave no child; If you leave a child, they get an eighth; After payment of legacies and debts. If the man or a woman whose inheritance is in question, has left a brother or a sister, each one of the two gets a sixth; But if more than two, they share in a third; After payment of legacies or debts; So that no loss is caused (to anyone). It is thus ordained by Allah; And Allah is Always All Knowing, Most Forbearing.

Generally, the mathematical formula illustrated in the Quran has been perceived to be “inequitable” where it apportions less to women than to men. The two verses explicitly show that when it comes to distribution of inheritance between male and female relatives, the men get double the share of women. This disproportionate distribution between the sexes has been defended and justified by many Muslim ulama. Its defenders have argued that in an ideal Islamic family the responsibility of earning a livelihood is exclusively placed on men, in this case the father. In the absence of the father, the brother takes the responsibility for the woman’s maintenance. After marriage, it is the husband who is required to provide and meet all the maintenance expenses of his wife. Whatever the woman earns and acquires over the years is exclusively hers, while what belongs to the man is shared with the woman.

It is against this reasoning that the lower proportion of women’s inheritance has been justified. Such an interpretation would again be argued to be a static and not a dynamic understanding of the Islamic law.

Emerging realities among Kenyan Muslims today call for reevaluation of this original justification with regard to disproportionate distribution of inherited wealth. Among Muslims in Kenya, there are cases where men have neglected to fulfill their material responsibilities in a manner provided by the Quran. As a result, there are several cases where women have to play the role of the family provider for unemployed siblings and husbands together with
aged parents. In addition, new economic demands have forced women to join their spouses in the work arena and assist in providing for the family. Present-day family needs and other economic expenses have made it impossible for men to be the sole family providers.

In his call to Kenyan Muslims to reflect on the emerging situations and thereby move toward reforming the Islamic law of inheritance within the spirit of the Quran, Mazrui remarks:

Certainly, the spirit of justice and equality in Islam cannot be blind to these unfolding new realities. Where the gender imbalance in the Islamic law of inheritance was both equitable and just in a particular context in time, it can no longer uphold these principles adequately today.27

As a result of the developing new economic environment, there is a need for Muslims in Kenya to reformulate the law of inheritance so as to uphold justice and equality, which is the foundation of the Quran. The Equality Bill took these changes into consideration, which necessitated the distribution of inheritance to be equitable. Despite the Equality Bill being consistent with the Quran, it is clear that most of the Kenyan Muslim religious leaders do not subscribe to the modernist and liberal interpretation of the Quran. They believe that such an interpretation is contrary to the Islamic doctrine, and this is why their opposition was uncompromising. As a result of the Muslims’ opposition and other sections of the Kenyan population, the bill was not enacted into law. The outcome of the debate on the bill favored Muslims because the political leadership was also against the bill.28

The Suppression of Terrorism Bill 2003: Legislating Against Terrorism

The international community recognizes that terrorism constitutes a global threat, and it has committed itself to taking firm action to address the problem. The activities of international terrorism have raised the issue of how global security can be guaranteed and maintained.29 In solidarity with the international community against terrorism, Kenya acceded to the International Convention for the Suppression of Terrorism and ratified both the International Convention for the Suppression of the Financing of Terrorism and the African Union Convention on the Prevention and Combating of Terrorism.30 These international resolutions implied that the global community was bound to create strategies to fight terrorism. It was against this background that after the terrorist attacks of 9/11 and the subsequent international resolution on terrorism, the U.S. government passed antiterror legislation, the U.S. Patriot Act, to combat terrorism.31 Thereafter, many countries taking a
cue from the U.S. government passed antiterror legislation such as the Anti-
Terrorism Crime and Security Act (Britain), \(^{32}\) Prevention of Terrorism Act
2002 (India), \(^{33}\) Anti-Terrorism Act 2002 (Uganda), \(^{34}\) and Prevention of Ter-
rorism Act 2002 (Tanzania). \(^{35}\) According to Ali Mazrui, African countries like
Uganda, South Africa, Tanzania, and Kenya were under American pressure to
pass their own antiterrorist legislation, intended to control their Muslim pop-
ulations and potential al-Qaeda infiltrators. \(^{36}\) Due to the purported pressure,
Uganda and Tanzania were among the earliest countries in Africa to have
antiterror legislation.

In 2003, Kenya’s attorney general published the Suppression of Terrorism
Bill, which was part of the effort by the government to combat terrorism.
Before the bill had the opportunity to be taken to parliament for discussion,
it raised wide criticism from a cross-section of Kenyans. This included law-
yers, human rights activists, and parliamentary legal committee and Muslim
leaders who had all described the bill as draconian and oppressive. \(^{37}\) The Ken-
yan public believed that the U.S. government had influenced the drafting of
the bill because there were many similarities between it and the U.S. Patriot
Act. \(^{38}\) This explains why some of the antibill marches were also vocal against
the U.S. government, as witnessed in the July 2003 demonstrations organized
by human rights lobbies and student organizations, where protesters burned
American flags. \(^{39}\) Although the Suppression of Terrorism Bill was connected
to the global event of September 11, 2001, the Kenyan debate focused on the
local implications of this new legislation.

The opponents of the bill feared that if adopted it would undermine civ-
il liberties and human rights and infringe on citizens’ privacy and freedom.
This is because the proposed law empowered the government to open and
read private letters, download e-mails, and confiscate computers. All it would
take were suspicions by a police officer that a person might be engaging in
terrorist activities. The powers of investigation under the bill were also im-
mense. The proposed law allowed the police to use “necessary force” instead
of “reasonable force” on suspects, and while all this happens the police would
not be liable for any damage they inflict on a suspect in implementing this
law. This raised the fears that if the proposed legislation was adopted it would
legitimize excessive police violence against a suspect, a culture of impunity
and routine torture in the name of “state security.” \(^{40}\)

The bill also criminalized any association with any member of an organi-
zation that has been declared “terrorist.” Directors of banks that offer financial
services to the organization or its members, property managers who lease their
premises to them, lawyers who arrange for trustee or nominee ownership of
any property belonging to the organization or its members would be subject
to long-term imprisonment. The onus of proof of innocence in most of these
offenses would rest with the accused person. All the prosecution would have
to prove is that someone was found in possession of an article that could be
used for terrorist purposes. It would now be the responsibility of the accused
person to prove to the court that the article was not meant to cause terror.\textsuperscript{31}
Apart from the bill infringing on individual freedom and privacy, Kenyan Muslims strongly believed that it was also anti-Muslim. Muslims asserted that
the government was already applying the provisions of the bill against them
even before it had been enacted into law. One official of a Muslim organi-
zation claimed that “over thirty Muslims have been arrested and others are
facing trial on allegations of being terrorists. To us this shows that this govern-
ment has targeted the Terrorism Bill on Muslims only.”\textsuperscript{42}

Muslims’ wariness that the bill was targeting them more than any other
community in Kenya was reinforced by Section 12 (1) of the proposed legis-
lation that said:

A person who in a public place, (a) wears an item of clothing; or
(b) wears, carries or displays an article in such a way or in such cir-
cumstances as to arouse reasonable suspicion that he is a member
or supporter of a declared terrorist organization shall be guilty of an
offence and shall be liable on conviction to imprisonment for a term
not exceeding six months, or to a fine or both.\textsuperscript{43}

If the proposed law was influenced by the U.S. counterterrorism measures
against al-Qaeda and radical Muslims worldwide, then its repercussion would
be felt by Kenyan Muslims. The media regularly relays images of al-Qaeda
and alleged Muslim terrorists in flowing robes and long beards. This typical
image of a Muslim in robe (\textit{kanzu}), an Islamic cap (\textit{kofia}), and long beard (\textit{ndevu}) is also evident among Muslims in Kenya. This particular dress code
is important to Muslims because it is a way of showing that they belong to a
certain faith. Muslim protest against the bill was based on the fear that the
police could arbitrarily use the powers invested in them to arrest Muslims on
the ground that they were dressing like certain declared terrorists or terrorist
groups. Already there was concern among Muslims about the war on terror
because it was seen “as a war on Islam and Muslims.”\textsuperscript{44} A disproportionate
number of Muslims have allegedly been harassed by police and some arrest-
ed on suspicion of terrorist activities without evidence.\textsuperscript{45} Some of the alleged
questions asked while in custody were related to their dress code. Their inter-
rogators want to know why they wear the \textit{kanzu}, the \textit{kofia}, and \textit{ndevu}.\textsuperscript{46} When
the Kenyan government resolved to support the U.S.-led global war on terror,
it implied “counter-terrorism co-operation, including enhanced military-
to-military relations and a renewed focus on the neighbouring failed state
of Somalia” among other issues.\textsuperscript{47} With historical experiences of prejudice
and marginalization, the Somali community—and the Muslim community
in general—became a potential security threat in the country, due to their
religious attachment. For Muslims, particularly of Somali and Arab descent, their aspirations as Kenyans continue to be hindered by ethno-religious biases.

Therefore, before the bill was tabled in parliament, some of its opponents mandated the Law Society of Kenya (LSK) to set up a special team to review the proposed law and present a new draft to the government. After a thorough review, in April 2003, the LSK came up with a new draft where articles that Muslims and human rights groups objected to were revised. The LSK claimed to have removed 70 percent of clauses in the bill that were seen as targeting Muslims. However, Muslim leaders insisted that the government should withdraw the proposed law completely thereby calling Muslims to reject the amended version. This response could be attributed to the immense mistrust and fear on the part of Muslims. It is evident that the Suppression of Terrorism Bill is not acceptable to most Kenyans, particularly Muslims. In 2006, the government made another attempt and presented an Anti-Terrorism Bill, which like the previous proposed law was strongly opposed by Muslim human rights groups and the civil society as undermining civil liberties. Nonetheless, in 2012 the state succeeded in passing the Prevention of Terrorism Bill into law after convincing particularly Muslim leaders that the proposed legislation was not targeting the community, but only terrorists.

Like the earlier two proposed laws that sought to provide measures for detecting and prevention of terrorist activities, the enactment of the Prevention of Terrorism Act 2012 faced similar opposition from Muslim leaders and human rights civil societies in its initial stages of debate. Responses from Muslim leaders and bodies were numerous and focused on diverse issues. A section of them reasoned that the Constitution of Kenya 2010 had sufficient provisions for preventing various crimes including terrorism offenses, but in reality the legislation in the constitution did not stipulate terrorism and penalties for individuals convicted of involvement in terrorist activities, making it challenging for security agents to combat terrorism. While others referred to the proposed law as a Western agenda imposed on the country, there were those who commended it as an improvement over the prior bills but maintained that there were still numerous flaws in it that needed to be amended.

Significantly, the Muslim leaders were concerned with Section IV of the bill that sought to give police officers immense powers when investigating suspects, including allowing them to intercept communications and submit them to court as evidence without verification of their admissibility. They insisted that there is need for the security agents to seek permission from the court to determine the necessity of intercepting communications as a way of controlling abuse and infringement of one’s rights by the officers while performing their duty. To avoid the proposed law being sabotaged and failing to be passed into law, the state amended the contentious clauses to accommodate the various concerns raised by stakeholders. From varying events that I will demonstrate in the next section, there is no doubt that Kenya needed a
strong antiterror legislation. Terrorism is no longer just an international problem, but a reality in the country, and Muslim leaders can no longer ignore this fact. Clearly, a good law is required to help in dealing with the problem decisively. At this juncture an important question needs to be asked: is Kenya under threat of international terrorism? I will now examine the challenges of terrorism in Kenya.

The Challenge of International Terrorism in Kenya

International terrorism in Kenya, attributed to extremist Muslim groups such as al-Qaeda and more recently the al-Shabaab, poses a daunting political challenge to Kenyan authorities. The terrorist onslaughts of December 1980 (in Nairobi), August 1998 (in Nairobi), and November 2002 (in Mombasa), coupled with the arrests of several alleged indigenous terror accomplices, indicate that Kenya has entered the global arena of terrorist operations. The situation was exacerbated in August 2003 (in Mombasa) when a suicide bomber detonated a grenade, killing himself and a policeman in a bid to resist arrest. Recently, in September 2013 (in Nairobi), four gunmen affiliated to al-Shabaab attacked and took hostage a shopping mall for three days and killing around sixty-seven and injuring not less than one hundred people. This incident confirmed that an international terrorism network is active in Kenya and willing to strike at any given opportunity. These occurrences compel the government to take a firm stand against terrorists and their supporters.

The first terror offensive was a bomb explosion in 1980 in the Nairobi Norfolk Hotel owned by an Israeli. The Popular Front for the Liberation of Palestine (PFLP), which claimed responsibility for the hotel attack, retorted that it was retaliating against Kenya’s supportive role in the Israel rescue of its airline hijacked by Palestinians in Uganda in 1979. On August 1998, eighteen years later, the U.S. embassy in Nairobi was attacked, claiming twelve American and over two hundred Kenyan casualties, while injuring more than five thousand people. Statements by Osama bin Laden released subsequently led to the conclusion that al-Qaeda was responsible for the strike. After investigations, it was revealed that all the perpetrators of the bombing were foreigners, including a Palestinian, Mohammed Sadiq Odeh, who was married to a Kenyan and had lived in the country for around five years.

On the first anniversary of the devastating strike, August 7, 1999, the SUPKEM chairman gave a speech summarizing the painful experiences of Kenyan Muslims since the attack. These include having to endure sweeping suspicions of Muslims as terrorists; public defamations of Islam by the media, politicians, and church representatives; and a ban on not less than five Islamic nongovernmental organizations (NGOs) accused of threatening domestic security. It was reported that while addressing mourners after the bomb blast
in Nairobi, President Moi remarked that those behind the bombing “could not have been Christians.” This statement attributed to Moi could have insinuated Muslims were complicit in the atrocity. The remarks by the president were criticized by Muslim leaders who argued that their religion was being wrongly associated with violence. Such statements show that Muslims in Kenya are aware of the negative impact of terrorist attacks that are carried out in the name of Islam. For many, this is a sufficient reason to condemn and reject such violent actions.

Though a section of Muslim leaders have been critical of the banning of some Muslim NGOs, intelligence reports confirmed that the al-Qaeda group had established a terrorist cell in Kenya in 1993 masquerading as investors and charity workers as they plotted attacking the U.S. embassy. As a cover-up, the planners in the Kenyan cell, Mohammed Sadiq Odeh and Wadih El-Haji, operated fish and precious stone dealings in Mombasa and Nairobi, respectively. The two also facilitated the registration of an NGO—Help Africa People—which the al-Qaeda cell used to camouflage its activities in the country. The charity organization had also links with other NGOs—Mercy International Relief Agency and the Haramayn Foundation—which, as officials of the charity organizations, allowed the al-Qaeda cell leaders to move between Nairobi, Khartoum, and Mogadishu with no difficulties using a miraa/khat aircraft haulage arrangement. With this network, they were able to circulate funds within the cell on the pretext that the NGOs were delivering emergency humanitarian support to affected people. The revelation prompted the government to act swiftly, proscribing their activities in the country.

In an interview, Sheikh Ali Shee was asked what Kenyan Muslims thought of Osama bin Laden, and he replied, “He is a hero.” However, Shee disclosed to me during this study that his position was quoted out of context. He clarified his comment by explaining:

Bin Laden is viewed by Muslims to be their hero in terms of advancing their education, seeking unity among them and promoting the general social life of Muslims in the world. But when it comes to committing terrorism, bin Laden cannot be regarded as a hero on the basis that his actions have gone against the Islamic principles of war. According to Islam it is wrong to kill people indiscriminately for political gains.

Such ambiguous positions of Muslim leaders in Kenya and majority Muslims in the country vis-à-vis the terrorists acts of bin Laden are evident. In spite of Shee’s clarification, it is clear that he is tacitly sympathetic to the al-Qaeda cause, having established himself as one of the vocal critics of the West and also a staunch proponent of anti-Americanism. This growing
anti-Americanism was evident during the demonstrations that were held in Mombasa and Nairobi following the fateful events of September 11. These demonstrations were a reaction against the U.S. bombing of Afghanistan and the Kenyan government’s pledge of support for the American cause. In one of the protests, people marched shouting “down, down, USA,” and at the same time praising bin Laden. These marches were an expression of their sympathy with al-Qaeda because attacks on Muslims whether in Palestine, Kashmir, Bosnia, or Afghanistan are viewed as attacks on all Muslims. These demonstrations illustrated Kenyan Muslims’ perception of the 9/11 attack on the United States, which arguably signified the demystification of the power of the West and a proof that America is not invincible.

On November 28, 2002, terrorism struck again, this time at the Israeli-owned Paradise Hotel in Kikambala and against an Israeli jet taking off from Mombasa’s international airport. The remnants of the al-Qaeda cell responsible for the embassy attack were blamed for the onslaught. On the property of the Paradise Hotel, which is mostly visited by Israelis, three suicide bombers attacked the hotel reception as two hundred guests were checking in. Sixteen lives were lost, including the three perpetrators and three Israeli tourists. At almost the same time at the airport in Mombasa, a missile was fired at an Israeli Arkia airplane that had just taken off with 261 passengers who had checked out from the Paradise Hotel. The shot from the two SAM-7 missiles narrowly missed the targeted plane. While a report came from Beirut saying that a group known as the Army of Palestine had claimed responsibility for the two attacks, a U.S. government spokesman suggested that the Somali organization al-Ittihad al-Islami, which is linked to al-Qaeda, might be responsible for the attacks. However, further investigations showed that the same cell established by Odeh was responsible for the two attacks. In 1976, similar efforts by a Beirut-based PFLP to shoot down an EL-AL airplane in Nairobi were thwarted by Israel’s and Kenya’s secret service. The planned attacks of Israeli passenger planes in both Nairobi and Mombasa airports might be the result of the groups’ inability to infiltrate Western-Europe airports due to stringent security measures.

Again Kenyan Muslim officials spoke up condemning terrorist attacks. An official SUPKEM statement read:

Whoever planned and executed the bombing is definitely the number one enemy of Islam and Muslims in Kenya . . . We would like to assure . . . that the Muslims of Kenya will continue to co-exist with Kenyans of other faiths as they have always done.

The SUPKEM official declaration was intended to present an impression that though bin Laden may have gained admiration, he had not won sympathy
among Muslims. This view is doubtful as shown by the statements of condemnation by the Muslim organization during the U.S. embassy bomb blast anniversary and the twin attacks in Mombasa, which are not categorically critical of the al-Qaeda activities. Despite investigations showing that the al-Qaeda was responsible for the terror attacks, Muslim leaders were cautious with their statements and did not want to antagonize al-Qaeda.

Another terror incident followed in August 2003 when a suicide bomber, Feisal Ali Nassor, detonated a grenade killing himself and a policeman in a bid to resist arrest in Mombasa. As he was being driven to the police station, Nassor decided to detonate a hand grenade to conceal any further leads following his arrest. The incident confirms that members of the al-Qaeda network were still in Kenya and willing to strike at any given opportunity. Thereafter, investigators found at a house used by Nassor a cache of ammunition that included five SAM-7 missiles similar to those used in the failed attempt to shoot down the Israeli airline taking off from Mombasa, a hand grenade, and six AK-47 assault rifle magazines. Despite this major breakthrough by the Kenya Anti-Terrorism Police Unit (ATPU), Nassor’s accomplices managed to evade arrest. Such occurrences reinforce the perception that terrorists are still living amid Kenyan Muslims. This situation has been made worse by the Muslims themselves because their leaders have not been consistent in condemning terrorist actions. Rather, apart from not unequivocally reproaching terrorist acts, some of the Muslim leaders have embraced a defensive approach as illustrated by a protest letter from the CIPK officials:

We, the Muslim inhabitants, do not believe that among us is a terrorist . . . In other words, they do not exist here. Unless America and Britain and their allies make another fool of the world and plant one in our country like how Osama Bin Laden has been planted. He is of course, nowhere to be found. What we are going to request from you, do come openly to us and point out in order to ascertain.

Clearly, this demonstrates the ambiguous position of Kenyan Muslim leaders and the majority of Muslims in the country vis-à-vis the terrorist acts attributed to Islamist groups. Even with evidence indicating that terrorism and particularly al-Qaeda activities are a reality in Kenya, a section of Muslim leaders present this truth as baseless and mere U.S. propaganda. But the foregoing examples of incidents reveal that there are terrorists living among Kenyan Muslims, who have accepted to play host to the terrorists as they plan their activities. There is no doubt that Kenyans have not established al-Qaeda cells, but they host al-Qaeda operatives. What is not clear yet is how many Kenyans have directly been involved in the terrorist acts perpetrated in the country.
Al-Shabaab’s Challenge to Kenyan Security

In October 2010, the Kenyan government outlawed thirty-three criminal groups in the country including the Somalia’s al-Shabaab. Al-Shabaab—along with other Islamist groups—is blamed for instability in Somalia since the ousting of Siad Barre from power and condemnation by the Kenyan authority is an indication of the danger it poses to the state. After Siad Barre’s twenty-two-year rule ended in 1991, Somalia became lawless, with warlords using militias to control different strongholds. Following many years of restlessness, Abdullahi Yusuf was elected, on October 14, 2004, as the president of Somalia in Nairobi, Kenya. However, due to the clan factor in Somalia’s politics, Abdullahi Yusuf was not able to get the support of the other warlords. Siad Barre’s government is alleged to have been dominated by people from his Darood clan. As a result of Barre’s nepotism, members of the Hawiye, Isaaq, and other non-Darood clans were marginalized and plotted for his removal. Later when Abdullahi Yusuf, a Darood, was elected president in 2004, the Hawiye and other non-Darood opposed him because they viewed Abdullahi Yusuf’s administration as the reemergence of the Darood hegemony. Consequently, Abdullahi Yusuf’s government lacked the support of other Somali clans. This explains why Abdullahi Yusuf’s administration could not operate from Mogadishu as it was under the control of the Hawiye clan. After the downfall of Abdullahi Yusuf’s (a Darood) government, came Sheikh Sharif Ahmed’s (a Hawiye) administration in 2009. Analysts argued that Sheikh Sharif Ahmed faced the challenge of pacifying the long-standing animosity between his Hawiye clan and the former ruling Darood clan. The Darood were blaming the Hawiye for sabotaging Abdullahi Yusuf’s government. And now that a Hawiye is in power, it is possible that majority of the Darood were reluctant to recognize Sheikh Sharif Ahmed’s regime. This opened up another front of conflict despite efforts by Sheikh Sharif Ahmed to incorporate the Darood into the highest governing council.

This rendered Yusuf’s administration ineffective and contributed to its collapse. In 2006, the country came under the control of the Islamic Courts Union (ICU) who were subsequently removed from power through the efforts of Ethiopian forces and the fragile interim government. The presence of the Ethiopians became unpopular, and several Islamist groups emerged to oust them, culminating in the Ethiopian army pulling out of Somalia in January 2009. Their withdrawal made way for the Somalia Transitional Federal Government (TFG) led by a former ICU leader, Sheikh Sharif Ahmed, in 2009. With the installation of Sharif to the presidency, another Islamist group, al-Shabaab, initially an armed wing of the ICU, came into prominence to challenge the TFG. Led by Sharif’s former ally Sheikh Hassan Dahir Aweys, al-Shabaab challenged the legitimacy of the TFG. With its leadership in Eritrea, al-Shabaab viewed Sharif as a traitor because
of his approach of encouraging reconciliation with the other various factions in Somalia. In an effort to dislodge Sharif from power, fighting erupted between the Islamist al-Shabaab and the TFG troops leading to displacement of thousands of Somalis, most of them fleeing to Kenya. As they enter Kenya, some of these fleeing Somalis would find their way to the various urban centers in the country. This has created a security concern in Kenya, as the influx of Somali immigrants reveals that some of them carry weapons with them. In one incident, according to a Kenyan police report, nine youths from Somalia were arrested with a rocket launcher, two rocket propelled grenades, seven AK-47 rifles, a Tokerlev pistol, seven ammunition pouches, and 361 rounds of ammunition. There were also reports of militia suspected to be members of al-Shabaab raiding certain border towns in the northern Kenya region and causing mayhem. As a result, several international NGOs closed operations after the government failed to ensure their security. Furthermore, according to intelligence investigations, the al-Shabaab and other militia groups fighting in Somalia had also been conducting military recruitments in Kenya. The unsuspecting youths were lured with promises of jobs, offering salaries as high as U.S.$ 2,500, according to some of the recruits arrested.

Apart from al-Shabaab’s recruitment, the Kenyan government has also been accused of recruiting youths from among the Somali community, as mercenaries for the fragile Somali TFG of Sheikh Sharif Ahmed. Over three hundred youths were confirmed to be undergoing military training in the country with a promise of U.S.$600 as a monthly salary. This raised the concerns of the Kenya National Commission on Human Rights, Muslim religious leaders, and politicians. Particularly, the officials of NAMLEF were concerned that upon accomplishing their mission in Somalia, the youth would pose a security threat to the country with their experience in combat. The NAMLEF officials feared that the enlisted youths could engage in activities of lawlessness considering that most of them would be unemployed when they return from their mercenary work. While the government denied involvement in the scheme, a parliamentary defense committee asserted that the report on the Somalia mission was credible.

Before the arrival of the U.S. secretary of state in 2009, the ATPU arrested Muhidin Gelle, suspected to be an al-Shabaab member and accused of planning a terror attack in Nairobi during the secretary’s visit in the country. After interrogation, Gelle was released and later arrested in Denmark for attempting to assassinate the Danish cartoonist Kurt Westergaard for his portrayal of the Prophet Muhammad in a 2005 Danish newspaper. An official of the antiterrorism unit claimed that Gelle’s stay in the country had been “well facilitated by notorious logisticians who continue to operate with impunity, taking full advantage of the fact that Kenya has no anti-terrorism legislation” at that time.
A demonstration called by the Muslim Human Rights Forum in Nairobi, on January 15, 2010, in protest of the release of a Jamaican Muslim preacher, Sheikh Abdullah al-Faisal, from a Kenyan cell, turned violent. Al-Faisal was arrested by Kenyan officials when they realized that he was on the international terror watch list. The ATPU claimed that during his brief stay in the country the cleric was encouraging Muslim youths to join the al-Shabaab militia. In the violence that ensued during the demonstration, two demonstrators were killed, six police officers were injured, and properties worth millions were destroyed. The government alleged that sympathizers of the al-Shabaab militia group took part in the protest with the intention to cause mayhem, a view utterly rejected by Muslim leaders. It is reported that during the demonstration some protesters were clad in military fatigue and black balaclava to avoid identification. Throughout the procession some youths were waving flags similar to those used by the al-Shabaab. Such developments heightened the state’s concern that intelligence reports had been accurate; the protest would be infiltrated by individuals sympathetic to the al-Shabaab. In its effort to infiltrate the Kenyan Muslim community, there is no doubt that the group has sympathizers among the country’s Muslims.

The concern for the al-Shabaab menace continued, as the group’s chain of kidnappings and intrusions into Kenya threatened security and the tourism industry in the country. As the end of 2011 was approaching, several security concerns—like that of abduction of two foreigners and the killing of another in a Kenyan coastal resort hotel, the kidnapping of two aid workers from a local refugee camp, and the sporadic onslaught against security officers—were now on the rise. Consequently, the Kenyan government decided to declare war against al-Shabaab, prompting the Kenya Defence Forces’ (KDF’s) invasion of Somalia—in October 2011—in a campaign expected to neutralize al-Shabaab at their operational base. But even after the KDF incursion, there was still a series of terrorist attacks—from October 17, 2011, to September 21, 2013—targeted against civilians, government officers, security agents, and Christian churches that were blamed on al-Shabaab. Clearly, the organization presents a serious security challenge to the country that needs to be addressed with urgency.

Despite earlier objections to the antiterror law from Muslims and human rights activists in Kenya, there is no doubt that the country requires an effective antiterrorism law—but an important question is, will the government be able to confront international terrorism without being seen as antagonizing its Muslim population?

The War on Terror and Growing Anti-Americanism Among Kenyan Muslims

The rejection of terrorist violence among Kenyan Muslims has not stemmed the tide of growing anti-Americanism. The anti-Americanism expressed by
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sections of the Muslim population has been heightened by the American lead on the war on terror, which has come up with policies viewed to be discriminatory by Muslims in different parts of the world. This war has not been well received by some Muslims who view it as a war against Islam and Muslims all over the world. The suffering by Kenyan Muslims as a result of the war on terror has been aptly expressed by one commentator:

For the last six years, Kenyan Muslim regrettably, have till to date been victims of this American inspired terror campaign. While the US champions the values of human rights, democracy and respect to the rule of the law, US missions in the country have been active participants in promoting illegal acts against Muslims in the country. American envoys have publicly lauded the arrests of Muslims detained on allegation of terrorism involvement and the US is known to provide substantial support to the Anti-Terrorism Police Unit—the main vehicle for perpetuating these abuses.  

Though the above view expressed by Muslims is a bit anecdotal, it demonstrates the conflicting relation between the U.S. government and the Kenyan Muslims. Earlier in the 1990s, there were no outbursts of anti-American sentiments because the relation between Kenyan Muslims and U.S. government was that of mutual trust. In fact, in 1991, the American envoy had forged a special relationship with Muslims in the country. During that time, the U.S. diplomat provided physical protection to some of the IPK sympathizers who were being hounded by the police, a gesture that strengthened Muslims’ trust toward America. Therefore, the recent change of attitude of some Kenyan Muslims toward America has raised concerns within ranks of the U.S. government, prompting them to search for solutions. In order to tackle the problem of mounting anti-Americanism, the U.S. government has pursued a two-pronged approach in Kenya since 9/11. On one level, the United States has intensified its intelligence operations, with the Kenyan authority allowing the U.S. intelligence agents to conduct their operations in the country to monitor terrorism activities in the region. Some of the surveillance intelligence activities are camouflaged under the guise of sociocultural and economic projects in certain Muslim-populated areas in the country.

Already identified for these U.S. projects are the Islands of Lamu, Pate, and Faza, believed to have hosted some of the most-wanted terrorists like Odeh, Saleh Ali Seleh Nabhah, and Fazul Abdallah Mohammed who are responsible for various terrorist activities in the country. To gain the support and trust of the local communities in these areas, American marines are engaging in community projects intended to alleviate poverty among the locals. Despite initiating significant projects, suspicion remains high about U.S. motives with some imams opposed to the presence of the U.S. forces, claiming it is a
scheme to counter Islamic influence in these areas. This action of the imams reflects an interpretation of the U.S. war on terror as a global fight against Islam. However, there are also other local Muslim leaders in the area who praise the work of the Americans, signaling their acceptance.

On another level, the United States has sought ways to counter the negative image that Kenyan Muslims have about its policies. The U.S. government embarked on an image-lifting strategy to address anti-Americanism, but it is unlikely to succeed given that the activities of the Federal Bureau of Investigation (FBI) and Central Intelligence Agency (CIA) continue to stir mistrust among Kenyan Muslims. This approach is based on the assumption that the tensions had to do with “image problem” that could be resolved with good public relations. The U.S. embassy in Nairobi assumed a leading role in this strategy, emphasizing that America’s measures are not targeting Islam, but terrorist groups that manipulate Islam for their evil actions. At the same time, the U.S. Agency for International Development (USAID) has established contacts with Muslim charity organizations, in order to explore the possibility of cooperation to provide support for needy Muslims. The USAID had approved a new education strategic objective for Kenya, which focuses on providing opportunities for children in marginalized areas, including Muslim communities in the northern and coastal regions where enrolment is low. The program hoped to strengthen school management committees, train teachers, and develop curriculum and learning materials. In addition, the organization developed a proposal to fund Islamic religious schools (madrasas) in the country. The funding was to be used in the payment of the madrasa teachers’ salaries and for developing a unified curriculum.

However, this offer was rejected by some Muslim religious leaders who doubted the United States’ “sincerity in supporting Islamic schools,” suspecting the effort to be a ploy to influence the curriculum of the madrasas as part of the war on terror. Critics of the proposal argue that the U.S. interest in the madrasas is based on the suspicion that terrorist organizations have infiltrated the religious schools, and that this is why America wants to control them. They saw the offer as part of Washington’s global antiterrorism campaign to win over Muslims’ support. There is a widely held public opinion among Muslims that the U.S. government is striving toward controlling the madrasas’ curriculum, which is considered an “ideological infrastructure of [Islamists] terrorism” in the world. This allegation was denied by the U.S. envoy, arguing that the offer to assist the madrasas was not linked to antiterrorism campaigns and pointing out that some Muslim organizations had sought the assistance of the USAID, which led to negotiations for providing financial support to the madrasas. Critics of the proposal argue that the U.S. interest in the madrasas is based on the suspicion that terrorist organizations have infiltrated the religious schools, and this is why America wants to control them.
Virtually all Muslims irrespective of their status have had an opportunity to go through a *madrasa*, which have been in existence in Kenya for many years. There are probably thousands of these *madrasas* in Kenya, and this is why the greatest challenge to the *madrasa* system of education is the lack of standardization (uniformity). It is believed that the standardization would improve the quality of *madrasa* education together with regularizing progression for those who wish to further their Islamic study. There is at present an initiative by the National Muslim Educational Trust to standardize the *madrasa* system. These efforts by Kenyan Muslims to improve the *madrasa* illustrate the community’s willingness to develop the *madrasa* education without the initiative and assistance of the United States.

The “*Wanjiku Constitution*” and the Politics of the Kadhi Courts

After around forty years of independence, Kenya began a search for a new constitution. The Independence Constitution was alleged to have allowed the suspension of human rights in many circumstances and also permitted a range of oppressive laws to continue. There was the feeling by most people that the laws in the Independence Constitution were similar to those used by the colonial government to oppress Kenyans and were no longer relevant in postcolonial Kenya. Despite the numerous amendments to the Independence Constitution, it attracted increasing calls to completely overhaul it. As the clamor for constitutional reform reached a climax, the government insisted that the drafting of such an important document was a task that would be done by foreign experts. However, reform advocates disagreed with the government, arguing that foreign experts could not offer solutions to local problems, thereby demanding that the process be people driven for it to be valid.

This is the constitution whose advocates referred to as the “*Wanjiku constitution*.” *Wanjiku* is a common Kikuyu female name, and like elsewhere in Africa, the female in Kenya is the most underprivileged person. The name *Wanjiku* was borrowed to symbolize the common person in the country. The call for a *Wanjiku* constitution implied a constitution where the ordinary citizens of the country were consulted about the type of government they desired. Consequently, in 1998, the Constitution of Kenya Review Commission was established and charged with the responsibility of collecting and collating the views of Kenyans on what they would want reflected in the new constitution. This was why the commission endeavored to hear as many voices as possible to ensure that the recommendations they made were as representative of the common person as possible. On September 27, 2002, the CKRC published a draft bill that came to be popularly known as the Ghai Draft Constitution. After the draft bill of the CKRC was published, a group of churches highlighted
a number of issues that were of concern to them, most notably the entrenchment of Kadhi courts, abortion, and same-sex marriage in the constitution.

I would now want to focus on the Kadhi courts, where the debate was centered on whether to entrench or retrench them.

To Entrench or Retrench the Kadhi Courts?

The row over the Kadhi courts revolves around the question of whether or not the courts should be entrenched in the Kenyan constitution. Opponents of the Kadhi courts, chiefly a section of church leaders, claim to have embraced the ideal of the secular state against the adoption of religious laws. On the other hand, supporters of the Kadhi courts—mostly Muslims—are oblivious to the implications of religious laws in the national context characterized by pluralism and freedom of expression. This tension is the predictable outcome of a national minority negotiating with a dominant majority in both religion and politics (parliamentary representation). I have already observed in chapter 1 that after the colonialists successfully imposed their regime, they introduced numerous changes that came to have a significant impact on both the colony and the protectorate of Kenya. Among these initiatives was the enactment of the Native Court Regulation of 1897, which legally allowed the British administrators to establish the Kadhi courts. The status of the Kadhi courts in the Independence Constitution could be traced to Article 66 (1) to (5), which provides for the establishment of these courts. Some of the Kadhi court articles in the Independence Constitution read as follows:

**Article 66 (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.

**Article 66 (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.

At independence, the Kadhi courts were three, but in 1967, the Kadhi Courts Act allowed the establishment of the courts in other parts of the country, and as a result, the number of the courts subsequently increased. Today, the Kadhi courts are scattered and can be found in all the major towns in the country. According to the Independence Constitution, these courts are supposed to be presided over by either a chief Kadhi or a Kadhi appointed by the Judicial Services Commission. It also outlined the jurisdiction of the
courts in addressing issues related to personal status, which included marriage, divorce, and inheritance in proceedings where the individuals practice the Islamic faith.

In the proposed Bomas draft, the *Kadhi* courts were retained and additional changes incorporated based on Muslims’ recommendations. This is how the *Kadhi* courts appeared in some of the sections of the Ghai Draft Constitution:

**Kadhi** courts:

**Article 199**

(1) There are established *Kadhi’s* 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 *Kadhi’s* court called a District *Kadhi’s* Court, having jurisdiction within a district or districts as may be prescribed by, or under an Act of Parliament.

**Jurisdiction of Kadhi courts:**

**Article 200**

(1) The Jurisdiction of a *Kadhi’s* 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 the 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.

According to the *Kadhi* courts sections of the Ghai Draft Constitution, Muslims had recommended that the existing *Kadhi* courts be reformed and made efficient. Some of the recommendations that were incorporated into the Bomas draft, as in Article 202, included the *Kadhis* being trained in both Islamic law and common law. In addition to their Islamic credentials, the *Kadhis* were required to be experienced advocates with a common law degree. Also recommended was the provision for a *Kadhi* Court of Appeal to address appeals from the lower *Kadhi* courts. The draft pointed out that only after these appeals have passed through the *Kadhi* Court of Appeal would cases from the lower *Kadhi* courts be heard in the national High Court of Appeal. And lastly,
the Ghai Draft Constitution recommended that the jurisdiction of the *Kadhi* courts be expanded to hear minor commercial disputes among Muslims.

When these recommendations were published in the draft bill of the CKRC, they raised concerns among Christians, particularly those from the Anglican and Pentecostal Churches. Their opposition in the plenary was uncompromising. The controversy instigated an intense debate between Muslims and Christians, and by extension over religion and state. Following the unresolved discussion in the plenary, the chairman of CKRC called a meeting of Christian, Muslim, and Hindu leaders to find ways of resolving the impasse. The meeting agreed to appoint a committee charged with the responsibility of solving the issue amicably. After several meetings the committee accepted a number of amendments, which Muslim representatives refused to endorse. While Muslims insisted on having the *Kadhi* courts entrenched in the constitution, the church-led opposition wanted the entire institution of the *Kadhi* courts removed from the Bomas draft.94

Leading this opposition was a group of church clergies who identified themselves under the banner of “The Federation of Churches in Kenya” or “The Kenya Churches.” The demand by the Christian clergy for the abolition of the Muslim courts was based on the following provisions in the Ghai Draft Constitution:

State and Religion

**Article 9**

(1) State and religion shall be separate.

(2) There shall be no state religion.

(3) The state shall treat all religions equally.

According to the opponents of the *Kadhi* courts, the Ghai draft had provided that Islamic personal laws would be a source of laws in Kenya despite the provisions in Article 9. They argued that Islamic laws are religious laws and thereby contradict the three provisions stated in Article 9. They further pointed out that the Ghai draft had created a parallel judicial system for Muslims, which was tantamount to favoring one religion and contravening the principle that the state should treat all religions equally. This line of argument was to reappear many times during the debate and became the basis of reference for the opponents of the *Kadhi* courts.

In this regard, the group of clergies requested all provisions on the *Kadhi* courts be removed and replaced by a provision establishing subordinate courts with limited jurisdiction on issues of personal laws relating to marriage, divorce, and inheritance, between parties of the same religious faith or persuasion and who submit to that jurisdiction.95 Consequently, the proposed provision by the opposing churches would allow parliament to establish sub-
ordinate courts for any religious community, including Muslims, to deal with their personal laws if so desired. This approach in their view would ensure equal treatment of all religions.

After a wide debate at the constitution review conference, three issues that are related to the Kadhi courts were removed. These were (i) the provision of Islamic laws being a source of laws in Kenya, (ii) the creation of a parallel judicial system for Muslims, and (iii) determination of civil and commercial disputes according to Islamic law. This implied that the provision entrenching the Kadhi courts in the Ghai draft was retained in the Bomas Draft Constitution to the dissatisfaction of the opposing churches. And as a result, in July 2004, twenty-six applicants representing a group of Kenyan churches went to the high court over the entrenchment of the Kadhi courts in the Independence Constitution and the Bomas draft proposal. The federation argued that the historical reasons for which the Kadhi courts were given constitutional protection are no longer tenable. They claimed that after several years of independence, the former “subjects” of the sultan of Zanzibar should no longer require any constitutional protection as Kenya is now a unified sovereign state where all enjoy equality irrespective of race, gender, or religion.

They contend that the entrenchment of the Kadhi courts in the Bomas draft and the Independence Constitution was a step toward the introduction of sharia in Kenya, which was unacceptable. They also pointed that any financial maintenance of the Kadhi courts from the public resources was unjust and amounted to support of one religion. They interpreted this practice as Islam being declared a state religion, contradicting one of the three provisions in Article 9 that there shall be no state religion. Therefore, they wanted Section 66 of the Independence Constitution, which introduces and entrenches the Kadhi courts, to be declared unconstitutional and expunged from the Bomas draft.

In responding to some of the arguments raised by the Federation of Churches of Kenya, the Muslims insisted that the inclusion of the Kadhi courts in the Independence Constitution was not because the beneficiaries were merely “subjects” of the sultan of Zanzibar, but because the courts are a core institution in the practice of Islam. Muslims’ claim that the laws, rules, and regulations applied by the Kadhi courts are not a creation of the sultan of Zanzibar, but a product of the teachings of Islam. It is against this background that the Muslims feel insulted by the claim that the courts are outdated and have no place in a modern constitution.

Apart from the objection to the Kadhi courts, the Federation of Churches of Kenya had other objections to the Bomas draft proposals. Among other issues, the federation outlined the following as being of great concern to its members: the supremacy of God and the separation of religion and state. As for the supremacy of God, the federation argued that Kenyans are an extremely religious community who recognize God as the supreme authority.
in their affairs, and therefore this should be reflected in the preamble of the constitution. This led to the federation drafting their suggestion that reflected its vision of the relationship between religion and state. The federation insisted that the first clause of the constitution should mention God indicating that it recognizes the supremacy and sovereignty of the Almighty God of all creation. A similar demand for the recognition of God was made in another clause, which originally read:

Kenya is founded on the Constitution and the rule of law and shall be governed in accordance with the Constitution.\(^{100}\)

The federation suggested:

Kenya is founded on the supremacy of God, and shall be governed in accordance with the constitution and rule of law.\(^{101}\)

These recommendations by the federation indicate that the churches are not advocating a clear separation of religion and politics per se because their views over the separation of religion and state are contradicted by the demand for the inclusion of the supremacy of God in the constitution. Their suggestions show that they are willing to allow an aspect of religion to pervade Kenya’s constitution. Once people use a constitution to acknowledge that God is the supreme authority in all their affairs, it becomes difficult for them to separate matters of state from religion. The action of the churches was summarized by Abdulkader Tayob that the Kenya churches had accepted the place of religion in the broader symbolism of the state, but the symbolism of a specific religion like Islam was unacceptable.\(^{102}\) It is clear that these churches are not keen to recognize the Islamic religious symbols in relation to the state.

On their part, Muslims accepted the retention of the courts in the status exemplified in the Independence Constitution. As the *Kadhi* courts play an important role in the preservation of Muslim identity, they insisted that the courts should be entrenched in the Bomas draft, maintaining that this was not a new demand, but an issue that had been recognized many years ago. Within the pro-*Kadhi* courts camp, apart from Muslims there were also several non-Muslim sympathizers who supported their cause. Among them was Father Gabriel Dolan of the Catholic Justice and Peace Commission, Kitale. His appeal to fellow Christian leaders was

*Kadhi’s* Courts, according to the final document, are not a threat to other faiths. Nor do they give preferential treatment to the Islamic Faith. Rather, the aim is to protect the rights of a minority . . . and also confine their jurisdiction to matters of Personal Law. We should
admit that Kenyan law is based on British law, which in turn was critically influenced by Canon Law and Christian values. The Islamic Faith comes from a different tradition, with its own values in matters of family, property and inheritance. By supporting the right of Kadhi’s Courts to be protected by the Constitution we are just acknowledging that there are different traditions in our young nation and that minorities need protection in the constitution.¹⁰³

On his part, the chairman of the CKRC thought it would have been a good faith gesture by the Christian majority to accept the entrenchment of the Kadhi courts in the Bomas Draft Constitution. Removing these courts, the chairman argued, would appear to Muslims as an act of vindictiveness, which was “regrettable to see the Church indulging in.”¹⁰⁴ The views expressed by the chairman of CKRC and a church leader implied that entrenching the Kadhi courts in the Bomas draft was a way of safeguarding the rights of minorities. There is an argument that democracy requires the majority to protect the minority and not to bully them. Since the constitution is usually made for both the majority and minority, it is important that the voices of all are heard so that they can all own the constitution that will bind them together. Since Muslims constitute a minority group, the CKRC felt it was significant to entrench their rights in the constitution rather than leaving them to the mercy of parliament.

Most Muslim leaders perceived opposition to the Kadhi courts as externally inspired. They suspect that it forms part of the Western agenda to fight proxy wars with Muslims all over the world since 9/11. The U.S. government and the American evangelical churches were mentioned specifically as the main culprits. It has been alleged that the American evangelical churches exerted undue influence on the Kenyan Pentecostal Church to oppose the rights that Muslims have enjoyed for centuries.¹⁰⁵ This could be affirmed in an editorial comment from a Muslim bulletin:

Opposition to the courts first emerged during the Bomas constitution conference when some evangelical delegates launched a campaign to oppose their inclusion in the constitution. Behind this group was an American evangelist . . . who orchestrated a campaign against the inclusion of the courts. The preacher was at Bomas as an observer where he circulated literature opposing the existence of the courts.¹⁰⁶

However, according to some senior U.S. officials, they claim that it has not been the policy of their government to involve itself in the Kadhi issue, but it was possible that there could be some American churches involved in the whole saga.
The High Court’s Verdict on the Legality of the Kadhi Courts

I mentioned in the previous section that in 2004 twenty-six applicants had sought several declarations with regard to the entrenchment of the Kadhi courts in the Kenyan constitution. The case was presided over by Judges Roselyn P. Wendoh, Joseph J. Nyamu, and Anyara J. Emukule, who in May 2010 declared the Kadhi courts to be illegal and unconstitutional. In one section of their verdict, the judges concluded:

We grant the declarations sought in prayer 1 limited to declaring that Section 66 is inconsistent with sections 65 and 82 and in respect of Section 82 is discriminatory to the applicants in its effect. As regards to paragraph 2 of the prayers, we find and hold that sections 66 and 82 are inconsistent with each other, and that Section 66 is superfluous but it is not the court’s role to expunge it. It is the role of Parliament and the citizenry in a referendum. As regards prayer 3, we hold and declare that any provision similar to Section 66 in any other draft of a constitution in word or effect is not ripe for determination. The enactment and the application of the Kadhi courts to areas beyond the 10 miles coastal strip of the Protectorate is unconstitutional.

Following the constitutional court verdict on the Kadhi courts, their judgment was received differently and widely debated by various sections of the Kenyan population. On their part, the church leaders welcomed the ruling and urged the government to implement it. The government through the attorney general termed the verdict unconstitutional and appealed to the high court challenging the ruling. And for the Muslims, a section of the community went to court to challenge the ruling declaring the Kadhi courts illegal and unconstitutional. The petitioners were aggrieved by the decision of the court, claiming their constitutional rights had been violated. They argued that the Kadhi courts provided an essential dispute resolution mechanism, without which a vacuum would be created in administering justice. Through their lawyer the Muslims argued:

If the effect of the judgment would be to disband Kadhi Courts, which is a section of the judiciary established by the Constitution of Kenya, it would disrupt their proceedings thus creating a sense of insecurity and disillusionment with the administration of justice for a large sector of the population.

Muslim leaders rejected the view that the Kadhi courts are discriminatory on the basis of Section 62 of the constitution. They claimed that the ruling was faulty and that the judges had ignored the provisions of the same section
they had quoted, which says that issues of divorce, adoption, marriage, and inheritance are excluded from the definition of discrimination. According to Section 66 of the constitution of Kenya, the Kadhi courts have been given the jurisdiction to deal with issues of marriage, divorce, and inheritance among Muslims.

The main foundation of the judges’ ruling was that Section 66 of the constitution (which allows for the creation of the Kadhi courts) is inconsistent with Section 65 (which gives parliament the power to establish courts subordinate to the high court) and Section 82 (which outlaws discrimination in lawmaking) thereby declaring Section 66 to be superfluous. Despite making the correct conclusion that the role of the court is to interpret and declare the law, and not that of amending it, their verdict was the opposite of this conclusion. They made categorical pronouncements that declared a section of the Kenyan constitution illegal. For instance, they granted the request that had sought for Section 66 to be declared discriminatory, oppressive, unconstitutional, and null and void.

However, the attorney general argued that the constitutional court had no jurisdiction to declare Section 66 of the constitution as being unconstitutional. His position was that Section 66 of the constitution was an existing provision and could not be struck out on the basis that there is no provision of the constitution that is superior or inferior to the other. For the constitutional court to nullify any provision of the constitution would itself be unconstitutional. According to the attorney general, the court’s jurisdiction would be to strike out a law (an act of parliament) other than a provision of the constitution. Consequently, it was wrong to declare the Kadhi courts illegal if the country’s constitution provides for them. In their pronouncement, the judges emphasized in their verdict that they have granted a declaration that any form of religious courts should not form part of the judiciary as it offends the doctrine of separation of state and religion.

The reading of the judges’ verdict was faulted as to whether it was professionally acceptable for them to express their opinion on a matter for which they admitted they had no constitutional role. For the three judges to argue that religious courts should not form part of the judiciary in Kenya because it is against the principle of separation of religion and state was outside their role. The subject on the interaction of religion and politics is a long one, and it has been widely debated by scholars. There is no indication that a definite position on the subject has been reached. The judges dealt with the issue as if there is a conclusive position in the international law. There is no internationally accepted constitutional doctrine that governs cases involving the interaction of religion and politics. Countries that allow the interaction of religion and politics have embraced different approaches peculiar to their unique situations. Due to the realization that it is difficult to have a complete separation of religion and politics, these countries have been grappling with
the question of the extent that this interaction should be accepted. Therefore, the Kadhi courts were provided in the Kenyan constitution under the peculiar historical circumstances of the moment, which its defenders have argued should be put into consideration when debating about them.

The three judges also held that the enactment and application of the Kadhi courts beyond the Ten-Mile Coastal Strip specified during their establishment was unconstitutional. This judgment attempted to limit the Kadhi courts whose expansion outside the strip was sanctioned by an act of parliament. Based on this awareness, the constitutional court knew they had the jurisdiction to strike down any law made by an act of parliament if it is in conflict or inconsistent with the constitutional provision. Nevertheless, analysts argued that it was necessary for the judges before giving such a verdict to examine the history and circumstances under which Kenya accepted the courts. Though the courts have mostly been associated with the coastal region, during the colonial period the British had recognized the importance of this institution and extended it outside the Ten-Mile Coastal Strip. This was illustrated by the British appointing the first state-funded Kadhi for the Somali Muslims of the Northern Frontier District (NFD) in 1927.113

During the early years of the Kenyatta era, among other issues, the expansion of the Kadhi courts to the Somalis of the NFD was used in ending the Shifta war. As part of the peace agreement brokered in Arusha by Zambia’s President Kenneth Kaunda in 1967, the government of Kenya accepted the expansion of the kadhi courts to the residents of the NFD.114 This is an important background that should have informed the decision of the judges. Other analysts argued that at minimum, the expansion of the Kadhi courts should have been informed by the justification that “Kenya is not a federal state and that it will be wrong to expect a citizen to enjoy a right in Mombasa and not have the same right in other parts of the country.”115 This view implies that Muslims in Kenya also live outside the Ten-Mile Coastal Strip and it is the responsibility of the government to ensure that they continue enjoying their rights as Muslims wherever they choose to live. On the issue regarding financial maintenance of the Kadhi courts by the government, the constitutional court declared that it is discriminatory and sectarian. Such a conclusion was informed by perceiving the Kadhi courts as religious courts and not part of the judiciary. According to the Kenyan constitution the Kadhi courts form an integral part of the official judiciary, and this is why the public coffers are used in funding and maintaining them, its proponents hold. There is no doubt that the ruling by the three bench judges against the Kadhi courts set off a religious tension threatening Muslim-Christian relations in Kenya.

Nevertheless, the Kadhi courts saga was resolved when, in August 2010, Kenyans voted for a new constitution that entrenches the Kadhi courts as part of the judicial system. The passing of the 2010 Constitution of Kenya in the
referendum illustrated support for the Kadhi courts by most Kenyans. Amid opposition from a section of church leaders, the referendum results showed that there was acceptance of the Kadhi courts in the country. Section 170 of the promulgated constitution reads:

(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) Profess 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 Kadhi’s court, 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 which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi’s court.\textsuperscript{116}

Therefore, according to the new constitutional provision, the Kadhi courts are recognized as subordinate courts under the legal system. This is significant as it would debar any argument that these courts are religious courts and thereby favoring Kenyan Muslims. There is need for more public awareness about the Kadhi courts to guard against future opposition to them and possible challenges to the nature of the secular state in Kenya.

It is clear from the discussions expounded in this book that Muslims’ politics of legislation and constitution are different from their politics of associations and political parties. The politics of legislation and constitution have always brought Kenyan Muslims together with a united voice to demand what they regard to be rightfully theirs. Muslims in Kenya have succeeded in marshaling the community’s support in rejecting certain legislation they regard as inimical to allowing them to observe their lives in accordance with the principles of Islam. When it comes to politics of associations and political parties, however, unity on this level has not been forthcoming. Whenever Muslims
feel that the impending issue is not directly related to their collective marginalization, they retreat back to their ethnic and racial enclaves, jeopardizing any form of desired unity. It is against this background that the Kenyan Muslims have not been able to stage a cohesive unity on the political front. Like other groups in Kenya, Muslims politics is also strongly ethnically influenced.