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RELIGIOUS AND LEGAL PLURALISM IN RECENT AFRICAN CONSTITUTIONAL REFORM

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INTRODUCTION: RELIGION, “NEW CONSTITUTIONALISM,” AND LEGAL PLURALISM IN AFRICA

Something unexpected has been happening in Africa—and not just Northern Africa, the locus of democratic revolutions since January 2011, when a winter’s discontent produced an early Arab Spring. Over the last several years, several sub-Saharan African nations have held democratic elections, produced new constitutions, and even partitioned themselves in relative peace, despite the often dire predictions of foreign governments, media, and election-monitoring organizations.¹

In many cases, the constitution and reconstitution of these states has been accomplished by means of the referendum vote—sometimes viewed as the anti-democratic purview of special interests in the developed West, but having greater respect and utility as a tool of democracy in the developing South. Kenya produced a new constitution in 2010 by a referendum that has been lauded by international observers for its peaceful process and outcome.² The Kenyan referendum followed general elections in 2007, whose results were marred by violence in early 2008. The nearby countries of Zambia and Tanzania are currently in the process of constitutional reform, drawing lessons

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1. See Kenya’s Constitutional Referendum: *Stoking Up Violence*, THE ECONOMIST, June 17, 2010; Zoe Alsop, *Will Kenya’s Constitutional Vote Lead to Violence?*, TIME, Aug. 4, 2010; Xan Rice, *Kenya Votes Amid Tight Security in Referendum on New Constitution*, THE GUARDIAN, Aug. 4, 2010.

2. See Peter Clottey, *Peaceful, Credible Vote Goals in Kenya Constitutional Referendum*, VOICE OF AMERICA, Aug. 3, 2010; *Kenya Holds Referendum as Part of Political Peace Deal*, BBC News Africa, Aug. 4, 2010; Jeffrey Gettleman, *Kenyans Approve New Constitution*, N.Y. TIMES, Aug. 5, 2010; *Obama Congratulates Kenya on ‘Peaceful, Transparent’ Vote*, AGENCIE FRANCE PRESS, Aug. 3, 2010.

from Kenya's unexpectedly harmonious proceedings. In all three countries, the constitutional review processes have raised, among other issues, questions of legal pluralism, religious freedom, and relations between the Christian majority and Muslim minority.³

The "new constitutionalism" in East Africa is occurring at the same time as other actual and proposed constitutional reforms in the African subcontinent. Most notably, in a referendum process that was watched and assisted by experts from around the world, South Sudan partitioned itself from Sudan in 2010, put together an interim transition constitution in July 2011 and has recently appointed a constitutional commission.⁴ But initial hopes for South Sudanese independence are currently under great stress from fighting that has emerged in still contested middle regions between the two Sudans. South Sudan, thus, currently stands as a cautionary note about the democratic potential of African constitutional referenda. Another African country whose politicians and citizens have broached the possibility of a new constitution—or even partition—is Nigeria. Nigeria's northern and southern states have been in tension for more than a decade over the institution of *Shari'a* in the predominantly Muslim North, to the great objection of the predominantly Christian South.⁵ A Nigerian constitutional referendum,

3. Suffice it to say, these African developments are not widely reported in the U.S. or elsewhere. They can only be followed in the international and local press, the policy analyses of research organizations that study the region, and the burgeoning blogosphere in Africa and in the global Muslim and Christian communities. For representative headlines that convey the growing concerns, see *Kenyan Premier Warns of Muslim-Christian Conflict Over Islamic Law*, BBC Africa, Nov. 2, 2009; Mike Pflanz, *Kenya's draft constitution under fire for Islamic courts*, THE CHRISTIAN SCIENCE MONITOR, May 28, 2010; *Tanzanian Fear at Islamic Courts*, BBC Africa, Oct. 24, 2008; *New Cabinet Urged to Push Setting Up of Kadhi Court*, THE CITIZEN (DAR ES SALAAM), Nov. 25, 2010; *Faith Bigotry was One Huge Worry in 2010*, THE CITIZEN (DAR ES SALAAM), Dec. 30, 2010; Frank Jomo, *Islam Making Inroads in Zambia*, NewsFromAfrica.org, July 16, 2006; *Zambian Muslims Urged to be Peaceful and Patriotic*, LUSAKA TIMES, Dec. 31, 2009; *Muslims Ask Sata To Include Them in Constitution Technical Committee*, TUMFWEKO, Nov. 18, 2011.

4. For details of the constitutional reform in South Sudan, see the website of the South Sudan Law Reform (Review) Commission, available at <http://www.goss-online.org/magnoliaPublic/en/Independant-Commissions-and-Chambers/South-Sudan-Law-Review-Commission.html>. The commission was appointed to draft a permanent constitution to replace the Transitional Constitution of South Sudan, which came into effect on July 9, 2011, following the South Sudanese secession by referendum in January 2011.

5. For information on the recent Sharia debates in Sudan, particularly over the fraught issue of family law, see the essays in *Sharia, Family, and Democracy: Religious Norms and Family Law in Pluralistic Democratic States*, Symposium Issue, 25(2) EMORY INT'L L. REV. (Abdullahi A. An-Na'im & M. Christian Green eds. 2011), available at <http://blogs.law.emory.edu/nigeriasharia/law-symposium>. The Nigerian Constitution of 1999 is currently under review by a Constitutional Review Committee of the Nigerian House of Representatives, whose legislative materials are available at <http://www.hrcr.org.ng>. An amended constitution is scheduled to be released in 2013. While the primary issues in Nigerian reform have

if it occurs, may become a key bellwether for the future of religious and legal pluralism in Africa.

These developments in South Sudan and Nigeria, particularly in light of the recent history of conflict in those countries, have been watched closely in Kenya, Zambia, and Tanzania, and other African countries considering constitutional reform.⁶ In Kenya and Tanzania, the Muslim populations are much smaller than they are in Nigeria, but they are geographically clustered in the northeastern and coastal regions of Kenya and the autonomous island region of Zanzibar in Tanzania.⁷ While relatively small in numbers, Muslims in Kenya and Tanzania, arguably, have outsized influence because of their distinct geographic enclaves and the recent constitutional attention to their Islamic *Shari'a* courts—known locally as the Kadhi's Courts. Kenya and Tanzania have also been the subject of international attention as the sites of the 1998 Al Qaeda U.S. embassy bombings in Nairobi and Dar es Salaam, which were widely seen, with the Sudan-sponsored bombing of the U.S.S. Cole in 2000, as practice runs for the September 11, 2001, terrorist attacks in New York and Washington, D.C.⁸ Fears of Muslim religious extremism have also been spreading in other sub-Saharan nations, including the

had mostly to do with the structure of the federal system more than with issues of religious and legal pluralism, the religious and ethnic composition of the population in the proposed restructuring of federal states has been an important background issue in the debate.

6. For more background on African constitutionalism, including the role of religion, see CONSTITUTION-MAKING AND HUMAN DIGNITY: PERSPECTIVES FROM EASTERN AND SOUTHERN AFRICA (African Forum for Catholic Social Teachings 2006); ABDULLAHI AHMED AN-NA'IM, AFRICAN CONSTITUTIONALISM AND THE ROLE OF ISLAM (Univ. Penn. Press 2006); CONSTITUTIONALISM AND SOCIETY IN AFRICA (Okon Akiba ed., Ashgate c2004); B.O. NWABUEZE, CONSTITUTIONAL DEMOCRACY IN AFRICA (Spectrum Books 2003-04); CONSTITUTIONALISM IN AFRICA : CREATING OPPORTUNITIES, FACING CHALLENGES (J. Oloka-Onyango ed., Fountain Pub. 2001); THE STATE AND CONSTITUTIONALISM IN SOUTHERN AFRICA (Owen Sichone ed., SAPES Books 1998); YASH GHAI, THE RULE OF LAW IN AFRICA : REFLECTIONS ON THE LIMITS OF CONSTITUTIONALISM (Chr. Michelsen Inst. 1990).

See also the recent VOICE OF AMERICA seven-part series of articles on the topic, including: Nico Colombant, *Constitutionalism in Africa Follows a Rocky Road*, VOICE OF AMERICA, Mar. 28, 2012; William Eagle, *Push for More Democracy Drives Constitutional Change in Africa*, VOICE OF AMERICA, Mar. 28, 2012; Delia Robertson *ANC to Review South Africa's "Model" Constitution*, VOICE OF AMERICA, Mar. 28, 2012; *Drafting Somalia's Constitution Opens Debate on Religion, Law*, VOICE OF AMERICA, Mar. 28, 2012; *Zimbabwe's New Constitution Two-Plus Years Behind Schedule*, VOICE OF AMERICA, Mar. 28, 2012; Anne Look, *Experts: African Coups Are a Poor Way to Establish Democracy*, VOICE OF AMERICA, Mar. 28, 2012, Nico Colombant, *Africa's Constitutions Often Unfilled*, VOICE OF AMERICA, Mar. 28, 2012.

7. For information on the proportions and locations of Muslims in Kenya and Tanzania, see the United States Department of State's country reports on Kenya and Tanzania in the International Religious Freedom Reports, available at <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?dld=192767>.

8. See, e.g., NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT, Chs. 4 and 6 (U.S. Gov't. Printing Office, July 22, 2004).

constitutionally-proclaimed “Christian nation” of Zambia, which is also in the process of constitutional reform.

In the three countries that are the focus of this article, religious rights and religious freedom have been high-profile disputes between the Christian majority and Muslim minority, particularly over the issue of the Kadhi’s Courts. In Kenya, opposition to Kadhi’s Courts, coupled with the objection of Catholic and other Christian groups to liberalization of laws on abortion, prompted some Christian groups to lobby against the very referendum process that they had demanded of the state.⁹ In Tanzania, the constitutional reform process has been heavily influenced—and at times nearly derailed—by disputes over the sovereignty of the Muslim region of Zanzibar and associated calls for recognition of Kadhi’s Courts there and in other parts of mainland Tanzania.¹⁰ In Zambia, concern about the rise of Islam is filtered through the ongoing debate over the 1991 constitutional proclamation that the country is a “Christian nation,” and the potential emergence of Kadhi’s Courts has since become a concern.¹¹

What was unexpected in the constitutional referendum that took place in Kenya was its defiance of conventional assumptions about the propensity for religious contestation to lead to violent conflict. The constitutional reform procedure in Kenya seems to have unfolded peacefully and productively, at least in the near term. In Kenya, religious organizations were instrumental in calling for the referendum and in helping to engage the populace in peaceful participation in the referendum process—though not always without reservation, as indicated by the controversies over abortion, the Kadhi’s Courts, and

9. Church opposition was a feature of both the 2010 and earlier 2005 referenda. See *Kenya: Islamic Courts, Abortion Trigger Church Opposition to Constitution*, Ecumenical News International (Geneva), Apr. 29, 2010; *Don’t Kill Our Reform Dream, Churches Urged*, THE NATION (Nairobi), Apr. 4, 2010; *Kenya: Churches Campaign Against Referendum*, EAST AFRICAN STANDARD (Nairobi) Aug. 21, 2005.

10. At the time of this writing the situation regarding Zanzibar autonomy has become even more serious in the wake of riots by Islamist groups. See *The Swahili Coast: Contagion of Discontent: Muslim Extremism Spreads Down East Africa’s Coastline*, THE ECONOMIST, Nov. 3, 2012; *Tanzania: Islamist Riots Threaten Zanzibar Stability*, IRIN News, Oct. 24, 2012.

11. At the time of this writing in November 2012, there is also a Muslim activism brewing in the Kenyan coastal regions that were once part of the Sultanate of Zanzibar. See *Briefing: Kenya’s Coastal Separatists-Menace or Martyrs?*, IRIN News, Oct. 24, 2012 and *Analysis: Kenya’s Deadly Mix of Frustration, Politics and Impunity*, IRIN News, Sept. 14, 2012, both citing Paul Goldsmith, THE MOMBASA REVOLUTIONARY COUNCIL: CONFLICT ASSESSMENT: THREATS AND OPPORTUNITY FOR ENGAGEMENT (Kenya Civil Society Strengthening Program, Nov. 2011), available at http://www.kecosce.org/downloads/MRC_Conflict_Assessment_Threats_and_Opportunities_for_Engagement.pdf.

11. Jomo, *supra* note 3, *Islam Making Inroads in Zambia*.

other matters.¹² The Zambian and Tanzanian constitutional review processes have been plagued by multiple postponements over various issues, but both countries seem likely to follow the Kenyan example in the next few years.

What does the “new constitutionalism” of the recent African referenda augur for legal pluralism, religious freedom, and Muslim-Christian relations in the region? How do the issues play out differently in light of differences in religious demographics and religious attitudes among the three countries in question? In particular, how do these constitutional controversies reflect or refute recent survey data on religious freedom, democracy, and religious pluralism in the region? Does the actual function of legal pluralism confirm or challenge the sometimes apocalyptic perceptions of tension around religious pluralism in these countries? In order to address these questions, I shall provide an analysis in this article of the role of religion in the recent constitutional referenda in Kenya, Tanzania, and Zambia, with particular focus on legal pluralism and Muslim-Christian relations reflected in the disputes over Kadhi’s Courts. I shall conclude with some observations about the directions that the “new constitutionalism” and legal pluralism are likely to take in Africa in the years to come.

I. KENYA: RELIGIOUS FREEDOM, LEGAL PLURALISM, AND DEMOCRACY

A. Background and Impetus to the Recent Kenyan Constitutional Referendum

On August 4, 2010, the eyes of the world were on Kenya, as it held its constitutional referendum. The 2010 Constitution replaced the 1969 Constitution, which was itself a revised version of the original 1963 Independence Constitution. The new constitution had been written by the independent Committee of Experts and was the subject of extensive public education and public commentary.¹³ The constitutional review process is said to have cost the Kenyan government over three million dollars and drew financial and technical assistance from a variety of international organizations and entities, including a reported twenty-three million dollars from the United States Government under the

12. For post-referendum analysis of the role of the Kenyan churches on these points, see Charles Onyongo-Obio, *Why the Glory of the Referendum Belongs to the 'No' Campaigners*, THE NATION (Nairobi) Aug. 7, 2010; Abiud Ochieng, *Clergy Accept Defeat But Push for Amendment*, THE NATION (Nairobi), Aug. 5, 2010.

13. For more information on the 2010 Constitution of Kenya, see <http://www.kenyaconstitution.org>.

Obama Administration.¹⁴ In the end, the 2010 Constitution of Kenya was approved by two-thirds of the voters in a process that some argued had taken far too long.¹⁵

The Kenyan constitutional referendum was the culmination of a process that began inauspiciously with an earlier attempt in 2003 that resulted in the “Bomas Draft,” which was rejected by the government and ultimately denied a referendum vote.¹⁶ The Kenyan Government’s preferred “Wako Draft” was, in turn, rejected by a national referendum on November 21, 2005, with fifty-seven percent voting against.¹⁷ The failed constitutional process of 2003-05 is said to have cost the administration of Kenyan President Mwai Kibaki considerably in terms of prestige and legitimacy, producing a political vacuum so severe that some observers called for the government itself to step down.¹⁸ The political confusion spawned by the failed 2005 constitutional reform continued to reverberate in the Kenyan general elections of December 27, 2007, whose violent aftermath plunged the country into even greater chaos. Incumbent President Kibaki was declared the winner of the presidential election, but the main opposition party alleged electoral manipulation.¹⁹

14. While some observers praised the peaceful process in Kenya, others denounced the expenses associated with holding the referendum and festivities to celebrate the new constitution. *See Peaceful Voting in Kenya and Rwanda Praised*, THE NATION (Nairobi), Aug. 11, 2010; *Kenya: New Constitution, Same Old Waste of Public Money*, THE EAST AFRICAN (Nairobi) Aug. 30, 2010.

15. The Obama Administration’s financial support of the Kenyan process drew criticism from conservative political opponents at home, including “birther” conspiracy theorists, religious institutions and members of Congress opposed to abortion, and organizations concerned about the spread of Islam and *Shari'a*. *See Jeffrey Gettleman, Kenyan Constitution Opens New Front in Culture Wars*, N.Y. TIMES, May 13, 2010; Scott Baldauf, *Powerful Churches Target Kenya's Constitution Over Abortion*, CHRISTIAN SCIENCE MONITOR, May 14, 2010.

16. President Barack Obama praised the new constitution as perhaps signaling a turnaround from the continuing instability and corruption from the coalition government, which Obama and other world leaders condemned in the days after the 2008 post-election violence. *See Murithi Mutiga & Mugumo Munene, Obama—New Law a Boon*, THE NATION (Nairobi), Aug. 21, 2010.

17. For a comparative analysis of the Kenyan constitutional process and that of other East African nations, *see Charles Onyango-Obbo, The Un-East African' Constitution and Why It Took So Long*, THE EAST AFRICAN (Nairobi), Aug. 2010.

18. National Constitutional Conference, Draft Constitution of Kenya of 2004 (Mar. 23, 2004) [hereinafter Bomas Draft].

19. *See Kenya: Divided by the Colours of a New Constitution*, UN INTEGRATED REGIONAL NETWORKS (Nairobi), July 30, 2010. Parliamentary Select Committee on Constitutional Review, Proposed New Constitution of Kenya 2005 [hereinafter Wako Draft]. For further discussion of the Bomas and Wako drafts, *see Preston Chitere et al., KENYAN CONSTITUTIONAL DOCUMENTS: A COMPARATIVE ANALYSIS* (Bergen, Norway: Chr. Michelsen Inst. 2006), available at <http://www.cmi.no/publications/file/2367-kenya-constitutional-documents.pdf>.

18. *See Mwesiga Baregu, Constitutions and Constitutionalism*, THE CITIZEN (Dar es Salaam) Dec. 29, 2010.

19. *See Jeffrey Gettleman, Disputed Vote Plunges Kenya Into Bloodshed*, N.Y. TIMES, Dec.

The results of the 2007 elections were incendiary primarily along ethnic lines, but there were some discernible religious dimensions and manifestations. Post-election violence first erupted in the Rift Valley Province between the Kikuyu people, who shared President Kibaki's Kikuyu ethnicity, and the Luo and Kalenjin who were supporters of Kibaki's leading rival, Raila Odinga.²⁰ The Kikuyu, Luo, and Kalenjin ethnic groups all practice diverse blends of Christianity, Islam, and African traditional religion,²¹ but in the post-election violence, one group of Kikuyu Christians suffered a particularly heinous act of violence. On January 1, 2008, a church in the town of Eldoret was set afire and more than thirty Kikuyu women and children burned alive. There were also riots by Kenyan Muslims in the city of Mombasa.²² With the intervention of former United Nations Secretary-General Kofi Annan, who arrived in the country a month after the elections, the two parties were able to come to a power-sharing agreement through the National Accord and Reconciliation Act. That Act created a coalition government and the office of prime minister, which Odinga would assume as a counterbalance to Kibaki's presidential power.²³ While the violence surrounding the 2007 elections has been described as more ethnic than religious in nature, it indicated a state of sociopolitical fragility in Kenya that continues to rankle today. These concerns were at their height in the months preceding the 2010 constitutional referendum.

B. Religion in the Kenyan Constitution

The recent controversy over religious and legal pluralism in Kenya has its roots in the 1963 Independence Constitution and the revised 1969

31. 2007; *Kenya's Dubious Election*, BBC News, Jan. 8, 2008; Tavia Nyong'o, *Kenya's Rigged Election*, THE NATION, (Nairobi) Jan. 21, 2008. See also European Union Election Observation Mission, KENYA: FINAL REPORT: GENERAL ELECTIONS 27 DECEMBER 2007 (Brussels: European Commission, Apr. 3, 2008) available at <http://www.eeas.europa.eu>; International Republican Institute, KENYA: PRESIDENTIAL, PARLIAMENTARY, AND LOCAL ELECTIONS: ELECTION OBSERVATION MISSION FINAL REPORT (IRI, Dec., 27, 2007) available at <http://www.iri.org>.

20. It may be worth noting that both of the candidates in this case were Christian—Kibaki a Roman Catholic and Odinga an Anglican.

21. PEW FORUM ON RELIGION AND PUBLIC LIFE, TOLERANCE AND TENSION: ISLAM AND CHRISTIANITY IN SUB-SAHARAN AFRICA, 307 (Pew Research Center: Washington, D.C., 2010).

22. See Jeffrey Gettleman, *Mob Sets Kenya Church on Fire, Killing Dozens* N.Y. TIMES, Jan. 2, 2008; *Kenyans Burned to Death in Church* BBC News, Jan. 1, 2008; Robyn Dixon, *Kenyans recall the screams of the dying in burning church*, L.A. TIMES, Jan. 3, 2008; Jeffrey Gettleman, *Protests Bring New Violence in Kenya*, N.Y. TIMES, Jan. 17, 2008.

23. The National Accord and Reconciliation Bill, 2008 (Mar. 6, 2008), available at <http://www.kenyalawreports.or.ke.>; *Kenya Rivals Agree to Share Power*, BBC News, Feb. 28, 2008.

Constitution. Section 66 of the 1969 Constitution, in the chapter on the Kenyan judiciary, provided for Kadhi's Courts with special jurisdiction in the Protectorate, a ten-mile long strip of coastal land that was originally leased to the British colonial powers by the Sultan of Zanzibar.²⁴ Section 66 set forth the constitutional requirements for Kadhi's Courts, including the number of Kadhis, the requirements to serve as a Kadhi, and the requirements for courts. A Kadhi's Court judge was to be a professing Muslim with "such knowledge of Muslim law applicable to any sect or sects of Muslims, as qualifies him, in the opinion of the Judicial Service Commission, to hold a Kadhi's court."²⁵ The Kadhi's Courts' jurisdiction extended to "the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion."²⁶ Section 78 protected each individual's freedom of conscience, including "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 or propagate his religion or belief in worship, teaching, practice and observance."²⁷ Other provisions addressed religious education, oath swearing, and various limitations on the right of religious freedom, including limitations in "the interests of defence, public safety, public order, public morality or public health" and for the "purpose of protecting the rights and freedoms of other persons, including the right to observe and practise a religion without the unsolicited intervention of members of another religion."²⁸

The new 2010 Constitution included a new preamble with paragraphs expressing pride in Kenya's "ethnic, cultural, and religious diversity" and the determination "to live in peace and unity as one indivisible sovereign nation."²⁹ It also added a section on the relationship between religion and the state containing the declaration, "There shall be no State religion."³⁰ A section on the implementation of rights and fundamental freedoms committed the Kenyan government to the protection of "the needs of vulnerable groups in society," including "members of particular ethnic, religious or cultural communities."³¹ In a

24. Constitution § 66(4) (1969) (Kenya).

25. *Id.* § 66(2)(a).

26. *Id.* § 66 (5).

27. *Id.* § 78 (1).

28. *Id.* § 78 (5) (a-b).

29. Constitution, Preamble (2010) (Kenya).

30. *Id.* § 8.

31. *Id.* § 21(3).

move that would become especially controversial, the section on the limitation of fundamental freedoms provided that the relevant provisions on equality and freedom from discrimination in the enjoyment of fundamental rights “shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhi’s courts to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce or inheritance.”³²

The section on “Freedom of conscience, religion, belief or opinion” was rewritten in the new constitution to include, in addition to the basic definition of freedom of conscience, two specific provisions prohibiting the denial of “access to any institution, employment or facility, or the enjoyment of any right, because of the person’s belief or religion” and the compulsion of any persons “to act, or engage in any act, that is contrary to the person’s belief or religion.”³³ The section on family law recognized a right of Parliament to enact legislation recognizing “marriages concluded under any tradition, or system of religious, personal or family law,” including “any system of personal or family law under any tradition, or adhered to by persons professing any particular religion.”³⁴ A section on political parties stated that parties shall not “be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis.”³⁵ The Kadhi’s Courts provisions contained in the new constitution were identical to those in the 1969 Constitution, but with a new reference to the courts potentially having “jurisdiction within Kenya” in its entirety, rather than being limited to the region of the former Protectorate.³⁶

The Act of Promulgation by which President Kibaki gave effect to the new constitution praised the way in which the constitutional review process had “accommodated the diversity of the Kenyan people . . . and was guided by the universal principles of human rights, gender equity, and democracy,” had “provided the people of Kenya an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution,” and had “resulted in a new Constitution which faithfully reflected the wishes of the people of Kenya.”³⁷ In particular, the Act of Promulgation praised the way in

32. *Id.* § 24(4). The equality and freedom from discrimination provision is in Sec. 27(4).

33. *Id.* § 32 (3-4).

34. *Id.* § 45(4).

35. *Id.* § 91 (2 (a)).

36. *Id.* § 170.

37. *Id.* at 192.

which the new constitution reflected “the pride of the people of Kenya in their ethnic, cultural and religious diversity and their determination to live in peace and unity as one indivisible and sovereign nation.”³⁸ It was a crowning moment in a nation that had approached the brink of disaster. But the new constitution has not been achieved without dispute and debate—particularly over matters of religious and legal pluralism.

C. Religious Dimensions of the Recent Kenyan Constitutional Referendum

While conflict in Kenya has generally occurred across lines of ethnicity, religious tensions are evident in both the 2007-08 electoral violence and the lead-up to the 2010 constitutional reform. In 2004 Catholic bishops and other Christian leaders led a vigorous campaign to hold a referendum the following year, but they ultimately voted against the proposed constitution because of its continued recognition of Islamic courts.³⁹ In both the lead-up to the failed 2005 constitutional referendum and in the 2007 general elections, religious hate material was reported to have been distributed between Muslims and Christians, with each side concerned about potential domination by the other.⁴⁰ In the 2007 elections, the opposition to the Kibaki administration played up Muslim concerns about a proposed anti-terror bill, perceived as propagating negative impressions of the Muslim community, in order to win Muslim support.⁴¹ And, as noted above, the diverse ethnic and religious identities of supporters of the Kibaki and Odinga candidacies, along with Muslim demonstrations in Nairobi and the deadly post-election church-burning in Eldoret, all indicated undercurrents of religious tension in Kenyan politics. In light of these earlier controversies around religion and constitutionalism in Kenya, it remained to be seen whether and how religion would shape the 2010 constitutional reforms.

38. *Id.*

39. Francis Openda, *Church Leaders Call for a Referendum*, EAST AFRICAN STANDARD (Nairobi) Mar. 25, 2004.

40. *Religionism a Threat to East African Unity*, EAST AFRICAN STANDARD (Nairobi) Mar. 30, 2008. *See also* UNITED STATES STATE DEPARTMENT, INTERNATIONAL RELIGIOUS FREEDOM REPORT, KENYA, § 2 (United States Department of State, 2006) (IRFR). The 2006 IRFR for Kenya describes the ongoing disputes over Kadhi’s Courts that emerged in the 2005 constitutional debate, as well as concerns about the Suppression of Terrorism Bill and government assistance to Islamic schools.

41. Kenyan Muslim concerns about anti-terrorism bills preceded the 2007 elections and have continued to the present day. *See* Alex Thurston, *Kenyan Muslims Debate Anti-Terror Law*, The Revealer.org, July 7, 2012; Clar Ni Chonghaile, *Kenyan Muslims fear the worst over proposals to boost police powers*, THE GUARDIAN (U.K.), Sept. 27, 2012; Gabe Joselow, *Kenyan Muslims Condemn Killing in Anti-Terror Raid*, VOICE OF AMERICA, Oct. 29, 2012.

The national and international investment in the Kenyan constitutional reform process resulted in the creation of a number of civic educational resources and public platforms for debating the new constitution. The most innovative of these were either online or disseminated via the cell phones that substitute for the internet in Kenya and other sub-Saharan nations, where internet access remains scarce.⁴² These new technologies are a novel and significant source of information on Kenyan attitudes toward religion and the new constitution.

One website called Katiba Mobi, set up by a Kenyan media consultant, Joe Njeru, was designed to allow Kenyans to access the proposed constitution article by article, rather than as a single document, in order to allow the constitution to be read in both English and Kiswahili over the smaller screens of cell phones and other portable devices.⁴³ The website tracked the most-read constitutional articles, which included Article 26 on the right to life and Article 19 on rights and fundamental freedoms, in addition to several provisions dealing with land policy, use, and reform, and with issues of popular sovereignty, citizenship, and the supremacy of the Constitution. Even more revealing in terms of religion and legal pluralism, are the statistics for most searched terms on the Katiba Mobi website. The list included the following search terms: "(1) Abortion, (2) Marriage, (3) land, (4) Kadhi courts, (5) Teachers, (6) country, (7) RELIGION,⁴⁴ (8) kadhi, (9) Attorney-General, (10) kadhis court."

The inclusion of the terms marriage, religion, and no fewer than three permutations of the term "Kadhi's Courts" shows especially high levels of concern about legal pluralism and the implications for family law and religious freedom. The significance of the Kadhi's Court issue is also suggested in the way in which each of the terms on the list intersects with the Kadhi's Courts issues in some way, as seen in the constitutional articles turned up in searches of each of the controversial terms. The list of constitutional articles retrieved in a search of "marriage" included provisions on citizenship through marriage, family rights, land reform, and limitations on rights and fundamental freedoms,

42. See Toby Shapshak, *Africa Not Just a Mobile First Continent—It's Mobile Only*, CNN.com, Oct. 4, 2012.

43. Katiba Mobi, at <http://katiba.mobi> (last visited Feb. 24, 2012). The Katiba Mobi Twitter site reported the website's launch on May 10, 2010, and on May 26, 2010, reported the site had drawn 100,000 views. On Aug. 4, 2010, the day of the referendum, the site drew 4,000 views. See <https://twitter.com/#!/katibamobi>.

44. Available at <http://katiba.mobi/const/topsearches.php> (last visited Mar. 8, 2013). The term "RELIGION" is rendered, without explanation, in capital letters.

including the exceptions made to principles of equality and nondiscrimination in the case of Kadhi's Courts, as well as the main Kadhi's Courts provision.⁴⁵ A search of the term "religion" pulled up articles on religion and the state; the limitation of rights and fundamental freedoms; equality and freedom from discrimination; freedom of conscience, religion, belief, and opinion; the family; and the Kadhi's Courts. Searches of the various permutations of "Kadhi's Courts," of course, turned up the articles on Kadhi's Courts and on limitations of rights and fundamental freedoms.

The frequency of searches on the Kadhi's Courts indicates a high level of interest among Kenyans using the site on the Kadhi's Court question, and the intersection of the Kadhi's Court question with the perennially hot topics of religion, family, and fundamental freedoms conveys an indication of the heightened level of sensibilities on these issues. Many users of the site were searching these terms with deliberate interest. But even someone with no knowledge of Kenyan constitutional affairs who happened upon the site would not be able to avoid the impression that the Kadhi's Courts issue was especially significant, given the number of references to the Kadhi's Courts on the most frequently viewed pages of the site. The Katiba Mobi website was far from the only online resource on the Kenyan Constitution,⁴⁶ but it was one of the most innovative in terms of fostering popular participation in the referendum process and is an especially revealing source of information on concerns of Kenyan voters leading up to the constitutional referendum.

The Kadhi's Courts provisions were, indeed, the subject of a great deal of public discussion, not only on the internet, but also at the Kenyan High Court. In the spring of 2010, as the new constitution was making its way toward referendum, the issue ultimately reached the Kenyan High Court by way of a petition filed in 2004 by Christian leaders in

45. It is worth noting that "The Marriage Bill, 2012," currently up for review in the Kenyan National Assembly, makes ample provision for Kadhi's Court marriages. See the bill and public comments to it at the website of the Commission for the Implementation of the Constitution (CIC) website at <http://cickenya.org/bills/marriage-bill-2012>.

46. See the Committee of Experts on Constitutional Review, PROPOSED CONSTITUTION OF KENYA: CURRICULUM FOR CIVIC EDUCATION, (Nairobi: Committee of Experts on Constitutional Review 2010) at http://www.constitutionnet.org/files/coe_civic_education_curriculum_0.pdf; CONSTITUTIONAL REFORM AND EDUCATION CONSORTIUM (CRECO), *Constitutional http://www.crecokenya.org/?page_id=342; The 11 Cardinal Principles: A Scorecard to the Kenyan Constitution-Making Process*). See also INSTITUTE FOR SOCIAL ACCOUNTABILITY, *Jukwaa la Katiba!*, <http://www.tisa.or.ke/jukwaa-la-katiba/> "Jukwaa!" is the successor to the "Katiba Sasa!" campaign, whose work is available at <http://www.katibasasa.org/2010/06/12/kenya%E2%80%99s-constitution-making-history-1890-2010>.

opposition to the Kadhi's Court provisions. In that case, *Jesse Kamau & 25 Others v. Attorney General*, a group of bishops and other high-level clergy from a range of Christian denominations charged the Kenyan government and the disbanded Constitution of Kenya Review Commission with violations of equal protection and nondiscrimination under the 1969 Constitution that was still in effect.⁴⁷ The focus of the litigation was the aforementioned Section 66, which established the Kadhi's Courts as part of the Kenyan judiciary system. The Christian leaders challenged the establishment of these courts on the basis of the 1969 Constitution's other provisions protecting fundamental rights and freedoms, particularly freedom of conscience, freedom of expression, freedom of assembly and association, and freedom from discrimination. Since Sections 169 and 170 of the proposed 2010 Constitution were nearly identical to Section 66 of the 1969 Constitution, the decision in *Kamau*, which was handed down on May 24, 2010, was read by many as a judgment on the proposed constitution.⁴⁸

Among other charges, the Christian leaders in *Kamau* maintained, first of all, that "the financial maintenance and support of the Kadhi's Courts from public coffers amounts to segregation, is sectarian, discriminative, and unjust as against the applicants and others and amounts to separate development of one religion and religious practice and therefore unconstitutional."⁴⁹ The petitioners further maintained that the

entrenchment of the Kadhi's Courts . . . has a clear and determined hidden agenda to or is intended to advance, promote, encourage, introduce, propagate an *Islamic agenda* . . . whose ultimate objective is to turn Africa in general into an Islamic continent and Kenya in particular into an *Islamic nation*.⁵⁰

On a related note, the petitioners maintained that the constitutional provisions at issue were a "stepping stone and or vehicle" to the "introducing of Sharia Law or form of justice in Kenya," which would be "retrogressive, discriminatory, dangerous as far as the stability of the Nation is concerned."⁵¹ They also alleged that "the introduction of

47. *Kamau v. Attorney General* [2010] eKLR (Kenya). The cited version in the electronic Kenya Law Reports is unpaginated but available at <http://www.kenyalaw.org>. Citations to quoted matter will be given according to the relevant sections, subsections, and paragraphs of the electronic version of the decision (emphasis added).

48. Jillo Kadida, *Red Card-Judges Say Kadhi Courts Illegal*, THE NATION (Nairobi), May 24, 2010; Carol Maina & Nzau Musau, *Kadhi Courts Declared Illegal*, NAIROBI STAR, May 25, 2010.

49. *Kamau v. Attorney General*, § 2(5) (Declarations Sought by Applicants).

50. *Id.* § 2(9) (Declarations Sought by Applicants).

51. *Id.* § 2(11) (Declarations Sought by Applicants).

Sharia and or Islamic agenda for Kenya and Africa and the whole of the *Islamic religious agenda* is aimed ultimately at the sole goal of acquiring *inter alia* political power, supremacy and control over Africa and Kenya.”⁵² Finally, apart from supposed “Islamic agendas” and more to the point of their equal protection and nondiscrimination arguments, the Christian leaders argued that the disputed Kadhi’s Courts provision “elevates and uplifts the Islamic religion over and above other religions in Kenya which is unconstitutional and discriminatory against the Applicants and Kenyans of other religions.”⁵³

In additional arguments, the Christian leaders claimed that “[t]here is no valid basis whatsoever for the inclusion of the Kadhi’s Courts in the Constitution” and that to assert otherwise was to offend against Kenya’s status as a “multi-religious and multi-cultural state.”⁵⁴ The disputed provisions were also, in their view, discriminatory against non-Muslims, violative of the principle of separation of religion and state, and unconstitutional in permitting personal laws to qualify fundamental rights. As for the process of constitutional reform that was under way during the litigation of their case, the clergy members maintained, “The entire process of the Constitutional Review has been skewed, biased against the Applicants and other Kenyans and bereft of any iota of Constitutionalism.”⁵⁵ Ultimately, the Christian petitioners argued the Kadhi’s Courts act was “ultra vires [and therefore] the Constitution and should be struck down” and that their fundamental rights of the applicants were being violated “by the unconstitutional and discriminatory manner in which the respondents are *propagating the Islamic agenda*.”⁵⁶

In a decision that ran in excess of one hundred pages in most published versions, the Kenyan High Court examined a range of international, interdisciplinary, and historical precedents and principles.⁵⁷ In its reasoning, the Court focused particularly on the relationship between the 1969 Constitution’s recognition of the Kadhi’s

52. *Id.* (Declarations Sought by Applicants) (emphasis added).

53. *Id.* § 2(13) (Declaration Sought by Applicants).

54. *Id.* § 3(b) (Grounds of Summons).

55. *Id.* § 3(g) (Grounds of Summons).

56. *Id.* § 3(h) (Grounds of Summons) (emphasis added). It is worth noting that the Christian petitioners were joined by the Hindu Council of Kenya, but the Supreme Council of Kenya Muslims, served with the petitioner’s application to the court, declined to participate in the case.

57. Legal sources included in Kenyan, British, American, Indian, Mauritian, Tanzanian, Ghanaian, Indonesia, and South African law. The Court also cited the Qur'an, the United States Constitution, the writings of Thomas Jefferson and James Madison, and academic research in the sociology of religion, political science, and Islamic studies. *Id.* § 7(B) (Applicants’ Counsel’s Submissions).

Courts in Section 66 and the protection of freedom of conscience in Section 78, concluding that Section “cover[ed] all religious communities, including Muslims” and was “the anchor or umbrella provision in the Constitution on freedom of worship, practice and observance of religion” in such a way as to render Section 66 “superfluous.”⁵⁸ It also considered the expansion of the territorial jurisdiction of the Kadhi’s Courts beyond the former area of the coastal Protectorate that had been granted in the Kadhi’s Courts Act of 1967 and concluded, “The establishment of Kadhis’ Courts outside the protectorate violates Section 66(4) of the Constitution. The Kadhi’s Courts were intended to have territorial application within the Protectorate as defined, and on strict construction of the constitution Kadhi’s Courts were restricted to the former Protectorate.”⁵⁹ Or, as the Court otherwise put it, “territorial jurisdiction at this time and age in our democratic state curtails that freedom of worship or religion.” The Kamau Court further argued that Section 66 was “inconsistent with the secular nature of the state.”

In an especially poignant dictum, the *Kamau* Court, declared, “We believe and pray that the Republic of Kenya, from East to West and from North to South shall remain a country under God’s protection where all faiths, Judeo-Christianity, Islam, Buddhism, Hinduism, Bohras, Indigenous spiritualists and non-believers alike will live and practice their faith or lack of it in harmony without interference from all or any of them.” Ultimately, the Court concluded,

It is our opinion that no single religion should be mentioned in the Constitution in order to maintain its neutrality. We recommend incorporation of religious Courts for all major religions to deal with personal law relating to marriage, divorce and inheritance. Whereas we are not opposed to confirmation of Kadhis’ Courts, Kadhis’ Courts with limited jurisdiction as stipulated in the 1963 Constitution should be accommodated outside the main body of the new Constitution. We, however, recommend that suitable amendments be made to the draft Constitution to reflect the philosophy of national unity.⁶⁰

The judgment against the Kadhi’s Courts was not well received by Kenya’s Muslim community, prompting some Muslim leaders to speak openly of the possibility of national division over the issue.⁶¹

58. *Id.* § 7(H). The quotations in this paragraph and the next are taken from Sec. H (Issues for Determination).

59. *Id.*

60. *Id.* § 3 (Grounds of Summons) (emphasis added).

61. Maina & Musau, *supra* note 48. This article is a particularly good summary of the

Ultimately, the *Kamau* judgment was overturned by the constitutional referendum, thus avoiding a more divisive outcome.

II. TANZANIA: RELIGION, ZANZIBARI AUTONOMY, AND NATIONAL UNITY

A. Background and Impetus to the Proposed Tanzanian Constitutional Reform

At the same time that the constitutional referendum was being held in Kenya, there were also important developments taking place in the neighboring country of Tanzania, particularly in its autonomous Muslim province of Zanzibar. On July 31, 2010, Zanzibar subjected its 1984 Constitution to a referendum. While much of the focus of the referendum centered on proposed changes to the Zanzibari executive branch, there was also pronounced debate over a proposed sovereignty amendment to the Constitution, which some considered to be a serious threat to Tanzanian unity.⁶² Indeed, as one Tanzanian constitutional law scholar observed, “If the amendments are implemented there is not going to be a united republic of Tanzania. The nation has broken up.”⁶³ The referendum passed with two-thirds of the vote on July 31, 2010—a number identical to the passage rate that the new Constitution of Kenya would garner a month later. Both the unity government proposal for the executive branch and the sovereignty amendment won wide support. The Government of Zanzibar has since sought to have the new sovereignty provision in its own constitution recognized in the Constitution of Tanzania.⁶⁴

The referendum in Zanzibar comes at a time when Tanzania itself is in the midst of ongoing debates over the proposed reform of the national constitution. The Constitutional Review Act of 2011, introduced in the Tanzanian National Assembly on April 5, 2011, and drew wide criticism from academics, students, legislators, government leaders and other stakeholders in both Zanzibar and mainland

decision.

62. For more on the referendum and its results, see ELECTORAL INSTITUTE FOR THE SUSTAINABILITY OF DEMOCRACY IN AFRICA, *Zanzibar: 2010 Constitutional Referendum Results*, (Aug. 2010) at <http://www.eisa.org.za>.

63. Bernard James & Beatus Kagashe, *Tanzania; After Zanzibar Referendum Comes Constitution Dilemma*, THE CITIZEN (Dar es Salaam) Aug. 10, 2010.

64. *Zanzibar reportedly seeks to have constitution changed*, BBC, Aug. 14, 2010; *Tanzania; Zanzibar Renews Bid for Independence*, EAST AFRICAN BUSINESS WEEK (Kampala), Aug. 16, 2010.

Tanzania.⁶⁵ Express concerns included issues of presidential power, freedom of expression, and a perceived unwillingness of the government to solicit and listen to the views of an increasingly diverse and pluralistic society. From the Zanzibari perspective, the initial introduction of the Constitutional Review Act was also marred by the perception that Zanzibari representatives had been excluded from the process. On April 9, 2011, the leader of Zanzibar's imams, Sheikh Farid Hadi Ahmed, led other participants in a public debate in tearing copies of the bill in two in protest, as other participants walked out of the debate.⁶⁶ There were also reports of copies of the bill being burned in Zanzibar during the period of public debate. Demonstrations and public disorder, particularly in Tanzania's largest city Dar es Salaam and the capital Dodoma were also reported.⁶⁷

The Constitutional Review Act of 2011 was finally put on the legislative agenda of the National Assembly on February 8, 2012.⁶⁸ The Bill passed on February 10, 2012, finally clearing the way for the appointment of a Constitutional Review Commission to draft and propose a new Tanzanian constitution.⁶⁹ As these deliberations were taking place in the National Assembly, Tanzanian Muslim leaders at a mid-February 2012 seminar were discussing the need to educate Muslims in their communities about their rights or lack thereof under the Constitution, and the need for constitutional recognition of Kadhi's Courts in order for Tanzanian Muslims to fulfill their religious obligations in matters of family law and inheritance.⁷⁰ The recent Muslim mobilization around sovereignty and the Kadhi's Courts has made both Zanzibari autonomy and religious pluralism significant features of the ongoing Tanzanian constitutional debate.

65. See Frank Kimboy, *Road to New Constitution*, THE CITIZEN (Dar es Salaam), Mar. 30, 2011; *Tanzania; People Say New Constitution Crucial*, TANZANIA DAILY NEWS (Dar es Salaam), Apr. 7, 2011.

66. *Tanzania; Debate Participants Tear Review Bill Apart*, THE CITIZEN (Dar es Salaam), Apr. 10, 2011.

67. *Tanzania; Constitution Talks Chaos*, THE CITIZEN (Dar es Salaam), Apr. 8, 2011.

68. In the interim, the bill had been withdrawn in the Tanzanian National Assembly on April 15, 2011, in order to allow more time to allow for public reflection and commentary on the proposed reforms. The bill was reintroduced on June 9, 2011, with the date of enactment contemplated as December 1, 2011, but further amendments were proposed on December 23, 2011. See The United Republic of Tanzania, "The Constitutional Review Act, 2011, no. 8," Nov. 29, 2011; The United Republic of Tanzania, "The Constitutional Review Act, 2011, no. 8, Bill Supplement," Dec. 23, 2011. See also Abdulwakil Saiboko, *Constitution Forum Calls for Amendments to Review Act*, TANZANIA DAILY NEWS, Jan. 30, 2012.

69. Lucas Liganga, *MPs reach consensus on Constitution review Bill*, THE CITIZEN (Dar es Salaam), Feb. 11, 2012.

70. *Clerics urged to educate Muslims on constitution*, THE GUARDIAN (Dar es Salaam), Feb. 14, 2012.

B. Religion in the Tanzanian Constitution

The 1977 Constitution of the United Republic of Tanzania declares in an opening section on the “Fundamental Objectives and Directives of State Policy,” that the State is to “provide equal opportunities to all citizens, men and women alike without regard to their colour, tribe, *religion*, or state of life.”⁷¹ A provision on equality under the law also references religion among the various categories of identity to be protected from discrimination.⁷² The right to freedom of conscience in the 1977 Constitution is comprised of four articles protecting the right to freedom of expression, freedom of religion, freedom of association, and freedom to participate in public affairs. Article 19 on freedom of religion protects a person’s “right to the freedom of thought or conscience, belief or faith, and choice in matters of religion, including the right to change his religion or faith.”⁷³ The same article also provides that “without prejudice to the relevant laws of the United Republic the profession of religion, worship and propagation of religion *shall be a free and private affair of an individual*; and the affairs and management of religious bodies *shall not be part of the activities of the state authority*.”⁷⁴ The qualifications for election to both the presidency and the Parliament in Tanzania are “without prejudice to any person’s right . . . to profess a religious faith of his choice.”⁷⁵ These are the only references to religion in the 1977 Constitution and they are echoed in the 1984 Constitution of Zanzibar.⁷⁶

While Tanzania does not have constitutionally recognized Kadhi’s Courts analogous to those in Kenya, there is a personal law process whereby civil courts apply *Shari'a* or secular law according to the religious backgrounds of the defendants.⁷⁷ Tanzania, and particularly Zanzibar, did have Kadhi’s Courts prior to independence, but with the unanimous approval of members of the Independence Parliament, they were removed from the judicial system administered by the government.⁷⁸

71. The Constitution of the United Republic of Tanzania 1977, Part II, Art. 9(g) (emphasis added).

72. *Id.* Art. 13(5).

73. *Id.* Art. 19(1).

74. *Id.* Art. 19(2) (emphasis added).

75. *Id.* Art. 39(2) and 67(2).

76. See Constitution of Zanzibar, 1984, (amended to 2006), esp. Arts. 12, 19.

77. Toni Johnson & Lauren Vriens, *Backgrounder: Islam: Governing Under Sharia*, COUNCIL ON FOREIGN RELATIONS (Oct. 24, 2011).

78. Damas Kanyabwoya, *Collapse of Kadhi Courts Explained*, THE CITIZEN (Dar es Salaam), Feb. 13, 2010. For more on the history and evolution of the Kadhi’s Courts in Tanzania, see H. MAJAMBA, POSSIBILITY AND RATIONALE OF ESTABLISHING KADHI COURTS IN TANZANIA

In the 2005 election campaign, Tanzania's largest party, Chama cha Mapinduzi (CCM), promised to establish Islamic courts, if elected.⁷⁹ There appears to be a fair amount of comfort or inertia—at least in the Tanzanian Government—in maintaining a supportive, but nonadministrative approach to the Kadhi's Courts. In 2009, the Tanzanian Prime Minister Mizengo Pinda reported to Parliament, in response to President Jakaya Kikwete's request that he facilitate the Muslim community's setting up a system of courts under their religious framework, that the government was not against the establishment of Kadhi's Courts, but that it could not administer them.⁸⁰ In November 2010, Tanzania's Vice President Mohammed Gharib Bilal, a former Vice President and Chief Minister of Zanzibar promised to push for Kadhi's Courts in mainland Tanzania.⁸¹ More recently, President Kikwete drew criticism from Tanzanian Muslims after a speech in which he indicated support for Kadhi's Courts, so long as they are not funded by the state, but also referenced a "memorandum of understanding" between the Tanzanian Government and Christian churches promising them financial support.⁸² So the Kadhi's Courts remain a source of unfulfilled yearning for Tanzania's Muslims, particularly in Zanzibar.

C. Religion and the Tanzanian Constitutional Reform

Until recently, religion had not been thought to have a particularly strong role in Tanzanian politics. Christians on the mainland and Muslims in Zanzibar were known in distinctive blocs on some issues, but boundaries were observed and religious and political differences generally respected. The tensions between Muslims and Christians in Tanzania has been described as "too complex to be labeled as a fundamental antagonism based on religion."⁸³ Even so, President Kikwete, a Muslim, has spoken publicly of the threat posed by some religious rhetoric to Africa's fragile democracies, the tendency in Tanzania for political divisions to be based on religion rather than

MAINLAND, paper presented at the 20th Research for Education and Democracy in Tanzania (REDET) RMC Workshop University of Dar es Salaam, Nov. 10, 2007, available at <http://www.redet.udsm.ac.tz>.

79. Aidan Eyakuze, *The Kadhi Courts Debate in Tanzania and the 'Primacy' of the Secular State in East Africa* available at <http://www.sidint.net/node/1379>. See also Telesphore R. Magobe, *Kadhi Courts in Tanzania*, GLOBAL POLITICIAN, Aug. 28, 2006.

80. Faraja Jube, *Govt Can't Run Kadhi's Courts—PM*, THE CITIZEN (Dar es Salaam), July 17, 2009.

81. *Bilal's Pledge to Muslims On Kadhi Court*, THE CITIZEN (Dar es Salaam), Nov. 17, 2010.

82. Makwaia wa Kuhenga, *On Wikileaks and the Question of Kadhi Courts*, THE CITIZEN (Dar es Salaam), Sept. 12, 2011.

83. *Tanzania, SHARIA DEBATES IN AFRICA* available at <http://www.sharia-in-africa.net>.

ethnicity, and, more pointedly, the need to resist attempts to “Islamize” the government, so as to avoid the sort of political violence that has occurred elsewhere.⁸⁴ In a February 2008 address to the nation, President Kikwete contrasted the electoral unrest in Kenya with the political scene in Tanzania, cautioning, “This is not to suggest that a similar thing cannot occur here. Tribalism is almost alien in Tanzania, although we are multi-ethnic. However, Tanzania has *udini* [religionism], which is not as pronounced in Kenyan politics.”⁸⁵ In October 2008, the Christian Council of Tanzania (CCT) issued a statement against Tanzania joining the Organization of the Islamic Conference (OIC), an umbrella organization for Muslim nations at the United Nations, and also against the establishment in Tanzania of Islamic courts.⁸⁶ The following month, six Tanzanian Muslim organizations issued a statement in response, defending the OIC as an organization dedicated to development rather than to a religious agenda and reasserting demands for Islamic courts on grounds of religious freedom.

In the context of this distrust and in light of the religious demographic differences that divide Zanzibar and mainland Tanzania, there is ample potential for questions of autonomy, sovereignty, and national unity to involve religious concerns, as well. On November 18, 2010, Christian members of Parliament staged a walkout at an address by President Kikwete.⁸⁷

In early 2011, the Muslim Council of Tanzania (BAKWATA) asked the government to form a special commission of religious leaders to explore the increasing religious tensions, referencing certain religious divisions that had manifested themselves in Tanzania’s 2010 general elections.⁸⁸ Two committees from the group had then recently filed reports with the government with recommendations for the establishment of Kadhi’s Courts. At the same time, BAKWATA also

84. *Religionism a Threat to East African Unity*. See also the transcript of President Kikwete, Speech on religion at the Fifth Anniversary of the African Presidential Archives and Research Center (APARC), at Boston University Sept. 25, 2012, available at <http://jkikwete.com/speechz.php?id=822>. President Kikwete has continued to speak out on the problem of religious bigotry in Tanzania. See *President Kikwete Deplores Religious Bigotry*, TANZANIA DAILY NEWS (Dar es Salaam), Oct. 15, 2012.

85. *Id.*

86. *Tanzania: Muslim leaders pressure country to join Islamic organization*, BBC News, Nov. 1, 2008.

87. *Tanzanian Muslim paper says House walk-out divides party along religious lines*, BBC News, Nov. 20, 2010.

88. *Bakwata [Muslim Council of Tanzania] Urges Bishops to Show Religious Tolerance*, THE CITIZEN (Dar es Salaam), Jan. 23, 2011.

issued a statement calling upon Christian bishops to show support for President Kikwete, a Muslim, and to refrain from opposition to the Kadhi's Courts and to Tanzania's quest to join the Organization of the Islamic Conference at the UN.⁸⁹ Recently, in February 2012, a member of the Zanzibar House of Representatives, Ismail Jussa, recently came under censure by fellow politicians for hate speech, following his attribution of his party's defeat in recent elections to Christians from Tanzania living in Zanzibar who did not vote for his party.⁹⁰ So, religious tensions, if once on the margins of Tanzanian law and politics, have become increasingly significant in recent years.

II. ZAMBIA: A “CHRISTIAN NATION” AND ITS MUSLIM MINORITY

A. Background and Impetus to the Current Referendum

In 2007, the Zambian government appointed a National Constitutional Review Conference as the most recent iteration of what has been a lengthy history of constitutional reform over the last two decades. The process has involved three separate Constitutional Review Commissions at Mvunga (1991), Mwanakatwe (1996), and Mung’omba (2003). With the 2007 appointment of the National Constitutional Review Conference, the constitutional process resumed. Nonetheless, the most recent constitutional draft, released by the Conference in June 2010, again failed to win Parliamentary approval, despite calls from many sectors of Zambian society that a new constitution be in place by the time of the 2011 elections.

In light of these repeated failures at constitutional reform, an ecumenical group known as the Oasis Forum—a coalition of civil society organizations that includes the Zambia Episcopal Conference, the Law Association of Zambia, the Zambian Council of Churches, the Evangelical Fellowship of Zambia, and the Non-Governmental Organizations Coordinating Council (NGOCC), among other organizations—recommended that the new constitution be removed from Parliament's hands and, as in Kenya, be redrafted by a Committee of Experts and subjected to a national referendum. In April 2011, the Oasis Forum released a statement that a new constitution was possible in

89. Sadik Mtuliya, *Bakwata Wants Probe into Religious Tensions*, THE CITIZEN (Dar es Salaam), Feb. 16, 2011.

90. Edward Qorro, *CUF Representative Under Attack in Zanzibar Over Remarks*, THE CITIZEN (Dar es Salaam), Feb. 25, 2012.

2011.⁹¹ But the end of 2011, there was still no Zambian Constitution. In March 2012, the United States Government pledged one million dollars to aid the Zambian constitutional reform effort.⁹²

B. Religion in the Zambian Constitution

The 1991 Constitution of Zambia has been controversial since its 1996 amendment to include its preambular declaration that Zambia is a “Christian nation while upholding the right of every person to enjoy that person’s freedom of conscience or religion.”⁹³ Article 19 on “Protection of Freedom of Conscience” in the 1991 Zambian constitution is virtually identical to Article 78 of the 1969 Kenyan constitution, with a broad definition of religious freedom and additional provisions on religious education, oath swearing, and limitations on the right to religious freedom.⁹⁴ These are the only two specific mentions of religion in the Zambian constitution.

As might be expected in a country with a population that is ninety-eight percent Christian and only two percent Muslim, there are no references to Muslim courts in the Zambian constitution. However, Article 23 on “Protection from Discrimination on Grounds of Race, etc.” would seem to leave open the possibility for such courts in permitting derogation from the general principle of nondiscrimination on the basis of “creed” and other categories of group identity.⁹⁵ The list of categories and instances in which such deviation might be permitted includes “persons who are *not citizens* of Zambia,” cases involving “adoption, marriage, divorce, burial, devolution of property on death or other matters of *personal law*,” and cases involving “members of a particular race or tribe, or *customary law* with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.”⁹⁶

These permissible derogations could be interpreted to apply, for example, to Muslim citizens or non-citizens who wished to have religious, personal, or customary law apply to their cases, particularly

91. Ephraim Nsingi, *Zambia: Constitutional Baby Out with the Bathwater*, INTER PRESS SERVICE, Apr. 9, 2011.

92. Teddy Kuyela, *US Pledges \$1 million to constitution-making process*, ZAMBIA DAILY MAIL (Lusaka), Mar. 1, 2012.

93. CONST. OF ZAMBIA of 1991 (as Amended to 1996), Preamble. *See also id.* Art. 19 “Protection of Freedom of Conscience.”

94. *Id.* Art. 19.

95. The list of categories of identity to be protected from discrimination includes, in full, “race, tribe, place of origin, marital status, political opinions, colour or creed.” *See* Art. 23(3).

96. *Id.* Art. 23(b-d) (emphases added).

the area of family law. However, the final clause in the permissible exceptions allows that protected groups “*may be subjected to any disability or restriction or may be accorded any privilege or advantage* which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such discrimination, is *reasonably justifiable in a democratic society.*” This provision could be used to restrict the application of religious law in a legally pluralistic state in circumstances where application of religious law would violate more widely held democratic norms. Thus, what recognition the constitution gives to foreign, religious, and customary law could easily be taken away.

The Mvunga Report of 1991 reflected substantial religious participation in the process that produced Zambia’s constitution. The list of organizations and institutions who sent representatives to give oral submissions to the Mvunga Constitutional Reform Commission included the Christian Council of Zambia, the Evangelical Fellowship of Zambia, the Zambia Episcopal Conference, and the Young Women Christian Association.⁹⁷ In various places, the report references the views of these organizations about the relationship of religion and the state. Some petitioners to the Commission maintained, for example, that the president of Zambia “must be a believer in God or a Christian and not a divorcee,” but the Commission ultimately determined that this view was “inconsistent with the freedom of choice of an individual and accordingly should not be a pre-requisite to presidential candidacy.”⁹⁸ There were also strong expressions of support for various forms of assistance to religious organizations from the state, particularly in the provision of social services, but the government was to affirm the more general principle of religious provision of these services than it was to commit to ongoing practical and monetary assistance.⁹⁹ In the end, the Mvunga Report reflected a high degree of support for protection of freedom of religion, including state support of religious organizations, but with no recorded discussion of how the constitutional provisions against discrimination might be applied to Zambia’s religious minorities.

For purposes of understanding legal pluralism in Zambia, it must

97. REPUBLIC OF ZAMBIA, MVUNGA CONSTITUTIONAL REVIEW COMMISSION, MVUNGA CONSTITUTIONAL REVIEW COMMISSION REPORT, Ch. 1(3) (1991) [hereinafter MVUNGA REPORT] available at <http://www.unza.zm/zamlii/mvunga-1991.html>.

98. *Id.* Ch. 3, § 9, 10, 10(b)(7). The Zambian perspective is worth comparing to those expressed in recent Kenyan controversies over judicial nominations.

99. *Id.* Ch. 2, § 2, 2(7)(a)(iii), 2(7)(b)(i). For the government reaction, see the “Government Reactions,” particularly the “Personal Liberties, Freedoms, & Rights” section of the ZAMLII website at <http://www.unza.zm/zamlii/mvunga-1991-plfr.html>.

be noted that, while the Mvunga Commission did not address the possible application of religious law in the case of religious minorities, it did include substantial discussion of the customary law administered by traditional rulers of Zambia's various tribes. According to the Mvunga Report, Zambia's traditional rulers "have always been recognised for their roles as custodians of the people's culture and customs and also for their part in the governance of their subjects."¹⁰⁰ At the same time, various petitioners, along with the organization of traditional leaders known as the House of Chiefs, expressed concern about the participation of tribal leaders in party politics and debated whether these "custodians of the cultural heritage of the nation" should instead remain politically neutral and removed from matters of the state.¹⁰¹ The majority of petitioners to the Commission recommended that the House of Chiefs be retained as an institution with broad ethnic representation, and some argued further that the House of Chiefs should be given legislative powers or designated an advisory body to the government and to Parliament.¹⁰² The Mvunga Commission ultimately recommended that the House of Chiefs should be given legislative powers, but through dissolution as a body and incorporation into Parliament by making provision for their election as representatives.¹⁰³

What is important in the debate at the Mvunga Commission proceedings over the role and function of the House of Chiefs is the deference given to traditional and customary law, particularly in personal law and property matters.¹⁰⁴ The constitutional deference given to traditional and customary law in the 1991 Constitution could eventually serve as a precedent for the recognition of religious law. The debate over the role and rights of traditional leaders did not end at Mvunga, but reemerged five years later in the next round of constitutional reform.

The Zambian Constitution was amended in 1996 in response to recommendations made by the Mwanakatwe Constitutional Review Commission, appointed in 1993 by then-President Frederick Chiluba.¹⁰⁵ On the subject of the relation of religion and the state maintained that, in

100. *Id.* Ch. 8(1).

101. *Id.*

102. *Id.* Ch. 8(3).

103. *Id.* Ch. 8(4).

104. Article 16 on "Deprivation of Property" in the 1991 Constitution, prior to the 1996 amendments, is the only place in the 1991 Constitution where the Chiefs are mentioned.

105. Chiluba died on June 18, 2011, with international obituaries noting both his early advocacy of democracy and civil liberties and born-again Christian faith convictions and his later personal and political corruption. Barry Bearak, *Frederick Chiluba, Infamous Zambia Leader, Dies at 68*, N.Y. TIMES, June 19, 2011.

Zambia, “Christianity or any other religion could be safely secured without any form of declaration and recommended that the Zambian Constitution should make it clear that Zambia should remain a *secular state*.¹⁰⁶ Debate also arose concerning the proposed use of the phrase “freedom of conscience, faith, belief, and religion,” instead of the existing Article 19 protection of “freedom of conscience.”¹⁰⁷ The Commission rejected a rephrasing of Article 19, finding it unwarranted since there were to be no changes to the article itself.¹⁰⁸ Despite these recommendations, there were no changes made to the 1991 Constitution’s preambular “Christian nation” declaration or to its provisions on religion.

On the question of customary law, the Mwanakatwe Commission did express some concern about the effect of customary law on women’s rights, recommending that “[a]ll laws, customary practices and stereotyped attitudes which are against the dignity, welfare or interest of women or which otherwise adversely affect their physical and mental well being be prohibited.”¹⁰⁹ The report also referenced the law of marriage as being governed both by the statutory provisions of the Marriage Act and by customary law.¹¹⁰ By the time of the Mwanakatwe Commission, opinion had shifted away from dissolution of the House of Chiefs and the inclusion of traditional leaders in Parliament in the direction of retaining the House of Chiefs as a separate institution. Thus, the Commission called for the restoration of the House of Chiefs and the election of chiefs at the local provincial level.¹¹¹ There was a similar return to the tradition of political neutrality in the Commission’s recommendation that, while “chiefs should be free to contest elections to the national assembly,” they “should abdicate their chieftaincy before lodging their nomination.”¹¹²

In 2005, the Mung’omba Constitutional Review Commission produced yet another constitutional draft. It retained the “Christian

106. See REPUBLIC OF ZAMBIA, MWANAKATWE CONSTITUTIONAL REVIEW COMMISSION, REPORT OF THE MWANAKATWE CONSTITUTIONAL REVIEW COMMISSION (1996), [hereinafter MWANAKATWE REPORT]. § I, 4(c) (Executive Summary) (emphasis added), available at <http://www.unza.zm/zamlia/mwanakatwe-1996.html>. Since the full report document is not included on the ZAMLII website, citations here are to the sections listed in the right-hand column on the report’s web page.

107. *Id.* § 7 (Fundamental Human Rights and Freedoms). The discussion is in the section on “Freedom of conscience, faith, belief, and religion.”

108. *Id.*

109. *Id.* § 1(c), “Women’s Rights.”

110. *Id.* § 7, “The Right to Found a Family.”

111. *Id.* § 1(4) (n) (Executive Summary).

112. *Id.* § 12 (Legislature).

“nation” declaration, but it also included preambular provisions that pledged to “uphold the human rights and fundamental freedoms of every person and recognise the equal worth of communities *and faiths* in our nation” and resolved that “Zambia shall remain a free, unitary, indivisible, multi-ethnic, multi-cultural, multi-racial, *multi-religious* and multi-party state.”¹¹³ Where in the 1991 Constitution there was just one mention of religion in the preamble, by 2005 the preambular mentions of religion had grown to three.¹¹⁴ According to the Mung’omba Report, the vast majority of submissions to the Commission argued in favor of retention of the “Christian nation” declaration, with some even arguing that the declaration should be included in the body of the proposed Constitution.¹¹⁵ Others argued against the declaration as discriminatory and a violation of religious freedom.¹¹⁶ Where both sides were said to be in agreement was in a “common concern that there was need to protect Zambia against religious fanaticism.”¹¹⁷ For its part, the Commission, while acknowledging that “Christian values have contributed to the moral fabric of the nation and that has, in turn, had a positive effect on the socioeconomic and cultural economic [sic] of the country,” sided with the minority opposed to the declaration in maintaining, “Religion is a matter of personal belief and faith based on freedom of choice which should be guaranteed by the Constitution. Consequently, the state should be separated from religion and should not be aligned to any particular religion.”¹¹⁸

The Mung’omba Commission ultimately recommended that the declaration be retained “subject to further debate and a decision by the

113. The Constitution of Zambia Bill, 2005, preamble (emphasis added).

114. *Id.* The proposed 2005 preamble references Zambia’s status as a “Christian nation,” the right of every person to “freedom of conscience or religion,” and the “equal worth of different communities and faiths in our nation.”

115. See REPUBLIC OF ZAMBIA, MUNG’OMBA CONSTITUTIONAL REVIEW COMMISSION, REPORT OF THE MUNG’OMBA CONSTITUTIONAL REVIEW COMMISSION, Dec. 29, 2005 [hereinafter MUNG’OMBA REPORT], Part II (Submissions, Observations, and Recommendations) at 82 (discussing “The State and Religion” at Sec. 1.2.7), available at <http://www.unza.zm/zamlia/downloads/mungomba.pdf>. Note that pagination is included, though barely visible in the bottom right corner of the document. Page cites are given according to this pagination, with additional section and topic information, as helpful for clarity.

116. *Id.*

117. *Id.* 83. Some petitioners also argued for a limitation on freedom of conscience and religion “to the extent that it does not infringe on the freedoms of others and maintenance of public order,” but the Commission rejected the inclusion of a qualification in the preamble. *Id.* at 93 (discussing the Preamble at Ch. 1.2.15). With regard to the concern about fanaticism, the MUNG’UMBA REPORT also noted the concern of a number of petitioners about the proliferation of Christian churches, so the focus was not specifically about Muslims or other non-Christian religions. *Id.* at 180 (discussing “Freedom of Worship and Conscience” at Sec. 3.2.2.20).

118. *Id.* at 84 (discussing “The State and Religion” at Ch. 1.2.7).

people of Zambia through the Constituent Assembly and national referendum,” in light of its “emotive and contentious” nature.¹¹⁹ But it also recommended that the preamble be amended to emphasize the commitment to freedom of conscience and religion that was part of the “Christian nation” declaration, so as to include recognition of Zambia’s increasing religious pluralism, along with its multi-ethnic and multi-cultural identity.¹²⁰ In the end, one of the Mung’omba Commissioners, Jitesh Naik, appended a reservation to the report challenging the “Christian nation” declaration. In his view, the Commission had abdicated its duty to “examine and recommend the elimination of provisions which are perceived to be discriminatory in the Constitution.”¹²¹ Naik emphasized the word “*perceived*” in that mandate and argued that the declaration was discriminatory to people of other faiths in both perception and reality and also violated provisions providing for equality before the law and protection from discrimination.¹²²

While the “Christian nation” declaration survived the the 2005 constitutional review process, support for customary law and the role of the House of Chiefs in political affairs was lagging. In the discussion of which democratic body would adopt the proposed constitution, there was only one petition in favor of the House of Chiefs having this function.¹²³ On the issue of traditional law, there was also a new movement afoot in favor of harmonizing customary law with statutory law to remove conflict.¹²⁴ Again, there was particular concern about customary laws that “worked against the dignity of women.”¹²⁵ The National Assembly had passed acts since the 1991 Constitution—the Local Courts Act and the Subordinate Courts Act—which empowered courts “to administer equity and to disregard customary laws that are repugnant to natural justice, good conscience, or contrary to statutory law.”¹²⁶

119. *Id.*

120. *Id.* (discussing the Preamble at Ch. 1.2.15). In assessing the Commission’s commitment to religious pluralism, it is, however, worth noting that in its recommendation that representation on the Constitutional Constituent Assembly that would include eight religious organizations, only Christian churches were mentioned. *Id.* at 806 (discussing “Method of Adoption of the Constitution” at Ch. 26.2).

121. *Id.* at 839 (Group Minority Report).

122. *Id.*

123. *Id.* at 800 (discussing the “House of Chiefs” at Ch. 26.2.6).

124. *Id.* at 544-65 (discussing “Traditional Authority, Customs, and Practices” at Ch. 12).

125. *Id.* at 66 (discussing “The 1996 Amendment to the Constitution” at Ch. 2.3.7).

126. *Id.* at 117 (discussing “Fundamental Human Rights and Freedoms, Gender Equality” at Ch. 3.1).

The Mung’omba Commissioners were especially concerned about portions of the 1991 Constitution’s antidiscrimination provision that would qualify women’s rights, particularly certain family law exceptions that would “permit the application of customary law to the ‘exclusion of all other laws’.”¹²⁷ Even so, the Commissioners were unwilling to recommend limits on customary law that would prohibit, for example, the controversial practice of polygamy, as this “would be contrary to the freedoms of worship, conscience, and the recognition of customary law.”¹²⁸ The House of Chiefs itself petitioned the Commissioners to establish a “Traditional Court of Appeals” for the purpose of harmonizing the statutory and customary laws, but the Commission ultimately concluded differently, finding that the “informal existence of these courts outside the judicial system is a source of strength.”¹²⁹ There was still considerable respect for the House of Chiefs and traditional customary law, but these institutions were increasingly coming into tension with concerns for democracy and gender justice. What seems especially significant about the movement back and forth on these traditional institutions in the Zambian constitutional review commissions is the way in which the concerns about customary law resemble concerns expressed about *Shari’ā* in African countries with a larger Muslim populations, particularly in the areas of gender, family law, and land tenure.

The 2010 National Constitution Commission review took up the “Christian nation” declaration for discussion yet again. The usual arguments were made for its retention on the basis of Zambian demographics and the normative contributions of Christian values to Zambian society; the usual arguments were also made against it on the basis on nondiscrimination and freedom of religion.¹³⁰ But the debate also featured a new and notable counter-argument on demographics to the effect that “a constitution should not be made with a view to who the people were in a society” and that “the majority of Zambians might be Christians at the moment but that may not be the case in the future.”¹³¹ Further, and contrary to the pro-declaration argument that the “Christian

127. *Id.* at 118 (discussing “Fundamental Human Rights and Freedoms, Gender Equality” at Ch. 3.3.1).

128. *Id.* at 107 (discussing “Marriage/Family” at Ch. 3.2.3.11).

129. *Id.* at 477 (discussing “Traditional Courts” at 10.2.15.6).

130. REPUBLIC OF ZAMBIA, NATIONAL CONSTITUTIONAL CONFERENCE, “INITIAL REPORT OF THE NATIONAL CONSTITUTION CONFERENCE,” (Lusaka, June 24, 2010), 80-81 (discussing “Deliberations of the Conference on the Preamble” at Ch. 4.4.3.1-4.4.3.2).

131. *Id.* at 81 (discussing “Deliberations of the Conference on the Preamble,” at Ch. 4.4.3.2 (a-b).

“nation” designation “worked well for Zambia,” opponents of the declaration maintained that it “did not improve people’s moral values,” since “more bars had been built in our communities as opposed to churches.”¹³² The opponents also argued that “matters relating to religion must be approached with caution because history had shown that many wars had been fought for religious reasons.”¹³³ These extra-constitutional reasons for opposing the declaration were apparently not persuasive, as the Commission opted to retain the “Christian nation” declaration.¹³⁴

The preambular pledge to recognize the equal worth of “communities and faith” also came under new scrutiny, with some arguing that the pledge was redundant in light of the pledge in the “Christian nation” declaration to uphold the right of freedom of conscience or religion.¹³⁵ Some argued for excision of the entire phrase, others argued for the deletion either of “communities” or of “faiths,” and the Conference ultimately decided to retain “communities,” but delete “faiths.”¹³⁶ The references to religion in the Constitution’s preamble were now just two—but there was more. The phrase “multi-ethnic, multi-cultural, multi-racial, and multi-religious” in the third of the 2005 draft’s three preambular mentions of religion was also renegotiated—and eventually dropped in its entirety.¹³⁷ While the “multi-ethnic” and “multi-cultural” recognition was retained in a separate provision on these points, the “multi-racial” and “multi-religious” references disappeared.¹³⁸ As a result, the 2010 draft was left with just the “Christian nation” declaration and its accompanying nod to freedom of conscience and religion as the lone religious reference in the preamble. The two hard-fought references to religious pluralism had fallen by the wayside.

C. Religion and the Proposed Zambian Referendum

In 2001, three religious organizations, including the Christian Council of Zambia (CCZ), the Zambia Episcopal Conference (ZEC), and the Evangelical Fellowship of Zambia (EFZ) were among the organizers of a public rally to debate the proposed changes to the

132. *Id.* (discussing “Deliberations of the Conference on the Preamble at 4.4.3.1(d) and 4.4.3.2(e)).

133. *Id.* (discussing “Deliberations of the Conference on the Preamble” at Ch. 4.4.3.2 (f)).

134. *Id.* at 77 (discussing “Recommendations of the Commission” at Ch. 4.2).

135. *Id.* at 82-83 (discussing “Recommendations of the Commission” at Ch. 4.4.5).

136. *Id.* at 82 (discussing “Recommendations of the Commission” at Ch. 4.4.5.2-4.4.5.3).

137. *Id.* at 84 (discussing “Recommendations of the Commission” at Ch. 4.4.11).

138. *Id.* (discussing “Recommendations of the Commission” 4.4.11.1-4.4.11.2).

Constitution.¹³⁹ The three Christian organizations, along with the Law Association of Zambia (LAZ), and Non-Governmental Organisation Co-ordinating Committee (NGOCC), had joined together under the name of the Oasis Forum in 2001, primarily to oppose an unconstitutional bid for a third term in the presidency by Frederick Chiluba.¹⁴⁰ In 2003, President Levy Mwanawasa appointed a new Constitutional Review Commission.¹⁴¹ In the early days of its existence, the Oasis Forum had refused to participate in the Constitutional Review Commission, mostly out of concerns about excessive presidential power to appoint commissioners and to accept or reject their determinations.¹⁴² The Oasis Forum called for a wider and more public process in public statements and demonstrations which then-Minister of Justice George Kunda extravagantly opined “bordered on treason.”¹⁴³

By 2004, the efforts of some Oasis Forum members were increasingly focusing their attention on the “Christian nation” declaration—and not for the purpose of defending it. Having thwarted President Chiluba’s efforts to achieve a third term, the organization was now taking aim at one of Chiluba’s most controversial actions. The Catholic Church, through its Zambian Episcopal Conference (ZEC) led the way in opposing the “Christian nation” designation.¹⁴⁴ Indeed, in their submission, to the Mung’omba Constitutional Review Commission of 2004, the Zambian bishops maintained:

The Church and State should be and continue to remain separate. . . . [A] nation is not Christian by declaration but rather by deeds. Zambia can be a Christian nation only if Zambian Christians follow Jesus in a life of love and respect for one another, a life of dedication, honesty and hard work.

. . . Christianity may be the religion of the majority of Zambians, nevertheless there are many dedicated Zambians who profess other

139. Zambia; “Constitution Review is Not Done Through Referendum,” THE POST, Apr. 23, 2001.

140. *Citizens Forum Zambia, Working Paper 8*, in THE POWER OF CIVIL SOCIETY WORKING PAPER SERIES (Hivos People Unlimited/International Institute of Social Studies, July 2010), available at <http://www.hivos.nl/eng/Hivos-Knowledge-Programme/Themes/Civil-Society-Building/Publications/The-Power-of-Civil-Society-working-paper-series/8-Citizens-Forum-Zambia>.

141. Zambia; *Constitutional Review Process Criticised*, UN Integrated Regional Networks, Sept. 20, 2004.

142. Zambia; “Door’s Still Open for Oasis Forum,” THE TIMES OF ZAMBIA, Apr. 18, 2003; Zambia; *Civil Society Rejects Third Term for Chiluba*, THE POST (Lusaka), Apr. 28, 2004; Zambia; *Constitutional Review Process Criticised*, *supra* note 141.

143. Zambia; *Constitutional Review Process Criticised*, *supra* note 141.

144. Zambia; *Declaration of Christian Nation Must Go, Submit Catholic Bishops*, THE TIMES OF ZAMBIA, Oct. 4, 2004.

faiths. The Constitution of the country belongs as fully to these citizens as it does to those who profess Christianity. No loophole should be left in the Republican Constitution, which might, at some further date, lead to non Christian Zambians being regarded as second-class citizens or even excluded from public office.

[The “Christian nation”] declaration could lead to abuse of religion for purely political ends and even bring discredit to the name Christian. Experience has shown that since 1992, Christianity has been brought into the political fray to the faith’s detriment.

Further, legislating faith and religion into the Constitution can lead to fundamentalism, which can one day be used against Christianity by a leadership of another religious persuasion.¹⁴⁵

The Zambian bishops have been leading proponents of the constitutional referendum process from the early stages of the current review in 2004,¹⁴⁶ and statements like this indicate that they have been supporters of religious tolerance as well.

Religious tolerance in Zambia is currently being tested. In the grand scheme of African society and politics, religious pluralism in Zambia is still very slight, despite an early history of Muslims in the region. In 2006, just at the beginning of the timeframe of the most recent constitutional reform, Zambian observers were noting a rise in the construction of mosques, schools, and other institutions, particularly in the eastern part of the country by Muslim groups.¹⁴⁷ Christian fears of this resurgence have resulted, for example, in allegations that Muslims are using material incentives to buy converts.¹⁴⁸ There have been concerns that religious instruction is provided for Christians, but not Muslims, in public schools.¹⁴⁹ In 2003 police in Lusaka raided several Islamic schools, charging educators with child abuse and unlawful confinement of their students. The charges were later dropped, but one of the school operators was ordered to be deported by the Zambian High

145. ZAMBIA EPISCOPAL CONFERENCE, SUBMISSION TO THE MUNG’UMBA CONSTITUTIONAL REVIEW COMMISSION, Sept. 30, 2004, in the pastoral statements section of the Zambia Episcopal Conference website, available at <http://www.catholiczambia.org.zm>.

146. *Catholic Bishops Issue Pastoral Statement On Constitution*, THE POST, Nov. 17, 2005.

147. *Islam making in-roads in Zambia*, *supra* note 3. See also Félix Phiri, *The Spread of Islam in Zambia*, available at <http://www.africafiles.org.>; FÉLIX PHIRI, MUSLIM ASSOCIATIONS AND THE RESURGENCE OF ISLAM IN ZAMBIA (Fenza, 2008), as well as various reports of the Evangelical Christian missionary group Frontline Fellowship, available at <http://www.frontline.org.za>.

148. See *Islam in Zambia, Small and Notable* (interview with Félix Phiri), ZENIT, Apr. 11, 2011.

149. UNITED STATES DEPARTMENT OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT, ZAMBIA (U.S. Dep’t. of State 2007).

Court.¹⁵⁰ In Zambia, there is a very small group of indigenous Muslims, alongside converts to the faith, but as most of Zambia's immigrant Asian community is of the Muslim faith, the Muslim community in Zambia community elicits the perception of being "foreign."¹⁵¹ All in all, the circumstances of religious pluralism in Zambia appear to be evolving. Whether this evolution is a Zambian phenomenon or comes to be influenced by developments in neighboring countries or the involvement of foreign Muslim and Christian groups remains to be seen, as does its manifestation in the forthcoming Zambian Constitution.

CONCLUSION: THE LESSONS OF LEGAL PLURALISM IN AFRICA

The East African nations of Kenya, Tanzania, and Zambia may seem unlikely places to draw lessons about religious and legal pluralism. They are not as religiously divided as Nigeria and the formerly united Sudan.¹⁵² Except for the United States embassy bombings by Al Qaeda in Kenya and Tanzania in 1998 and Kenya's post-election conflagration in 2008, they do not carry the legacy or bear the current reality of violent conflict in the way that countries like Rwanda, Liberia, Sierra Leone, the Ivory Coast, the Democratic Republic of Congo, and other sub-Saharan nations have done and continue to do. And yet a recent survey conducted by the Pew Forum on Religion and Public Life, and titled *Tolerance and Tension: Islam and Christianity in Sub-Saharan Africa*,¹⁵³ drawing on some of the most up-to-date government, scholarly, and policy analysis of the region, raises some important questions about the stability of the region, particularly around matters of religious freedom, religious pluralism, and legal pluralism that bear watching as constitutional developments continue in these countries. A full survey of the Pew data on these countries is beyond the scope of this article, but a sampling of the places in which each country is an outlier is highly revealing and helps to explain many aspects of controversy amid the recent constitutional reform efforts.

Kenya is overwhelmingly Christian (88%), but there have been

150. UNITED STATES DEPARTMENT OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT, ZAMBIA (U.S. Dept'. of State 2003).

151. *Id.*

152. For more on the situations in Nigeria and Sudan, *see* ELIZA GRISWOLD, THE TENTH PARALLEL: DISPATCHES FROM THE FAULT LINE BETWEEN CHRISTIANITY AND ISLAM (Farrar, Straus & Giroux 2010).

153. PEW FORUM ON RELIGION AND PUBLIC LIFE, TOLERANCE AND TENSION: ISLAM AND CHRISTIANITY IN SUB-SAHARAN AFRICA (Pew Research Center: Washington, D.C., 2010) [hereinafter "TT"].

tensions in recent years with the country's minority Muslim population (11%).¹⁵⁴ Kenya was significantly above the median of the Pew study countries in the number of its Christians (34%) reporting Muslim hostility—a score that put Kenya in the company of countries with larger proportions of Muslims (including Tanzania) and recent histories of violent conflict (Liberia and the Democratic Republic of Congo) on this measure.¹⁵⁵ It may be the case that the potential for interreligious tensions is greater in countries where Muslims and Christians encounter each other more regularly and that post-conflict and conflict-engulfed countries tend to report higher levels of conflict of all sorts and to conflate religious factors with other causes—and there is evidence in the Pew study that this is the case. If so, it can be argued that Kenyan Christians' perceptions of Muslim hostility are disproportionately high in light of the relatively small proportion of Muslims in their society. When asked whether ethnic and national conflict were national problems, Kenyan Christians and Muslims, in roughly equal numbers, were twice as likely to identify ethnic conflict as a problem (60%) as they were to cite religious conflict (29%).¹⁵⁶ However, Kenya was, again, behind only Rwanda and the Democratic Republic of Congo—both recent sites of notorious violent conflict—in perceptions of ethnic conflict.¹⁵⁷ Kenya was also an outlier in having the *lowest percentage* of Christians and nearly the lowest number of Muslims respond that they were satisfied with the way things were going in their country.¹⁵⁸

In a series of questions on characteristics that Muslims and Christians ascribe to each other, Kenya had the *second highest percentage* of Muslims who found Christians to be violent (32%), selfish (41%), and immoral (42%), and it was in the bottom quarter of countries in percentages of Muslims who found Christians to be honest (61%) devout (43%), and tolerant (61%).¹⁵⁹ In general, when it came to Christian perceptions of Muslims, Kenyan responses were significantly high in ascription of negative qualities and significantly low in ascription of positive qualities. Kenya also had the *highest percentage*

154. TT, 63, 143.

155. TT, 42-43.

156. TT, 44. *See also* TT, 79, 81.

157. TT, 79, 81. In all but two responses in the various degrees of agreement or disagreement with this perception, the difference between Muslims and Christians was within the margin of error for the study.

158. TT, 75. Only Senegal was lower among the total population and among Muslims, who constitute nearly the total population there. Conflict-prone Nigeria and the Democratic Republic, as well Zambia, which was contemplating its own constitutional referendum, scored just above Kenya on this question.

159. TT, 121-27.

of Muslims (34%) reporting that they are “very often” treated unfairly by the government.¹⁶⁰ More positively, Kenya was in the top quarter of countries in the percentage of Muslims (48%) reporting working with Christian churches to find solutions to community problems, but only (25%) percent of Christians reported working with Muslim mosques, which was the *largest gap* between Muslim and Christian responses on this question among the Pew countries.¹⁶¹ On questions related to religion and legal pluralism, sizeable majorities of Kenyan Christians felt that the Bible should be the official law of the country (67%) and opposed allowing judges to use religious beliefs to decide family and property disputes (65%), and a nearly equal percentage of Kenyan Muslims (64%) favored making *Shari'a* the law of the land.¹⁶²

The overall impression of Kenya in the Pew statistics is that there is considerable concern about the state of the country, particularly around issues of ethnic conflict and in a way that sometimes morphs into religious conflict. Kenyan Muslims have fairly high negative perceptions of Christians in their country, along with a sense of unfair treatment by the government. In the past, Kenya’s conflicts have tended to be more ethnic than religious in nature, but in light of the tendency in African conflicts for religion to be conflated with other factors, there is a risk that religious tensions could be more of a factor going forward. Most recently, Christian concerns about abortion and same-sex marriage seem to have moved slightly ahead of the Kadhi’s Courts issue in terms of religious and political focus, yet the reach of Kadhi’s Courts into questions of family, gender, marriage, and land reform could become an issue down the line, particularly if Kenya’s Christians import external—especially American—controversies about *Shari'a* to the extent that they have done with abortion and homosexuality. In the short term, however, the recent Kenyan referendum remains a triumph of popular democracy over some very divisive religious politics.

On the spectrum of Muslim-Christian demographics, with its Christian population at sixty percent and Muslim population at thirty-six percent, Tanzania is closer to Nigeria than to Kenya or Zambia, in its blend of faiths.¹⁶³ When asked about perceptions of interreligious hostility between Muslims and Christians, forty-three percent of Tanzanian Christians reported Muslim hostility toward Christians, which was significantly higher than the twenty-seven percent of

160. TT, 283.

161. TT, 165.

162. TT, 285-86, 289.

163. TT, 64, 151.

Tanzanian Muslims reporting Christian hostility toward Muslims.¹⁶⁴ On the other hand, Tanzania's Muslims had the *third highest percentage* among Muslims (20%) of respondents reporting that Muslims are treated unfairly in their country—running second only to Kenya and Guinea-Bissau who were tied at the top.¹⁶⁵

Where Kenyans reported a low level of satisfaction with the current situation in their country at the time of the survey, Tanzania had the *lowest percentage* (18%) of its population expecting that they would move into the highest stages of the “ladder of life” in the next five years.¹⁶⁶ Kenyans were actually just above Tanzania on this measure, but forty-one percent of Kenyans reported this level of hope for improvement—more than double the percentage in Tanzania. If pessimism is the absence of high hopes, then Tanzania was clearly an outlier on pessimism on this question in the Pew study. Responses to Pew study questions on such socio-economic indices as number of people in the household, education level, and ownership and access to computers, internet, and e-mail service suggest that both Kenya and Zambia have more affluent populations than Tanzania.¹⁶⁷ But in the context of the Pew study's overall suggestion of a high level of optimism among Africans, it is especially significant that nearly half of Tanzanians (48%) saw themselves as currently on the low rungs of the “ladder of life” and fifty-four percent saw themselves as having been in that position five years ago—in both instances the *largest percentage* for these low measures.

Tanzania also stood out among the Pew survey countries for its apparently high levels of social distrust, tempered by some solidarity among fellow believers of different faiths. Asked whether “most people can be trusted” or “you can't be too careful” when it comes to dealing with others, Tanzanians had the *highest percentage* in the Pew study, with eighty-three percent, reporting that “you can't be too careful.”¹⁶⁸ On the other hand, the total percentage of Tanzanians who reported trusting people with different religious values from their own was the *second highest* and the percentage of its Muslim respondents was the

164. TT, 42.

165. TT, 283.

166. TT, 74. The high marks here would be places like Liberia and Nigeria where, despite recent conflicts, ninety percent of Christian respondents had this level of expectation in quality of life improvement.

167. See TT, 297, 319-23.

168. TT, 83. Tanzania was followed by Cameroon (82%), Senegal (74%), and South Africa (70%) in levels of distrust, but these four nations were the only ones in which percentages ran above the sixties range, percentagewise. Most responses were in the 50s and low 60s, so the higher scores, including Tanzania's, are quite significant.

very highest among the Pew survey countries—so a common religiosity, even of different faiths, may be a vehicle for overcoming social distrust in Tanzania.¹⁶⁹

The Tanzanians' level of trust in co-religionists may not necessarily impinge on their desire to convert them, for the percentage of Tanzanian Muslims (75%) was surpassed only by that of Nigerian Christians (79%) in the sense of a duty to convert members of the other faith—and the issues of proselytism and conversion have been considerable sources of tension in Africa of late, even where the number of actual conversions is small.¹⁷⁰ In that sense, it may be especially significant that Tanzania was tied for *third highest percentage* of respondents (61%) who said that they “never” or “seldom” share their faith or views on God with people from other religions, compared to thirty-eight percent of Kenyans with this response.¹⁷¹ On questions of religion and legal pluralism, Tanzania reported the *lowest percentage* of Christians favoring making the Bible the official law of the land in their country.¹⁷² Tanzania was tied for the *lowest percentage* of respondents who favored allowing judges to use their religious beliefs to decide family and property disputes and also had the *lowest percentage* of Muslims (37%) who favor making *Shari'a* the law of the land.¹⁷³ This Tanzanian reticence regarding proselytism and the imposition of religious law, both of which would likely serve to alienate believers of other faiths, may attest to Tanzania's general spirit of tolerance, freedom, and trust among believers.

The overall impression of Tanzania from the Pew results is that of a religiously mixed, still-developing nation that is struggling to preserve a religiously pluralistic democracy in the midst of ethnic and religious tensions that are roiling neighbors like Kenya and Zambia. There is a sense that the privatized and secularized understanding of religion guaranteed in the existing constitution may not hold and that the call for recognition of Kadhi's Courts may upset the current balance of religious and legal pluralism in the country. The issues of Zanzibari sovereignty

169. TT, 130.

170. TT, 192.

171. TT, 208. In fact, Kenya came in fifth for its percentage of respondents who said they shared their religious beliefs with people of other religions in the two most frequent categories of “at least once a week” or “once or twice a month.”

172. TT, 285.

173. TT, 286. Tanzania was also second lowest in respondents (27%) favoring the death penalty for those who leave the Muslim religion, but there were several other countries with responses within a few percentage points. On the *Shari'a* question, Tanzania was more of an outlier, with the two nearest countries separated by more statistically significant span of ten percentage points. TT, 291.

and the need for economic development may bring other concerns to the forefront. If this happens, the low levels of social trust, coupled with the high level of subscription to beliefs about the nature of justice and evil in human relationships that are implied in the prevalence of witchcraft and “juju” in Tanzania¹⁷⁴ could evoke further religious and ethnic tensions.

When it comes to Zambia, those who defend Zambia’s “Christian nation” declaration as merely a reflection of demographics are not exaggerating. The ninety-eight percent of the Zambian population that is Christian dwarfs the minuscule two percent minority that is Muslim.¹⁷⁵ In their responses to questions about the prevalence of religious and ethnic conflict, Zambians give the initial impression of being models of tranquility. When asked whether religious conflict and ethnic conflict were national problems, a slight majority of Zambians (51%) saw religious conflict as “not a problem at all,” and a similar percentage of Zambians (55%) did not see ethnic conflict as a problem.¹⁷⁶

But the sanguine spirit of Zambian society comes through in some measures more than others when it comes to overall quality of life. Compared to Christians in other Pew study countries, Zambia’s Christian majority falls within the top third in percentage of respondents’ optimism about their prospects five years from now.¹⁷⁷ At the same time, Zambia was *third highest* in the percentage of Christians expressing dissatisfaction with the way things are going in their country today, and second only to Kenya in the number of Christians responding that the economic situation was “very bad” in their country.¹⁷⁸ The economy does not, however, seem to be the sole reason for the Zambian malaise, for there also appear to be concerns about the state of Zambia’s democracy. One place where Zambians differed notably from other nations in the Pew study was in their response to a question about whether democracy or a strong leader was the best form of government for their country, which can be interpreted as a telling response on the state of political democracy in the country. Zambians were evenly divided between the two options, with forty-nine percent responding

174. See the Tanzanian reaction to the Pew study, in particular its findings regarding the prevalence of belief in witchcraft and indigenous religion in *Welcome to Juju Nation!*, THE CITIZEN (Dar es Salaam) Feb. 27, 2011.

175. TT, 153, 257.

176. TT, 79, 81.

177. TT, 74. Only Christians are included in the Pew study, since the Muslim population was too small to sample. Thus, I have made comparisons here only to Christian populations in other countries.

178. TT, 75-76.

each way. Even more significantly, Zambia had *the highest percentage* of responses favoring a strong leader among all the Pew survey countries.¹⁷⁹

In their perceptions of Muslims, Zambia's overwhelming Christian population was tied with Rwanda and just above the Democratic Republic of Congo in the percentage of respondents who found the Muslims and Christians to be "very different."¹⁸⁰ In fact, Zambians give the impression of being more wary of their Muslim neighbors than might be expected, particularly in light of the small Muslim population that would form the basis of their impressions. Zambians were in the top third in the Pew study countries in finding Muslims to be violent, selfish and arrogant and *lowest of all* in finding Muslims to be tolerant.¹⁸¹ Zambians were also *third highest* in being "very concerned" about extremist religious groups, though, as was the case with a number of countries in the Pew study, they were significantly more likely to be concerned about Christian groups (32%) than about Muslims (22%).¹⁸² On matters related to religion, Zambians had *the highest percentage* of respondents (77%) who favored making the Bible the official law of the country, but, perhaps because of their respect for traditional and customary law, were comparatively more in the middle of the Pew countries in the percentage of respondents (42%) willing to allow local leaders and judges to decide family and property disputes on the basis of religious law.¹⁸³

As suggested above, Zambia's recognition of customary law could serve as a vehicle for the eventual recognition of *Shari'a* courts, if Zambia's Muslim community continues to grow. But for the time being, Zambia remains a "Christian nation," albeit one with some outsize concerns about development, democracy, and increasing religious pluralism. As with Kenya, there remain significant concerns in Zambia about the tenor of Christian mobilization around political issues and how

179. TT, 90. South Africa was the next highest, with forty percent supporting the strong leader option, followed by Tanzania, with thirty-seven percent. The average favorable response for strong leadership was in the twenties, so the numbers for Tanzania and Zambia are significant. Kenya, by contrast, was representative of the general preference for democracy in the Pew study, with seventy-eight percent advocating democracy and just twenty percent advocating a strong leader.

180. TT, 103. As with several other indices, the fact that these countries were clustered with post-conflict and conflict-engulfed countries like Rwanda and the DRC, with their likely heightened perceptions of conflict and threatening difference, is itself notable, particularly for a country as generally conflict-free as Zambia.

181. TT, 119.

182. TT, 277.

183. TT, 285-86.

this will affect its small Muslim minority.

The East African countries of Kenya, Tanzania, and Zambia, with their different religious demographics, levels of development, and constitutional treatments of issues of religious and legal pluralism will be important to watch in coming years, particularly as debates over *Shari'a* continue to percolate worldwide. Debates over religious and legal pluralism in this region have not drawn the attention that they have in places like Nigeria, Sudan, or Somalia—the last being the origin of recent and troubling incursions by the Al-Shabaab Muslim militias into Kenya and potentially other parts of East and Southern Africa.¹⁸⁴ There are signs of hope for religious pluralism in the region—perhaps even embracing forms of legal pluralism such as Kadhi's Courts. They can be found in the recent triumph of political democracy over religious division in the Kenyan referendum, in Tanzanian reserve in matters of proselytism and religious law, and in the statements of Zambia's Catholic bishops in defense of pluralism in a "Christian nation." There are potential perils as well, in the tendency of religious conflict to be grafted onto ethnic and socioeconomic conflict, in the influence of American international activism on abortion and sexuality, and in the recent incursion of Al Qaeda-sponsored extremist groups in the region.

There is a tendency in the study of Islam to focus on its Arab, Middle Eastern, and North African manifestations to the exclusion of developments in other parts of the Muslim world, particularly parts of the Muslim world as small as Zambia's small Muslim community. But there is often freedom and innovation in the margins, and it could well be the case that some of the most interesting experiments in religious and legal pluralism will come from these regions in the coming years. Constitutional developments in religious and legal pluralism in sub-Saharan Africa are an area which deserves attention for both their regional and global implications.

184. *Mombasa Protest Against Shabaab*, THE NAIROBI STAR, Apr. 9, 2011; Gabe Joselow, *Kenya's Military Presses Advances Against Al-Shabab*, VOICE OF AMERICA, Feb. 20, 2012; Gabe Joselow, *Kenya Refocuses Fight Against Al-Shabab*, VOICE OF AMERICA, Feb. 22, 2012.

