

The Kadhi Courts: the Committee of Experts' (CoE) position

Introduction:

The CoE derives its mandate from the Constitution of Kenya Review Act, 2008 (the *Review Act*). Additionally, the *Review Act* presents the principles, objects and purposes of the review process. It further mentions the other organs of review besides the CoE. These are the Parliamentary Select Committee, the National Assembly and the Referendum. Additionally, the *Review Act* sets out the statutory roadmap and timelines for reviewing the Constitution.

One of the important and preliminary tasks of the CoE is provided under section 23 (a) and (b) of the *Review Act*; to identify issues that are agreed upon and therefore not contentious and those that are not agreed upon and therefore contentious respectively.

In doing the above, the CoE is instructed to address itself to section 29 of the *Review Act* which sets out the reference material for the review. These are:

1. The summary of the views of Kenyans collected and collated by the CKRC;
2. The various draft constitutions prepared by CKRC and the National Delegates Constitutional Conference at Bomas (*the Bomas process*);
3. The proposed New Constitution, 2005;
4. Documents reflecting political agreement on critical constitutional questions, such as the document commonly known as the Naivasha Accord;
5. Analytical and academic studies commissioned or undertaken by the Commission or the Constitutional Conference

The CoE addressed itself to the above reference materials and additionally analysed memoranda it had solicited from the public on what they considered contentious.

It is out of the above statutory formula or methodology that the CoE identified contentious issues.

Contentious Issues:

On June 19th 2009, the CoE published the following as being contentious and therefore bringing most division amongst Kenyans:

1. The system/form of government (i.e. the Executive and the Legislature);
2. Devolution of power; and
3. Bringing the Constitution into effect (Transitional clauses)

The above issues manifested great variance in the three drafts and were issues mostly addressed by Kenyans through their memoranda, albeit with wide differences.

Other Issues:

There were a number of other important issues that Kenyans identified but could not meet the statutory test outlined above. The CoE could therefore not statutorily identify the issues as contentious. They include the Kadhis courts, land and the right to life, *a fortiori*, when life begins.

The Committee however noted the above issues as important and resolvable through other avenues such as the Reference Group.

This paper focuses on the issue of Kadhis courts and explains the reasons why the CoE did not identify it as contentious. It also states the Committee's position on the issue.

Reasons why not contentious:

As already pointed out, the Committee's functions, roadmap and methodology are greatly guided by the *Review Act*. As such the CoE arrived at the decision that the issue of Kadhis Courts is not contentious within the purview of the current review process. The following are the reasons.

- **Views of Kenyans collected and collated by Ghai's Commission**

The Committee's examination of the above revealed that Kenyans had indeed sought to have the Kadhis court provided for in Kenya's new constitutional dispensation.¹ There was no indication of contrary on this particular issue in the the Commission's Report

- **Various draft Constitutions**

The CoE's consideration also revealed that all of them provided for Kadhi's courts though with certain differences.

The Ghai draft provides for Kadhi's Courts in its ninth chapter. Several provisions witness to this. They are sections 185 (3) (a), 192 (2), 199, 200, 201, 202, 203 (3), 204 (b) and (g). Article 11 of the the Eighth schedule which addresses transitional and Consequential provisions also addresses itself to Kadhis courts.

The Bomas draft also provides for Kadhis courts. This is in Chapter Thirteen (13). The provisions are 184 (3) (a), 197 (2), 198, 199, 200 (e) and clause 13 of the Seventh Schedule also addresses Kadhis courts

Finally the Wako draft provides for Kadhis courts though in a different fashion compared to the drafts mentioned above. The Proposed New Constitution of Kenya, 2005 couches Kadhis Courts in section 195, referred to as Religious Courts.

As shown above, Kadhis courts were provided for in one way or another in all draft constitutions that the CoE was directed to consider.

- **Views from Kenyans on what they considered contentious**

As earlier pointed out, the CoE invited Kenyans to present their views through memoranda on what they deemed contentious.

As a result, the Committee received over 12,000 memoranda from Kenyans. The analysis of these memoranda reflecting Kenyans' views did not testify that Kadhis courts were contentious. Only a small percentage of those who sent their views mentioned it as being contentious. Others who mentioned the issue supported its retention as it currently is in the Constitution.

¹ The Report of the Constitution of Kenya Review Commission, p---

The CoE's position on the issue

From the foregoing, the CoE could not identify the issue of Kadhis courts as contentious. It however noted its importance as a national socio-cultural issue and strategized to address it through other avenues; primarily the Reference Group.

This is because the Reference Group presents an important opportunity through its composition and statutory mandate for resolution of this and other issues. First of all, leadership from all major religious persuasions in the country is represented. Secondly other important national interest groups are included.

The Committee however thought it prudent to propose a platform for discussion on the issue. It is the Committee's proposal that Kadhis courts be retained as they are in the current Constitution.

Kadhis courts in the current Constitution

Section 66 of the Constitution of Kenya provides as follows:

(1) There shall be a Chief Kadhi and such number, not being less than three, of other Kadhis as may be prescribed by Act of Parliament.

(2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless -

(a) he professes the Muslim religion; and

(b) he possesses such knowledge of the 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.

(3) Without prejudice to section 65 (1), there shall be such subordinate courts held by Kadhis as Parliament may establish and each Kadhi's court shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law.

(4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being less than three in number) as may be prescribed by or under an Act of Parliament, shall each be empowered to hold a Kadhi's court having jurisdiction within the former Protectorate or within such part of the former Protectorate as may be so prescribed:

Provided that no part of the former Protectorate shall be outside the jurisdiction of some Kadhi's court.

(5) The jurisdiction of a Kadhi's court shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.

The Committee presents the above position based on the following:

- The Kadhis Courts are provided for in Kenya's current Constitution and for over 40 years their existence has neither threatened nor in any way negatively affected persons who profess other religions
- Kadhis courts if retained as proposed will only handle Muslim personal law and in situations where all the parties are Muslims
- Thirdly, the Committee is informed of and by the history that led to the entrenchment of the Kadhis courts in the current Constitution (10 mile Coastal strip) – the 10 mile Coastal strip which represents the current Coast province (as added till Voi as at independence) was protectorate under the British via agreement with the Sultan of Zanzibar. During the

Lancaster talks, the question of the strip arose. The choices were: the strip becomes autonomous and independent; the strip reverts back to Zanzibar (which was independent from Tanganyika at that time) or become part of Kenya. In October 5th 1963, Kenya's Prime Minister, Jomo Kenyatta bound his government to recognition of the strip as part of Kenya with the understanding that Kadhis courts that had operated in this territory and had been part of the original agreement between the British and the Sultan of Zanzibar, be entrenched in Kenya's new Constitution. It is with this important resolution that Kadhis courts be retained and constitutionally entrenched, that now inform Kenya's current territory. The CoE is cognisant of this important historical fact.

- The Committee is also guided by section 4 of the Review Act which provides for the objects and purposes of the current process and in particular the following paragraphs:

(a) guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;

(e) respecting ethnic and regional diversity and communal rights including the right of communities to organise and participate in cultural activities and the expression of their identities;

(h) strengthening national integration and unity; and

(k) committing Kenyans to peaceful resolution of national issues through dialogue and consensus

- Further, section 6 of the Review Act provides the CoE with principles guiding it its functions. Specifically, the following principles are of importance in addressing this issue:

(b) ensure that the review process accommodates the diversity of the people of Kenya including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged;

(d) ensure that the review process – (iv) is guided by the respect for the principles of human rights, equality, affirmative action, gender equity, and democracy; and

(e) ensure that the outcome of the review process faithfully reflects the wishes of the people of Kenya.

Conclusion

It is from the foregoing that the CoE sets out its position on the Kadhis courts and presents it as a proposal to guide discussion with the Reference Group.