10   THE NEED FOR A SUBSTANTIVE *FATWA* INSTITUTION IN COUNTERING VIOLENT EXTREMISM IN KENYA

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INTRODUCTION

Various nations across the world have encountered a "Muslim problem"[2] in the public sphere, a problem that Islamic legal scholar Mohammad Fadel[3] considers to have been brought about by a revival in religious expression, the presence of a large number of Muslims in established democracies and many developing countries and the success of political movements with a religion-based agenda in Muslim-majority countries. One such problem is that of religious violent extremism.[4]

Violent extremism is a global question and various countries, including Australia,[5] United Kingdom,[6] South Africa[7] and Nigeria,[8] have taken steps to stem the wave. The phenomenon of violent extremism has in the recent past been at the core of Kenyan discourses on state security, owing to a resilient and condescending Al-Shabaab onslaught on Kenyan soil. The Mpeketoni, Westgate Mall, Mandera and Garissa University College attacks are etched in the memory of Kenyans, largely because of extensive media coverage of and commentary on the events. Hidden behind the veneer is a brutal radicalisation project orchestrated by adherents of Al-Shabaab and like-minded terror groups. Their project takes advantage of some grievances of a section of Kenyan Muslims toward the state and of the local

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2   Fadel M. 2012. "Muslim Reformists, Female Citizenship and Public Accommodation of Islam in Liberal Democracy", *Politics and Religion* 5:2-35.

3   Professor Fadel is Associate Professor and Toronto Research Chair for the Law and Economics of Islamic Law at University of Toronto Faculty of Law.

4   Fadel M. 2007. "Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law", *Chicago Journal of International Law* 8(1):1-20.

5   Harris-Hogan S, Barrelle K and Zammit A. 2016. "What is countering violent extremism? Exploring CVE policy and practice in Australia", *Behavioral Sciences of Terrorism and Political Aggression* 8(1):6-24.

6   Elshimi M. 2015. "De-radicalisation interventions as technologies of the self: a Foucauldian analysis", *Critical Studies on Terrorism* 8(1):110-129.

7   Solomon H. 2014 "Combating Islamist radicalisation in South Africa", *African Security Review* 23(1):17-33.

8   Ismail O. 2013. "Radicalisation and violent extremism in West Africa: implications for African and international security", *Conflict, Security & Development* 13(2):209-230.

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vulnerabilities among Muslim communities.[9] Religious tropes play a large role in cementing extremist theology in their minds.[10]

There have been determined efforts by the Kenyan government, civil society, faith-based organisations and international agencies to stem the wave of radicalisation of the vulnerable Muslim youths through the violent narratives propounded by terror groups. Most of these interventions have been legislative,[11] judicial,[12] extrajudicial[13] and militaristic.[14] Little has been attempted on the role of Islamic law and its institutions. Thus, a major premise of this chapter is that extremism motivated by religious rhetoric requires appropriate responses by religious authority from within the same religious tradition.

While undertaking research on political socialisation and radicalisation of Kenyan Muslims into the Al-Shabaab organisation, terrorism researcher Anneli Botha noted the role of Al-Shabaab's religious identity in shaping the contours of interpretive activity among its agents in mosques and religious groups.[15] Regular attendees to the mosques were "marked" and recruited into "classes" where lectures by jihadi-salafi preachers were being held. Discussions would afterwards progress into university corridors, professional bodies and online groups. At a later stage, socio-economic issues were introduced to provide back-up to the narrative on marginalisation of Muslims and the need for enlisting in a global jihadi movement for liberation. Botha further observes that the presence of religious leaders helped cement the doctrine into the minds of the recruits. Videos, CDs and tapes of extremist preachers were enough where physical presence of the preacher was not possible. Among Botha's respondents, 34% said they were approached by a religious figure.[16]

Despite Islamic law attracting negative reviews in many jurisdictions across the world, this chapter argues that the Islamic legal institutions, such as the *fatwa* institution can

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9   Interview with Dr Hassan Ndzovu and Prof Hamisi Boga by Tito Kunyuk via email 14 April 2017. Ndzovu and Boga are academics from the coast region of Kenya who are involved in research and civic programmes on countering violent extremism.

10   As seen with the sermons of Sheikh Aboud Rogo. See Ndzovu H. 2013–2014. "Struggle against Secular Power: The Prospects of Islamism in Kenya as Epitomized by Shaykh Aboud Rogo's Sermons", *Annual Review of Islam in Africa* 12(2):7-11.

11   For example, the Prevention of Terrorism Act No. 30 of 2012 of the Laws of Kenya, Security Laws (Amendment) Act No. 19 of 2014 of the Laws of Kenya.

12   *Masoud Salim Hemed & Another v Director of Public Prosecutions and 3 Others* (2014) eKLR (Habeas Corpus); *Muslims for Human Rights (MUHURI) & Another v Inspector General of Police & 4 Others* [2015].

13   Recent Human Rights Watch reports have covered many disappearances of persons based on counterterrorism grounds. See Human Rights Watch. 2016. "Deaths and Disappearances: Abuses in Counterterrorism Operations in Nairobi and Northeastern Kenya", Human Rights Watch Report, 20 July.

14   Including "Operation Linda Nchi" and "Operation Usalama Watch".

15   Botha A. 2014. "Political Socialization and Terrorist Radicalization Among Individuals Who Joined al-Shabaab in Kenya", *Studies in Conflict & Terrorism* 37(11):895-919.

16   Botha, "Political Socialization and Terrorist Radicalization", 905.

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help shrink the interpretive community into one whole that safeguards the sanctity of human conscience, life, dignity, honour and property. Terror groups do not guarantee these. It is against this backdrop that the establishment of an authoritative *fatwa* institution in Kenya is deemed essential in consolidating Muslim responses to radicalism and for other attendant purposes. This chapter shall therefore proceed to situate *fatwa* in Islamic socio-legal history with specific reference to the themes of faith, identity and citizenship. Historical situatedness of *fatwa* helps in introducing the dynamics at play in fighting violent extremism through Islamic law tools. The chapter shall then be followed by a discussion of the relationship between *fatwa* and countering violent extremism in Kenya and thereafter concluded with procedural aspects that may be involved in founding a substantive *fatwa* institution in Kenya.

FATWA, IDENTITY AND CITIZENSHIP THROUGH HISTORY

A *fatwa* basically refers to a non-binding legal opinion given by an expert in Islamic law, a *mufti*, regarding a question addressed to him by a questioner, the *mustafti*. The question could be from a lay Muslim, a judge regarding a court case in progress or a government authority or a body corporate seeking an opinion on a matter of public policy.[17] The response from the *mufti* is deemed to be authoritative owing to community's recognition of their scholarly credentials, exemplary moral character and sound judgment. *Fatwa* is generally non-binding in Islamic law. However, it can bind persons and courts if it is gazetted as is done in Malaysia, thereby forming part of the laws of the state which require enforcement.[18] The formation and formulation of *fatwa* involves rigorous thought processes, which are applied to the facts of the case before the *mufti* and to the law in order to arrive at conclusions best suited to address the issue presented. Islamic law is not codified. It has been preserved in authoritative texts of various schools of law and the *mufti* involves himself in translating and interpreting it, thus making it intelligible to the recipients. He informs them of what the law is.

Apart from this particular role, which enhances legal determinacy and fulfils the imperatives of the rule of law, *fatwa* provides a bridge to what anthropologist Hussein Agrama terms as "the constant gap between a settled doctrinal past and a future of continual novelty".[19] As society changes, the *fatwa* has to respond to the actual questions of a novel nature, and this therefore may necessitate a marked departure by the *mufti* from long held doctrinaire visions of law extant in the texts of law of a specific *madhhab*, or school of legal thought. The *fatwa* touched on almost all aspects of being Muslim, from mundane affairs, such as the ethical rules for relieving oneself, to more profound moral issues, such as abortion. A genre of

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17 Masud MK. 2009. "The significance of Istifta' in the fatwa discourse", *Islamic Studies* 48(3):341-366.

18 Adil MAM. 2015. "Standardization of fatwa in Malaysia: Issues, concerns and expectations", *Islam and Civilisational Renewal* 6(2):196-209.

19 Agrama HA. 2010. "Ethics, tradition, authority: Toward an anthropology of the fatwa", *American Ethnologist* 37(3):2-18.

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treatises under the banner of *adab al fatwa* (Etiquette for Issuing Legal Responsa) were composed by Muslim jurists to guide the *mufti* in performance of his tasks.[20]

Jurists from various schools preserved their *fatwa* in a compilation of texts known as *fatawa*. These included *fatawa* of Ibn Salah and *fatawa* of Al-Subki, both from the Shafii School of law. The Hanafi legal tradition had for example *Fatawa al Alamgiriyya*. Al-Wansharisi from the Maliki School composed *al-mi'yar al mu'rib* and the well-known *majmu-'ul-fatawa* of Ibn Taymiyyah from the Hanbali School of law. Though the rules extant in law books have had a substantive precedential value for subsequent appreciation of the law, the form of law was however dictated by the exigencies of the society within which the law is intended to operate and the level of juristic activity and scholarship of that particular era. In the past, the level of legal scholarship was such that the *madhhab* had a corporate status and jurists could only make rulings within the prism of the *madhhab*.[21] Since the nation-state and modernity that came with it, extrapolation of legal rules became largely localised within the nation-state, and extra-*madhhab* borrowing was incorporated as a pragmatic measure to incubate the society from legal views that do not address contemporary exigencies.[22]

In recent times, *fatwa* have been issued not only by a single *mufti*, but also by a collection of jurists under an umbrella body. Sometimes, international conferences attended by prominent Islamic scholars end in a declaration that takes the shape of a *fatwa*. All these point to a phenomenon known as collective *ijtihad*,[23] which is premised on the conception that few individual jurists in modern times are as competent enough as jurists in the pre-modern era to be able to originate legal opinions. This is due to the degree of sophistication of questions to be addressed in modern life. An opinion on human cloning or sperm banks, for example, may require the expertise from biologists, sociologists and psychiatrists, alongside ethicists, theologians and jurists.

Muftis and *fatwa* institutions are found in almost all Muslim-majority countries and in some Muslim-minority countries such as Singapore, Thailand, Sri-Lanka and liberal democracies, such as Australia.[24] The challenge of identity and citizenship keeps resurfacing in Muslim minority contexts, especially after terror attacks – and this is true for Muslims in these states, including Muslims in Kenya. A question

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20 See Caeiro A. 2006. "The Shifting Moral Universes of the Islamic tradition of *Ifta'*: A Diachronic Study of Four *Adab al fatwa* Manuals", *The Muslim World* 96(4):661-685.

21 Jackson SA.1996. *Islamic Law and the State: The Constitutional Jurisprudence of Shihab al Din al Qarafi*. Leiden: Brill, xx.

22 A phenomenon called pragmatic eclecticism. For more on this, see Ibrahim AF. 2015. *Pragmatism in Islamic Law: a Social and Intellectual History*. New York: Syracuse University Press, 129.

23 Hasan A. 2003. "An Introduction to Collective Ijtihad (*Ijtihad Jama'i*): Concept and Applications", *American Journal of Islamic Social Sciences* 20(2):26-49.

24 Singapore, Thailand and Australia have a Mufti. Sri Lanka has a Council of scholars incorporated under an Act of Parliament. This Council has a *fatwa* committee.

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arises: How did *muftis* in the pre-modern era deal with the issue of identity, citizenship and belonging in non-Muslim societies?

Additional questions that always bogged down Muslim jurists regarding citizenship and belonging in non-Muslim lands included whether Muslims could permanently reside in non-Muslim lands and under what circumstances and how Islamic law was to be applied by Muslims in such polities. Khaled Abou El Fadl, a professor of law in the United States, has documented early juristic activity of the various Muslim law schools regarding this matter.[25] He notes that since the polity was always associated with Islam, the default position of Sunni jurists was that of ambivalence toward Muslim residence in non-Muslim territories. That notwithstanding, different schools of law developed and established specific doctrines regarding this phenomenon, and their specific rules are extensively discussed by Abou El Fadl. Notable among jurists of these schools are the pre-modern Maliki *muftis* and Ibn Taymiyya of the Hanbali School, who have in their *fatawa* literature explored the various dimensions of the issue.[26] A classic treatment of the issue of faith, identity and citizenship in pre-modern Muslim minority jurisdiction has been rendered by the *fatwas* of Al-Wansharisi of the Maliki school of law. Alan Verskin, a specialist in pre-modern Islamic history, has done a critical edition, translation and extensive commentary of the *Mi'yar* of Al-Wansharisi in his book.[27]

As Muslims came under non-Muslim rule in the Iberian Peninsula and in Mongolia, Messina and Sicily, questions arose about legitimacy of their residence in these states and their trade or other civil relations with their inhabitants arose. Pre-modern Muslim jurists were attached to the formulaic notion of the state as either being either a *dar-al-Islam* (abode of Islam) or a *dar-al-harb* (abode of War) at least according to the political jurisprudence of Abu Hanifa and Ahmad ibn Hanbal. Al-Shafii conceived of a third abode, *dar-al-ahd* (abode of Covenant) owing to the 'merging of the frontiers between *dar-al-Islam* and *dar-al-harb* in the Iberian Peninsula, the Balkans, the Caucasus and the Deccan Peninsula.[28]

With the rise of the modern-nation state, there has arisen what Islamic legal scholar Abdullahi An-Na'im[29] would call a compatibility dialectic between Islamic law and the concept of a state law. Wael Hallaq, another scholar of Islamic law, goes even further, negating the whole notion of the existence of an Islamic State or a

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25   Abou El Fadl K. 1994. "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries", *Islamic Law and Society* 1(2):141-187.

26   Discussed in Mardin Fatwa. See Michot Y. 2011. "Ibn Taymiyya's 'New Mardin Fatwa'. Is genetically modified Islam (GMI) carcinogenic?", *Muslim World* 101(2):130-181.

27   Verskin A. 2015. *Islamic Law and the Crisis of the Reconquista: The Debate on the Status of Muslim minorities in Christendom.* Boston: Brill.

28   Mitchell CP. 2006. "Diplomacy", in Meri JW (ed). *Medieval Islamic Civilization: An Encyclopedia.* New York: Routledge, 207-208.

29   An-Na'im AA. 2010. "The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law", *Modern Law Review* 73(1):1-29.

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state governed by Islamic law.[30] State according to An-Na'im and Hallaq is secular, whether it is of a Muslim majority or minority jurisdiction. It follows from this view that law is that instrument of governing the state whether it is derived from Islamic norms, from customs of Muslim communities or borrowed from the instruments that led to the formation and development of the nation-state.

The competing notions of the state between territorial classifications by pre-modern jurists and the modern "secular" conceptions espoused by An-Na'im and Hallaq have played out in the radicalist discourse of Al-Shabaab which foregrounds the formation of an "Islamic State" as the eternal end.[31] Migration of Muslims to a utopian Islamic state is always projected as one of the means to an ideal life. With an Islamic state comes Islamic law, whose application especially in modern Muslim minority jurisdictions is a constant subject of debate.

The meaning, history and development of the institution of *fatwa*, as explained in this section, informs our appreciation of the parameters that are involved in the formation of such institution in Kenya for the sake of countering violent extremism. The pre-modern *fatwa* collections contained sections dealing with the aspects of faith, identity and citizenship in minority jurisdictions. Questions of a Muslim belonging to a non-Muslim state, trading with a non-Muslim state and following the laws of a non-Muslim state are rife in Al-Shabaab's radicalist discourse, yet such questions have been a subject of exhaustive deliberation in the *fatwa* collections of pre-modern jurists. The need for having a *fatwa* institution therefore arises from the understanding that a *fatwa* institution shall authoritatively answer these questions, not only by following precedents of *muftis* in pre-modern era, but also by situating *fatwa* in the discourses on law and the state in the modern nation-state.

HISTORY AND STATUS OF *FATWA* IN KENYA

Institutionalisation of *fatwa* in Kenya is a rather new phenomenon that is currently being discussed among Muslims, but the history of issuance of *fatwa* can be traced to the various individuals and Muslim leadership institutions that have assumed religious authority during the pre-colonial, colonial and independence Kenya. Notable among these is the office of the Chief Kadhi who occasionally held the title of *shaykh-ul-Islam*, since he performed other religious functions not pertinent to his judicial office.

Muslims in Kenya constitute between 15% to 30% of the Kenyan population.[32] They are not a monolithic group. They are characterised by regions, ethnic, races,

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30 Hallaq WB. 2013. *The Impossible State: Islam, Politics and Modernity's Moral Predicament*. New York: Columbia University Press, ix.

31 For radicalist discourse, see Chiluwa I. 2015. "Radicalist discourse: a study of the stances of Nigeria's Boko Haram and Somalia's Al Shabaab on Twitter", *Journal of Multicultural Discourses* 10(2):214-235.

32 Cussack A. 2008. "Muslims and Politics in Kenya: The Issue of the Kadhis' Courts in the Constitution Review Process", *Journal of Muslim Minority Affairs* 28(2):289-302.

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theological *madhhabs* and by conversion, but the ethnic (Somali, Swahili and Arab) and geographical (North-Eastern and Coast of Kenya) categorisation appears to have taken precedence in recent reference.[33] The majority of Muslims in Kenya are of the Sunni strand who follow the Shafi'i school of law. There exist also three Shia communities[34] of the Bohras, Ithna'asharis (Twelver Shia) and the Shia Imami Ismailis. Each of the Shia communities exist in major towns of Kenya, and each has distinct religious authority with defined roles in the social organisation. Notably, references to terrorism and radicalisation within Kenya are largely with regard to the Sunni strand of Islam, and it is only recently that a case of two Iranian nationals (presumably Shia) accused of terrorist activities was brought to the fore in the Kenyan Courts.[35]

The history of Islam in Kenya is closely intertwined with the rise of scholars and the growth of Muslim institutions that exercised religious authority. For example, Riyadha Mosque in Lamu was the epicentre of Islamic practice, intellectual tradition and manuscript culture in the East Coast of Africa in the late nineteenth century.[36] This mosque-*madrassa* produced scholars,[37] such as Sheikh Feisal bin Ali Al Lamy (1838–1918), Sheikh Kale bin Mwanamkuu (d. 1918), Habib Saleh al Jama al Layl (d. 1936) and Sayyid Abdurahman As-Saggaf (1844–1922), who was the only Kadhi to combine both titles of *Shaykh-ul-Islam* and the Chief Kadhi.[38]

Abdulkadir Hashim from the University of Nairobi observes that Kadhis have made tremendous contributions on the East African coast apart from their primary judicial work.[39] They acted as jurisconsults (*muftis*) in their respective communities and also served as state consultants and confidants in religious matters. Alongside this, they acted as scholars of the circles *halaqa*,[40] teaching and giving *fatwa* in established Islamic centres of learning.[41] Notable among these scholars was 'Ali ibn Ahmad Badawi Jamal al Layl (d. 1987), who was the Chief Kadhi of Kenya in 1948.

33 Mwakimako HA. 2003. *Politics, Ethnicity and Jostling for Power: The Evolution of Institutions of Muslim Leadership and Kadhiship in Colonial Kenya, 1895–1963*, PhD Diss, University of Cape Town, 4.

34 Jamal AA. 2001. "Models of Pluralistic Discourse: a Consideration of the Ismaili Muslim Conciliation and Arbitration Boards in Kenya", *Yearbook of Islamic and Middle Eastern Law* 8(1):86-97.

35 *Republic v Ahmad Abolafathi Mohamed & Another* [2013] eKLR.

36 Bang AK. 2015. "Riyadha Mosque Manuscript Collection in Lamu, Kenya", *Islamic Africa* 6:209-215.

37 Swaleh K. 2012. "Islamic proselytising between Lamu and Mozambique: the case of Kizingitini village", *Social Dynamics* 38(3):398-418.

38 Mwakimako, "Politics, Ethnicity and Jostling for Power", 142.

39 Hashim A. 2005. "Servants of Sharia: Qadis and the Politics of Accommodation in East Africa", *Sudanic Africa* 16:27-51.

40 Islamic knowledge before modernity was disseminated through study circles (*halaqa*) where students would sit in a circle facing the scholar, hence the term "scholars of the circles".

41 Hashim A. 2009. "Scholars of the Circles: Training of Qadis and Transmission of Islamic Scholarship along the East African Coast from the mid-19th Century to the 20th Century", *Journal for Islamic Studies* 29:104-143.

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Others, such as Muhammad Qassim Mazrui and Abdallah Swaleh Al Farsy wrote treatises and gave *fatwa* in bulletins such as *Hukumu za Sharia* (Legal Rules) and *Sauti ya Haki* (Voice of Truth).[42] The issues that were subject to *fatwa* included moon sighting during the onset of Ramadhan, innovation in religion, *bid'ah* and other aspects of Islamic praxis.

All this time, *fatwa* giving was a preserve of the coastal scholars. With the arrival of graduates from Islamic universities abroad, and the emergence of Islamic radio stations and programmes, the contestations for religious authority were heightened. The Chief Kadhi was caught up in the intense ideological rivalries between the traditional Sufi groups represented by a long chain of scholars from Riyadha and the Salafi leanings of graduates from foreign universities.[43] His role as the pronouncer of the onset of Ramadhan and 'Idd has been a subject of controversy ever since the demise of Sheikh Abdallah Swaleh Al Farsy who was a pacifying figure in the contestations between the two ideological camps.[44]

The Somali question in Kenya is also important in one's appreciation of *fatwa* institutions. When civil war broke out in Somalia in 1991, there was a huge influx of Somali scholars into Kenya. Many mosques, *madrassas* and centres of learning have been put up by the Somali community in various towns across the country with Eastleigh, Nairobi being the nerve centre of Islamic intellectual activity among the Somalis. Scholars such as Sheikh Muhammad Umal, Sheikh Mahmoud Shibli and the controversial Sheikh Hassan Mahad Omar (a.k.a. Sheikh Hassaan)[45] have lectured in mosques around Eastleigh and have been instrumental in shaping discourse on around extremism and war on terror. They have acted as unofficial *muftis* among the Somali community in Kenya with the last, Sheikh Hassaan, now deceased, being cited in various circles as the unofficial *mufti* of Al-Shabaab.

Establishment of the *majalis 'ulamaa* (councils of scholars) since 1990 has been a very important initiative that has brought Muslims in Kenya closer to the founding of a *fatwa* institution with a corporate status, the success of the councils notwithstanding.[46] The most notable councils were the Majlis Ulamaa established under the auspices of Supreme Council of Kenya Muslims (SUPKEM), Majlis Ulamaa of the Jamia Masjid Association Nairobi and the Majlis Ulamaa Kenya established under the initiatives of the Nairobi Joint Masaajid Programme. These

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42 Hashim A. 2008. "Reform and Resistance: Fatwa Institution in Kenya between Traditional Trends and Modern", in International Islamic University Malaysia (ed). *International Conference on Ijtihad and Ifta' in the 21st Century: Challenges and Prospects*. Kuala Lumpur: IIUM, 165-189.

43 Kresse K. 2007. *Philosophising in Mombasa: Knowledge, Islam and Intellectual Practice on the Swahili Coast*. Edinburgh: Edinburgh University Press Ltd, 176-177.

44 Mwakimako, "Politics, Ethnicity and Jostling for Power", 2.

45 His profile and former activities can be found online at Ben Adam A. 2015. "Profile: Hassan Mahad Omar (Alias Sheikh Hassaan Hussein Adam) – The ISIL-Allied Radical Muslim Cleric And Al Shabaab Spiritual Leader", *Strategic Intelligence News*, 23 March.

46 Hashim, "Reform and Resistance", 170-181.

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councils were instrumental during the formative stages in offering guidance to the Muslims in Kenya on religious matters. The Majlis Ulamaa Kenya, for example, had a *fatwa* department that issued *fatwa* on such issues as Islamic banking, reproductive technologies and buying of shares in Kenyan companies. These, along with questions on radicalisation and violent extremism, are issues that touch on identity of the Muslim in a Muslim minority context. Religious extremism researcher Hamadi Boga has noted that the biggest challenge faced in countering violent extremism is the view held by Muslims that Kenya is a *kufar* (infidel) state and they hate everything about it, including identity documents, working in its institutions and studying in its schools.[47] Hence the need for *fatwa* institution to answer these questions.

Another aspect of *fatwa* seeking and giving concerns the rise of Islamist cyber activism[48] and proliferation of cyber *fatwas*,[49] whose role in the social and political legitimisation of terrorism has been instrumental in motivating acts of terror. Almost 30.7% of the Kenyan population are internet users, and Muslims make up a significant number of that group.[50] As more Muslim youth use the internet, they come into contact with Muslim revivalist movements across the world and identify themselves with the leaders of these movements and the causes they champion. With the multiplicity of these movements, and the various questions raised about their agenda, methodology and execution, there arises among them the need for *fatwa* in order to identify with precision the "authentically Islamic" legal rule from the rest. New and emerging frontiers have also been opened up by social media applications, such as Facebook, WhatsApp and Twitter, in order to satisfy the youth's penchant for *fatwa* and counter-*fatwa*.[51] Those with closer ties with popular sheikhs in the Muslim world contact them directly for *fatwa*. Others just google *fatwa* and paste them in an online forum based on what they deem to be the authoritative opinion in Islam on the particular issue.

Fatwa-giving in Kenya is an eclectic process in which the seeker of *fatwa* chooses the authority or forum from which he or she seeks *fatwa* based on their own whims and aspirations. The authority could be an independent *mufti* or other religious scholar or that of specific school of Islamic legal thought. It could also be a reputable *fatwa*-giving institution in the Muslim world such as Al-Azhar Mosque in Egypt. With

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47 Interview with Hamadi Boga by Tito Kunyuk via email, Mombasa, Kenya, 4 May 2017.

48 Branson K. 2014. "Islamist cyber-activism: contesting the message, redefining the public", *The Journal of North African Studies* 19(5):713-732.

49 Weimann G. 2011. "Cyber-Fatwas and Terrorism", *Studies in Conflict & Terrorism* 34(10): 765-781.

50 Mair D. 2017. "#Westgate: A case Study: How Al-Shabaab used Twitter during the Ongoing Attack", *Studies in Conflict & Terrorism* 40(1):24-43.

51 On social media as a tool for radicalisation and terror, see Chiluwa I. 2015. "Radicalist discourse: a study of the stances of Nigeria's Boko Haram and Somalia's Al Shabaab on Twitter", *Journal of Multicultural Discourses* 10(2):214; Sullivan R. 2014. "Live-tweeting terror: a rhetorical analysis of @HSMPress_Twitter updates during the 2013 Nairobi hostage crisis", *Critical Studies on Terrorism* 7(3):422-433.

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such eclecticism, fulfilment of the rule of law exigencies mostly associated with the institution of *fatwa* in Islamic legal history becomes a pipe dream.

MAKING A CASE FOR A *FATWA* INSTITUTION TO COUNTER VIOLENT EXTREMISM IN KENYA

The role of *fatwa* in countering violent extremism and radicalisation has been well-documented in Muslim majority countries, as well as liberal democracies, such as Australia and the United States. Countries with Grand Muftis, *mufti* or a national *fatwa* council, such as Egypt and Saudi Arabia, have dealt extensively with questions pertaining to almost all facets of radicalisation, violent extremism and terrorism. The rulings of these *fatwa* councils are documented in Arabic and widely circulated in the Muslim world and are now available in their websites.[52] Muslim minority jurisdictions with organised and well-functioning *fatwa* bodies, such as the Fiqh Council of North America and the European Council for *Fatwa* and Research, have in the wake of 9/11 provided guidance to the Muslim population on issues of war, identity and citizenship in minority contexts. The question of permissibility in Islamic law of involvement of American Muslim soldiers in military operations in Iraq, for example, was a subject of consideration for *fatwa* by the Fiqh Council of North America. Dr Taha Al Alwany, then president of the Council, subsequently submitted the question to Sheikh Yusuf Al Qaradawi, who eventually issued a detailed *fatwa* on this and other questions raised by Captain Abdur Rashid.[53]

Moreover, the use of a new legal methodology, dubbed *fiqh al aqalliyyat* (jurisprudence of Muslim minorities), to contextualise and situate *fatwa* in these realms has helped Muslims integrate themselves into these rather "un-Islamic" environments. As a result, we hear of a "British Islam",[54] an "Amrikan Sharia"[55] and a "European Islam",[56] owing to the enhanced Muslim presence in the public sphere of these countries. Within the context of Kenya, the role of *fatwa* or any other tool of Islamic law in countering violent extremism is quite underdeveloped. Apart from pronouncements by sheikhs, such as Juma Ngao,[57] on the need to have

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52 See www.dar-alifta.org for the Egyptian Fatwa Council, and www.alifta.net for the Saudi Arabia Fatwa Council.

53 For analysis of the *fatwa*, see Stark H. 2011. "Religious Citizens after September 11th: The Impact of Politics on the Jurisprudence Concerning Muslim American Military Service", *The Muslim World* 101(3):484-493.

54 Bowen JR. 2016. *On British Islam: Religion, Law and Everyday Practice in Shari'a Councils*. New Jersey: Princeton University Press.

55 Zaman S. 2008. "Amrikan Shari'a: The Reconstruction of Islamic Family Law in the United States", *South Asia Research* 28(2):185-202.

56 Bougarel X. 2007. "Bosnian Islam as 'European Islam': Limits and Shifts of a Concept", in Al-Azmeh A and Fokkas E (eds). *Islam in Europe: Diversity, Identity and Influence*. Cambridge: Cambridge University Press, 96-124.

57 See Katana J. 2016. "Muslim Scholars call for Formation of Religious Authority Over Radicalisation", *The Coast*, 22 June.

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a *fatwa* body for such purpose, there is muted consideration by the Muslim religious establishment, especially the portion which is Salafi-leaning, of the role *fatwa* plays in countering violent extremism.

There are however piecemeal, but important, interventions such as press briefs, seminars, workshops and religious conferences, which have been organised from time to time by Muslim clerics, non-governmental organisations and civil society groups under the banner of deradicalising the Muslim youth. In addition to this, the *Friday Bulletin* which is a Muslim weekly publication of the Jamia Mosque Committee Nairobi, not too often carries commentary on issues pertaining to deradicalisation and combating terror and violent extremism. What is observable is that these interventions are rife only in the weeks following a terror attack, ostensibly to diffuse tension and avert the blame usually heaped on the Muslim community. The impact these interventions actually have in achieving the objectives of combating violent extremism has not yet been assessed.

It is important to note that Kenya does not have a *mufti* or a *fatwa* body. The only formal institution recognised in the Constitution and the statutes with the mandate to apply Islamic law is the Kadhis' Courts.[58] Yet, even its jurisdiction is limited to specific questions of Muslim personal law. The average Muslim in Kenya wants religion to have a say in organising their life, thereby safeguarding their identity as Muslims. The questions of law pertaining to novel issues, such as suicide bombing, health insurance, paternity tests, participation in elections, hijab in public schools and halal certification in a Muslim minority state, present conundrums for a seemingly unprepared population. There are no ready answers to these problems, and more importantly no official, credible and authoritative organ to handle them. Opinion is almost always divided owing to the constant theological disputation between the Sufi-leaning scholars and the Salafi-leaning ones, and also due to the intra-*madhhab* rivalry between the traditional Shafi'i positions as the dominant school in the region and the Hanbali leanings of graduates from the faculties of theology, Quran, *hadith* and *sharia* of Saudi Arabian Universities.

The rise in terror activity in the recent past has put Muslims in Kenya in a precarious position. Mosques, *madrassas* and Islamic centres suspected to harbour extremists have been constantly securitised. Preachers deemed by the government as radical have been eliminated,[59] money transfer businesses closed,[60] the threats of closure of Dadaab refugee camp in North Eastern Kenya[61] and reports of enforced disappearances and extrajudicial killings have been a constant feature in the Kenyan media.[62] Since the perpetrators identify with Islam, pressure from lay citizens and the government has heightened the need for Muslims to have a *mufti*

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58   Constitution of Kenya, 2010, art 170.

59   These include Sheikh Aboud Rogo and Sheikh Abubakar Shariff a.k.a. Makaburi.

60   Adow M. 2015. "Terror-linked Somali Forex bureaus closed", *The Star*, 9 April.

61   Agutu N. 2016. "State extends Dadaab Refugee Camp Closure", *The Star*, 16 November.

62   Machina B. 2017. "Lifting the Veil on Enforced Disappearances and Extrajudicial Killings in Kenya", *Oxford Human Rights Hub*, 4 January.

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or a *fatwa* body. In his state of the nation address following the Garissa University College attack, President Uhuru Kenyatta prevailed upon Muslims specifically to help in combating terror. He noted that "The radicalisation that breeds terrorism is not conducted in the bush at night. It occurs in the full glare of day, in madrassas, in homes and in Mosques with rogue Imams. We must ask where are the religious leaders, the community leadership, and the parents and families of those who are radicalising our young people? The government must get the information and cooperation of all these parties if we are to effectively combat the terrorists."[63]

The *fatwa* institution is deemed important, since it can act to unify Muslim positions on controversial and novel issues, such as radicalisation and extremism.[64] Secondly, it is hoped that rivalries within Muslim schools of thought would be lessened by moving discourse to the centre, such that religious authority on matters of public importance is negotiated within the existing structures in the *fatwa* institution.[65] Finally, the official position taken by the *mufti* or *fatwa* institution would be intended to authoritatively influence public policy on matters of national security, thereby saving the government and various actors in the security sector from conflicting rulings that may arise from a dispersed religious authority.

Having acknowledged the need for a substantive *fatwa* institution for the sake of countering violent extremism in Kenya, it is noteworthy at the onset to state that actualising such intentions is an onerous task. The challenge lies in according legitimacy to such institution within the framework of the laws applicable in Kenya. A further challenge is in the authoritativeness of such institution in fulfilling the role of countering violent extremism. Kenya is a state with a history of colonialism and an ethnically diverse population with an entrenched form of religious and legal pluralism. Although the Constitution of Kenya, 2010 explicitly provides that there shall be no state religion,[66] the same constitution acknowledges and seeks to promote diversity in the cultural expression[67] of its citizens and in the mechanisms of dispute resolution,[68] both of which may have an element of religious expression.

Interestingly, Muslims, unlike people of other faiths, find explicit mention in the text of the Constitution of Kenya owing to the historical attachment of the Kadhis' Courts within the fabric of the state's judicial system.[69] The inclusion of the Kadhis' Courts in the Constitution was a watershed moment in defining Muslim-Christian relations with regard to statist norms. In the run up to the referendum that culminated in the promulgation of the constitution, the issue of entrenching

63 Kenyatta U. 2015. "Statement by President Uhuru Kenyatta on the Terrorist Attack at Garissa University College", 4 April.

64 Interview with Hamisi Boga.

65 Interview with Hassan Ndzovu via email, Eldoret, Kenya, 4 May 2017.

66 Constitution of Kenya, 2010, art 8.

67 Constitution of Kenya, 2010, art 11.

68 Constitution of Kenya, 2010, art 159.

69 Mwakimako HA. 2008. "Kadhi Court and Appointment of Kadhi in Kenya Colony", *Religion Compass* 2(4):424-443.

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the Kadhis' Courts in the Constitution was flagged by the Christian clergy as one of the contentious issues.[70] In the High Court case of *Jesse Kamau & 25 Others v Attorney General*,[71] the petitioners' argument for a declaration of unconstitutionality of the Kadhis' Courts was pegged on the existence of the court being a colonial imposition, discriminatory, an affront to the principle of separation of religion and state and, more significantly, a ploy to introduce the "dreaded" *sharia* law in Kenya. The amount of friction that this issue generated was unprecedented. Various press conferences and counter-press conferences were held by both Christians and Muslims. Muslims eventually boycotted the Ufung'amano Initiative that brought all major religious groups together. Although the High Court bench ruled in favour of the Petitioners, Kenyans overwhelmingly voted for the Constitution and the question of the Kadhis' Courts became moot.

Religious expression in the form of hijab in schools is another front that has in recent times witnessed various contestations between the Christians and Muslims. Some public schools that are managed under strict doctrine of a specific church have shown ambivalence towards school girls wearing hijab, and the High Court and the Court of Appeal have pronounced themselves on this matter.[72] These examples are a pointer to what awaits the Muslim community if they choose to propose legislation for the creation of the institution of *fatwa*.

Apart from this, there also exists a problem internal conflict among Muslims. Various attempts at institutionalising religious authority have proved futile ostensibly due to the absence of collective efforts among Muslims to found such institutions. The doctrinal differences between the Sufis and Salafis and within the Salafi strand itself poses a challenge to having a unified front in the fight against extremism. There is also a subtle supposition by the Sufis that the problem of extremism is purely that of Salafi thought. Most attempts at founding *fatwa* institutions have been by predominantly Salafi institutions, with Sufi scholars having a marginal role or no role at all. It therefore follows that any attempts at founding such institution must be widely consultative such as to include the views of the majority of Kenyan Muslims regardless of theological disposition, legal *madhhab*, gender, race, ethnicity and geography. Legislation to bring about a *fatwa* institution is the most effective route to achieving recognition, legitimacy and the most efficacious for rule of law, as the *fatwa*, especially that which touches on matters of national security can be gazette, thereby informing public policy. The obstacle on legislation mentioned before can be remedied by the ongoing attempts by various interest groups such as the Inter-Religious Council of Kenya (IRCK) and academic institutions such as St. Paul's

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70 Mwakimako HA. 2007. "Christian-Muslim Relations in Kenya: A Catalogue of Events and Meanings", *Islam and Christian-Muslim Relations* 18(2):287-307.

71 *Jesse Kamau & 25 Others v Attorney General* [2010] eKLR.

72 *Mohamed Fugicha v Methodist Church in Kenya (Suing through its registered Trustees) & 3 Others* [2016] eKLR.

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University to close the Christian-Muslim divide through their programmes.[73] Each religious community has also incorporated important elements of interreligious dialogue and intercultural communication in teaching the laity and that is hoped to reduce culture shock across the religious divide. The Muslim community is, therefore, expected to invest properly in interreligious communication in order to convince the majority Christian community, as well as the state, of the merits of having a *fatwa* institution, the scope of its influence and its contribution to national security.

The other route would be for Muslims to found the *fatwa* institution and register it under the registrar of societies as a faith-based organisation that brings all issues of Islamic jurisprudence under one umbrella. This particular initiative, though not having the same effect as legislation, is hoped to help in consolidating the Muslim voice in addressing radicalism and extremism within the Muslim ranks. Consolidating Muslim voice is another route to governance by the rule of law since the Muslims would be bound by the *fatwa* as a matter of faith, and not necessarily as a matter of law.

CONCLUSION

Since the tragedy of 9/11, the question of radicalism and violent extremism has gained notoriety in many states across the world. Responses to violent extremism have differed from one state to another owing to the peculiar threats faced by each state, and the existence of appropriate tools of response. Muslims living in Muslim minority states have almost always been suspected of condoning and abetting extremists in their midst; yet what escapes such notions is that Muslims are continuously grappling with the problem of reconciling their faith and identity with the question of citizenship in these states.

In Kenya, terror groups such as Al-Shabaab have used the vulnerabilities of Muslims on the question of faith, identity and citizenship to recruit many youth into their fold. This chapter argues that since this particular question involves an understanding of the position of Islamic law on matters of Muslim citizenship in Muslim minority contexts, the use of *fatwa* is deemed very necessary for the following reasons. Firstly, *fatwa* has the effect of consolidating Muslim legal opinion on this question, in a system known for legal pluralism and intra-*madhhab* rivalry. Secondly, the institution of *fatwa* can help in uniting Muslim voices in the murky politics of the war on terror. The diversity of Muslims in Kenya has not helped in the fight against violent extremism. Finally, *fatwa* can be used by the government to shape policy on national security.

This chapter has attempted set out to highlight the history of the *fatwa* institution in Islamic history with specific reference to the themes of faith, identity and citizenship. The *muftis* in pre-modern Islam grappled with these themes and the history has

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73 The Centre for Christian-Muslim Relations in Eastleigh (CCMRE) is one of the more pronounced projects of St. Paul's University, Limuru, Kenya.

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precedential value for subsequent derivation of legal rules by Muslim jurists. Since a formal *fatwa* institution did not exist in Kenya, the chapter has attempted to reconstruct the idea of *fatwa* within the Muslim community in Kenya and connect it with the need to have one. Founding such an institution is, recognisably, an arduous task due to recent history of Christian-Muslim relations and the disunity in Muslim ranks. However, it is in the interest of Muslims in Kenya, firstly, to have a comprehensive attempt at founding such an institution and, secondly, to convince the state and non-Muslims that a *fatwa* institution will help fight against violent extremism when properly formulated and created.