

**THE CONSTITUTIONAL MANAGEMENT OF RELIGIOUS
DIVERSITY IN KENYA**

By

AHMED ISSACK HASSAN

(ahmedissack786@gmail.com)

(www.ahmedissackhassan.com)

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BRIEF BIOGRAPHY OF THE AUTHOR

MR. AHMED ISSACK HASSAN studied in Garissa High School for his ‘O’ and ‘A’ levels in 1983 to 1988. He graduated from the University of Nairobi in 1992 with a Bachelors degree in Law (LLB), Second Class Honors, and Upper Division. He proceeded to Kenya School of Law where he obtained his post graduate diploma in Law in 1994. He was admitted to the Bar as an Advocate of the High Court of Kenya in 1995. He has been practicing Law in Nairobi since 1995 to date.

Mr. Ahmed is also a Certified Public Secretary of Kenya (CPSK). He is the Managing Partner of the Law firm of **Messrs Ibrahim, Issack & Company Advocates** based in **Nairobi**.

Mr. Ahmed served as a Commissioner in the Constitution of Kenya Review Commission (CKRC) from 2000 to 2005. In May 2006, he was appointed by the United Nations political office for Somalia (UNPOS) as a legal consultant in the training of Somali Parliamentarians on Constitutionalism and Federalism in Baidoa, Somalia. In June 2006, he was appointed by the President to the Kiruki Commission of Inquiry to inquire into the activities of Artur Margaryan and Artur Sargasyan (the Armenian Brothers). He is currently serving as a legal consultant for **UNDP – Somalia** for the Somalia Constitution Making Project.

THE CONSTITUTIONAL MANAGEMENT OF RELIGIOUS DIVERSITY IN KENYA By Ahmed Issack Hassan, Advocate, High Court of Kenya.

INTRODUCTION

The dictionary definition of Religion is a system of faith and worship, usually involving belief in a Supreme Being or controlling power entitled to obedience and worship and usually containing a moral or ethical code (Collins, Oxford and Black’s Law Dictionary). Religion has been described by one Communist leader as “**the opium of the masses**” and by Napoleon as “**the only thing that prevents the poor from killing the Rich**”. Most of the Major Religions preach peace, love and harmony and generally set the moral and ethical guidelines for its followers. Religion is from the Latin word “**religio**” which means obligation, bond or reverence.

Religious diversity refers to the existence of different religious beliefs and how their followers relate to each other and with followers of other religions.

The treatment of religious diversity in a country is very crucial to its peace and social stability. The respect for and protection of religious diversity is the cornerstone of a peaceful nation. In Kenya, the management of religious diversity is governed by the Constitution and the Laws of the Land.

At independence, the three major religions recognized were: Christianity, Islam and Hindu. This did not however exclude other religions. The Constitution establishes a secular state with no state religion. All religions are to be treated equally.

This paper will seek to analyze the management of religious diversity in the Constitution and the Laws enacted by Parliament.

THE CONSTITUTION Section 1A of the Constitution declares Kenya to be a Multi-Party democratic state. There is in theory a separation of the state and religion. There is no state religion and all religions are to be treated equally. Religion has no formal role in state affairs. Indeed, the Societies Act, Chapter 108, Laws of Kenya prohibits the formation and registration of political Parties that are based on a specific religion. Notwithstanding the foregoing, the practice is that religion has a lot of influence on the conduct of state affairs and formulation of Public Policy. The debate on gay rights and abortion is one area that has clearly brought into sharp focus the power and influence of religion viz the universality of human rights. For its policies to have wider acceptance and legitimacy, the state cannot afford to ignore the views and positions taken by the major religions in the country. To do so may be politically suicidal as the political leadership could face the wrath of the disaffected electorate.

The participation of religious leaders in state affairs in a more visible manner continues to create a blur in the theoretical separation of the state and religion. Religious leaders have been appointed to Public positions in the country such as Commissions of Inquiry, task forces, Advisory Committee, Constitutional Commissions, parastatal bodies and other similar Public Institutions. In most cases such appointments may not be based on merit, competence or professional qualification but on other strategic factors that have everything to do with the faith of the individual.

Chapter 5 of the Constitution of Kenya contains the Bill of Rights for the protection of the fundamental rights and freedoms of the individual subject to the limitations and exceptions contained therein.

Section 78 of the Constitution of Kenya guarantees the freedom of thought, religion and conscience. It enables every person to worship in Private and in Public and to manifest the same in any form. This Provision also enables Communities to establish places of worship and educational Institutions in aid of their religious beliefs. This has enabled the establishment of churches, mosques, temples, synagogues and other places of worship. The same applies to educational Institutions such as Seminaries, Theological and Bible Schools and Colleges, Madrassas, etc.

Section 78 of the Constitution lays down in great detail the basic foundation and building blocks for the management of the religious diversity in the country. The Section states as follows:-

“78. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section that freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance. (2) Every religious community shall be entitled, at its own expense, to establish and maintain places of education and to manage a place of education which it wholly maintains; and no such community shall be prevented from providing religious instruction for persons of that community in the course of any education provided at a place of education which it wholly maintains or in the course of any education which it otherwise provides.

(3) Except with his own consent (or, if he is a minor, the consent of his guardian), no person attending a place of education shall be required to receive religious instruction or to take part in or attend a religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own.

(4) No person shall be compelled to take an oath which is contrary to his religion or belief or to take an oath in a manner which is contrary to his religion or belief”.

The rights and freedoms contained in this Section are not absolute. Subsection 5 provides the exceptions and limitation to these rights in the interests of defence, Public safety, Public order, Public morality or Public health or for the purpose of protecting the rights and freedoms of other persons. Religious beliefs and practices that are deemed to fall within the exceptions such as devil worship and other cults are therefore outlawed.

Section 82 of the Constitution of Kenya prohibits the discrimination of any person on account of inter alia, his or her religious beliefs. Where these rights are violated, the High Court has been empowered under **Section 84** of the said Constitution to hear and determine matters involving such violations. There have been reported Cases of children being compelled to attend Churches or receive religious instructions other than that of their religion. Some schools have also been accused of punishing, suspending or even expelling students for wearing headscarfs to cover their heads as part of their religious beliefs. Some of these cases have ended up in Court whose decision almost invariably tend to declare the actions of the schools as unconstitutional. Finally **Sections 66 and 69** of the Constitution of Kenya enshrined the Kadhis Courts for the Muslims with jurisdiction to determine all matters of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the Parties profess the Muslim faith.

The entrenchment of the Kadhi's Courts in the Constitution is historical and was meant to protect the rights of the Muslims as a minority. The Kadhi's Courts existed even during the colonial period and their jurisdiction extended to the Muslims living in the 10 - mile coastal strip. At independence, they were entrenched in the Constitution in fulfillment of an agreement reached between the Sultan of Zanzibar and Mzee Jomo Kenyatta during the Lancaster house Constitutional talks.

During the National Constitutional Conference for a new Constitution at the Bomas of Kenya in 2004, the debate on the Kadhi's Courts became one of the contentions issues that was hotly debated. Religious leaders of other faiths such as the Christians and Hindus wanted them excluded from the Constitution and provided for under an ordinary Act of Parliament. They claimed that there was no equality of religions if one faith only was allowed to have its Courts. Some even proposed for the creation of Christian Courts and other Courts for other religious faiths to deal with their personal Law. Most of the Mainstream Churches such as the Catholic Church and Anglican

Church and the major political Parties supported the maintenance of the status quo with respect to the Kadhi's Courts. However, leaders of the Evangelical Church groups were adamant in their opposition to these Courts and they made it a rallying point for their followers in opposing the final draft Constitution. This was in spite of the compromise position taken at the Conference to allow for Parliament to enact legislation establishing Courts for other religious groups, especially the Christians.

LEGISLATION ENACTED BY PARLIAMENT

Apart from the Constitution of Kenya, Parliament has enacted several legislations for the better management of the religions diversity in the country. These Laws cover a wide range of issues such as offences relating to religion, marriages, divorce, inheritance, children's rights and religious holidays among others as set out here below.

OFFENCES RELATING TO RELIGION

In an effort to maintain harmony and co-existence between the various religious faiths, **Chapter XIV of the Penal Code, Chapter 63**, and Laws of Kenya creates several offences relating to religion. **Section 134** makes it an offence for any person to destroy, damage or defile any place of worship or any object which is held sacred by any class of persons with the intention of thereby insulting the religion of that class of persons. This Provision is meant to punish those who desecrate places of worship such as churches, mosques, temples etc. **Section 136** makes it an offence for any person to trespass in any place of worship or in any place of sepulture or in any place set aside for performance of funeral rites or depository for the remains of the dead with the intention of wounding the feelings of any person or insulting the religion of any person.

Finally **Section 138** of the Penal Code makes it an offence for any person who, with the deliberate intention of wounding the religions feelings of any other person, writes any word or makes any sound or gestures. This Provision criminalizes any written material or drawings such as cartoons that are intended to wound the religious feelings of others.

MARRIAGE, DIVORCE AND INHERITANCE

CHRISTIAN FAITH

Marriages and Divorce for those of the Christian faith and other monogamous marriages is governed by the **Marriage Act, Chapter 150 Laws of Kenya**. This Act makes Provision for the solemnization of Civil Marriages, their celebration and registration by Registrars and related matters.

The African Christian Marriage and Divorce Act, Chapter 151, Laws of Kenya makes Provision for the Marriage of African Christians, their celebration by Licensed Ministers and for the dissolution of such marriages. **Section 3 of the Act** states that it shall apply only to the marriages of Africans one or both of whom profess the Christian religion and to the dissolution of such marriages. **Section 9 of the Act** provides for the conversion of marriages already celebrated under native or customary law into marriages under the Marriage Act.

The Matrimonial Causes Act, Chapter 152, Laws of Kenya provides for the process of dissolution of marriages contracted under the afforested Acts. It also makes provisions for separations, maintenances and matters incidental to divorce such as division of matrimonial property before the High Court.

The Subordinate Courts (Separation and Maintenance) Act, Cap. 153 Laws of Kenya also makes provisions for the rights of married women to seek for orders of maintenance, separation and matters connected therewith before the Subordinate Courts. The rights and reliefs granted to married women under this Act are without prejudice to the Provisions of the **Matrimonial Causes Act** which is the main Law dealing with dissolution of Christian Marriages and matters connected therewith. It is important to note that **Section 2 of the Matrimonial Causes Act** defines marriage to mean, “**the voluntary union of one man and one woman for life to the exclusion of all others**”. It is therefore an offence to marry a second time when the first marriage is still subsisting. This is bigamy and is punishable by Law.

The definition Sections of all the above Acts do not contain any reference to the definition of a Christian. However the Collins dictionary defines a Christian as “**a person who believes in and follows Christ**”. It defines Christ as “**Jesus regarded by Christians as the Messiah**”. Christianity is therefore defined as “**the religion based on the Life and teachings of Christ**”.

HINDU FAITH

The Hindu Marriage and Divorce Act, Chapter 157, Laws of Kenya regulates the marriage, separation and dissolution of marriages and other related causes between Hindus and persons of allied religions. **Section 2** of the Act defines a Hindu to mean “**a person who is a Hindu by religion in any form (including a virashaiva, a lingayat and a follower of the Brahmo, Prarthana or Arya samaj) or a person who is a Buddhist of India origin, a Jain or a Sikh by religion**”.

The Act also makes Provisions for the conditions of Hindu marriages, their celebrations or ceremonies and registration.

Section 7(2) of the Act declares a marriage under the Act as a marriage as defined in the **Matrimonial Causes Act** which is essentially a monogamous one. This means that the Provisions of the **Matrimonial Causes Act and the Subordinate Courts (Separation and Maintenance) Act** are applied to Hindu marriages as they apply to marriages under the **Marriage Act** and the **African Christian Marriage and Divorce Act**.

MUSLIM FAITH

The Mohammedan Marriage and Divorce Registration Act, Chapter 155, Laws of Kenya provides for the registration of marriage and divorce by Muslims. **The Mohammedan Marriage, Divorce and Succession Act, Chapter 156 Laws of Kenya** deals with the Law relating to divorce, matrimonial causes and intestate succession. **Section 2** defines a matrimonial cause or suit to mean any suit relating to the validity of an Islamic marriage or any Suit claiming any species of relief whether by divorce or otherwise. **Section 3(1)** states that Islamic Law will apply in all divorce cases involving Muslims. **Section 3(2)** provides that the High Court and every judge shall have power to hear and determine all matrimonial causes or Suits arising out of Muslims marriages at the instance of either Party if resident in Kenya. In exercising this power, the High Court or the

judge is to give reliefs upon the principles of Mohammedan Law applicable to that marriage. **Section 4** provides that the onus of proving an Islamic Law principle before the High Court is on the Party alleging it”.

In matters of Succession and Inheritance, an amendment to **Section 2** of the **Law of Succession Act, Chapter 160, Laws of Kenya**, vide Legal Notice No. 21 of 1990, provides that the estate of a Muslim who has died intestate (i.e. without a will) is to be devolved in accordance with Islamic Law.

The **Wakf Commissions Act, Chapter 109, Laws of Kenya** defines a Muslim to mean, “**an Arab, a member of the twelve tribes, a Baluchi, a Somali, a Comoro Islander, a Malagasy or a native of Africa of the Muslim Faith**”. This definition was descriptive and not exhaustive. It did not include the Caucasian. The **Law of Succession Act, Chapter 160, Laws of Kenya**, later gave a more definitive description of a Muslim when it defined a Muslim as “**any person who professes the religion of Islam and accepts**” the unity of God and Mohammed as his Prophet”. It also defined Muslim Law as “the Law applicable to a person who is a Muslim”.

PUBLIC HOLIDAYS OF RELIGIOUS SIGNIFICANCE

Under the **Public Holidays Act, Chapter 110, Laws of Kenya**, there is Provision for the celebration of Public holidays that have religious significance for the various religions in the country.

Under this Act, Christians are able to celebrate Good Friday, Easter Monday, Christmas and Boxing Day as Public holidays. The Muslims are also able to celebrate Idd-ul-fitr and Idd-ul-Azha as Public holidays. The Hindus are also able to celebrate the Diwali in accordance with the Hindu calendar. Diwali is defined as “**a Hindu festival with Lights, held in the period of October to November**”. It is from the Sanskrit word “**dipawali**” which means “**row of Lights**”.

In addition to the celebration of days of religious significance as Public holidays, the Executive and the legislature have established the practice of allowing the three major religions in the country and in the case of Parliament one traditional one, to say prayers before commencement of official functions such as the state opening of Parliament and during National Holidays such as Madaraka Day, Kenyatta Day and Jamhuri Day. It is also out of respect for the followers of the Seventh Day Adventist (SDA) that Saturday is not a working day despite attempts to make it as

such.

CHILDREN'S RIGHTS

The **Children's Act, 2001, No. 8 of 2001** was enacted by Parliament to consolidate all the Laws relating to Children, to provide for the parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children and to give effect to the Principles of the convention on the Rights of the child and the African Charter on the Rights and Welfare of the child and for connected purposes.

Throughout the Act, the issues of the religious rights of the child and his parent go hand in hand with the protection and enforcement of the rights of the child in the context of the management of the religious diversity in the country.

Section 2 of the Act makes it clear that in all matters concerning a child, the best interest of the child shall be a Primary consideration. This may appear to make the religious beliefs of the parents or guardian to be Secondary to the welfare of the child. However, **Section 8** provides that every child shall have a right to religious education subject to appropriate parental guidance. This is given effect by the fact that Christian Religious Education (CRE) and Islamic Religious Education (IRE) have become part of the curriculum of education in the country to be taught to those who belong to the respective religious persuasions.

Under **Section 163 of the Act** which deals with adoption of children, **clause 2 (d)** provides that the Court making the adoption order may impose a condition upon the child being brought up in a particular religious persuasion.

With respect to foster care placement, **Section 152 of the Act** as read with Rule 5 of the Third Schedule provides that, **“where a child's religion is known, the child shall be placed with a foster parent who either is of the same religious persuasion as the foster child or who gives an undertaking that the child will be brought up in that religious persuasion”**.

CHALLENGES/CONSTRAINTS

In spite of the Constitutional Provisions and legislation governing the management of religious diversity in Kenya, there have been several factors that have posed challenges to the same. These include, but are not limited to the following:-

(a) The conduct and utterances of religious extremists that tend to create unnecessary tension among followers of different religions. This is especially the case for the Christian evangelical extremists and Muslim fundamentalist. The debate on the Kadhi's Courts during the National Constitutional Conference in Bomas was an eye opener for many Kenyans for the extremists that exist in both Camps.

(b) Religious Leaders becoming partisan and taking sides in contested National political issues such as in the Referendum on the Draft Constitution and the agreements that were executed between some religious leaders and political Parties during the recent 2007 general elections.

(c) Complaints by other religious groups such as the Muslims and Hindus against the National broadcaster, KBC, for giving unfair advantage to coverage of Christian programs as compared to programs from other religious groups.

(d) Lack of legal frame work and Institutions for inter faith dialogue and resolution of emerging conflicts between the faiths inter se.

(e) Continued existence of obstacles to the social integration of people of different religions. This is best manifested in Communities' attitude towards cross-faiths marriages i.e. marriages between persons of different religious persuasions. Past experiences have shown that such persons who dare cross that divide to face severe social stigma and lack of acceptance within their respective Communities.

(f) Complaints by Muslims of discrimination and unfair treatment by Government Agencies such as the Registration of Persons office and the Immigration department in the issuance of Birth Certificates, Identity Cards and Passports to Muslims in Kenya.

(g) Complaints by Muslims of harassment and unfair treatment by the Police and other security agencies of the state in the war on terror which they see as a war on Islam and Muslims.

(h) Complaints by Muslims of marginalization in allocation and distribution of National resources e.g. in the employment in the Public Service, the Cabinet, Judiciary etc.

NOTE: H.E. President Mwai Kibaki appointed a task force in December 2007 to look into the complaints by the Muslims and the report of the task force is yet to be released. Since the formation of the coalition government in 2008, the Muslims have appreciated the Government efforts to address their grievances in the employment in the Public Service and the Cabinet.

CONCLUSION AND WAY FORWARD

Despite the many challenges, Kenya has managed to remain a relatively stable and peaceful country due to its prudent management of the religious diversity. There has never been any serious conflict of great consequences between the different religious groups in the country. The same cannot be said of the tribal clashes that have rocked the country since the introduction of multi-party politics in 1992. These tribal clashes however, had nothing to do with religion, but were caused by underlying ethnic tensions due to historical injustices, inequitable distribution of resources and political factors.

There is however much room for improvement to allay the fears and concerns of those that feel discriminated or unfairly treated. This can only be achieved through constant review of the existing legal and administrative mechanisms and a comprehensive review of the Constitution.

There is also a need for a legal and institutional framework for inter-faith dialogue for the resolution of disputes between the different religious groups. The Commission for ethnic relations established under the National Accord and Reconciliation Act is a good start. The Government must urgently act on the recommendations of the task force appointed by the President in December 2007 to deal with the issues raised by the Muslim Community.

The appointment of religious leaders, who are active in the service of their religious faith, to Public positions is not desirable as they would not be seen as Public servants per se but first and foremost as the religious leaders they are.

In order to reign in on the destructive influence of extremists and religious fundamentalist, there should be a Law to penalize utterances and conduct that are likely to create tension, hatred or animosity between different religious communities.

National Institutions, such as the Kenya Broadcasting Corporation, which are wholly or partially funded by the state, must be compelled to treat all religions equally and give them equal airtime to preach and propagate their faiths.

In order to address the feeling of marginalization and discrimination by persons of various religious faiths, there is a need to ensure fair and equitable distribution of National resources. This includes the development of all regions to enable all citizens get the same quality and quantity of services from the state and in the appointment to Senior positions in Government such as in the Cabinet, Public Service, judiciary, disciplined forces, constitutional commissions and parastatal bodies to reflect the diversity of the country and to promote inclusivity and national cohesion.

There must be equal application of the Law to all charitable and educational institutions set up by the different religious faiths so that they are able to enjoy the same rights and privileges to avoid the perception that there is one favoured religion over the others.

Finally, the Government should establish a standing Committee comprising of representatives of the major religious groups in Kenya to consult and engage it on matters of National importance that may have an impact on the religious beliefs of the different communities before embarking on a plan of action.

END