

1 ABORTION

In the Bill of Rights - Chapter 6, the draft has avoided defending the right to life for the unborn.

Every person has a right to life, so it says, but unlike previous drafts it leaves the meaning ambiguous by removing the statement "Life begins at conception and ends at natural death". This is what Kenyans demanded at Bomas.

All opinion polls have shown that Kenyans are overwhelming pro-life and anti-abortion. The COE musty put back the statement "Life begins at conception and ends at natural death".

If not, lets meet at the Referendum...

If the Committee of Experts did not have any evil motives, they will put back the definition of life as beginning from conception and ending at natural death.

If not, that's why we will have a referendum. Lets wait and see...

Just because it doesn't stipulate that life begins on conception does not mean that it ALLOWS abortion. The current Constitution says nothing of when life begins either but we all know that abortion is illegal in Kenya. Don't we?

Miasma,
Don't be naive. It is precisely this type of ambiguity that the abortionists want so as to have their day in court.

As for the current constitution, forget it, that's what we are getting rid of. If abortion is illegal now, it is only because of subsidiary acts of parliament and the presidence set by court judgements. But now we WANT IT CLEAR IN THE CONSTITUION as was agreed at Bomas, no less!

There's no need for name-calling; and who tells you that the subsidiary Acts of Parliament and judicial precedents decided before the enactment of this constitution will become obsolete?
As long as they are not in conflict with the Constitution they will have the force of law.

This is the problem - we can't have EVERYTHING including mundane things the residence of the president or the capital of Kenya enacted as constitutional provisions. It is just not the way it works. Ask the experts themselves if you doubt me.

My stand remains. The current constitution says nothing about abortion but we all know it is illegal. You are getting your panties in a knot over nothing. It's covered.

The draft also fails to include right to life among the non-negotiable rights. It takes pains to protect citizens against torture; what about being killed?

The Constitution that we have in force today was written at a time when Kenyans didn't no much about themselves in terms of formal gornenance.

Now that most of us Kenyans are informed and aware of how ambiguities can be used/misused/abused against the general appeal of the majority, why not clear it out now.

We can't afford to have ambiguities at a time like now. Take the example of the Nolle Prosequi thing

2 SYSTEM OF GOVERNMENT:

TYRANNY OF NATIONAL ASSEMBLY vs Tyranny of EXECUTIVE

Kenyan from all backgrounds Listen.

We have continuously been taken for ride by our so called "leaders". All Kenyans know why there is all this commotion by our politicians on the executive and appointments.

I want to bring up and compare two issues about two arms of government. These two arms of government have colluded on several occasions to fleece Kenyans of their hard earned money and taken away the Kenyans trust in Kenyan Institutions.

Since the harmonized draft is out I will focus on how these two issues have been addressed and what weaknesses are eminent there off. The issues here are THE TYRANNY BY THE EXECUTIVE VS TYRANNY BY THE NATIONAL ASSEMBLY.

As per my own views I consider the draft an improvement on the areas of TYRANNY BY THE EXECUTIVE as compare to the current constitution. The state president will be required to have approval of the national assembly on all public appointments. The prime minister will nominate cabinet ministers for appointment to the president. This is an improvement in the spirit of checks and balances and separation of powers. Separation of powers because the head of government will have power to run the government and is not a mere rubber stamp. And checks and balances because all public office appointments will have to be vetted by parliament. The president will have no option but to build a working relationship with the Prime Minister and his cabinet. If the working relationship is not there then parliament can use a vote of no confidence to oust the president. A strong PM from parliament will mean the president will have to listen to such PM and the need to have the bills signed the PM will have to listen to the State Presidents arguments. In my own opinion THE TYRANNY OF THE PRESIDENT are adequately tackled by the draft.

On to my second point.

THE TYRANNY BY THE NATIONAL ASSEMBLY. This is where my GRIEVANCES start- THE national assembly has on numerous occasions absconded or exhibited tyrannical conduct in dealing with public affairs. PARLIAMENT has been the source of IMPUNITY IN THE HIGHEST CALIBRE. I would have expected the COE to KNOW THIS ISSUE BY HEART. I am therefore really shocked to see there is not SERIOUS EFFORT by the COE to ensure that PARLIAMENT ABUSE OF LEGISLATIVE ROLE is FULLY CHECKED and TO ENSURE THAT ANY BILL THAT COMES OUT OF PARLIAMENT HAS THE BEST INTEREST OF THE PUBLIC and not some FRINGE GROUPS in which MP'S have pecuniary INTEREST. When It comes to IMPUNITY IF MP'S NEED TO BE REQUIRED TO FOLLOW THE LAW AND TO ENSURE THAT NO ONE HAS ANY FAVOUR BEFORE THE LAW.

I must add that THE COE might just transfer TYRANNY FROM THE PRESIDENT TO THE PARLIAMENT. This is a very real possibility because nothing has changed in the draft to ensure that CANDIDATES VYING FOR PARLIAMENT ARE LAW ABIDING AND ARE OF GOOD CONDUCT. I will agree with an argument that the senate checks the National Assembly and the draft touches on issues like wealth declaration and ensures that not candidate has a criminal record. I might agree with such arguments. My contention is the Harmonized draft has not come out fully to ensure that these LAWS ARE ABIDED BY. I have not seen a single clause that says that A minister or deputy minister needs to step down in the event of conflict of Interest in his/her ministry. I have also not seen a clause barring Candidates with a court case in relations to misappropriation of funds from the government. I have not seen a clause barring candidates who have been adversely mentioned in Kenyan Mega Scandals from running for office. I have not seen a clause barring Members of parliament from AMENDING THE CONSTITUTION FOR THEIR OWN BENEFIT. We all know we can talk all we want about MP's until they COLLUDE AND AMMEND THE HARMONIZED DRAFT TO RELAX LAWS SUCH AS WEALTH DECLARATIONS AND ALLOWANCES AMONG other pecuniary.

Concluding Thoughts and Question to the COE.

My concluding thoughts are as follows. The COE SHOULD WORK FOR THE KENYAN INTERESTS AS A WHOLE. NOT SOME FRINGE GROUPS. TYRANNY BY ANY ARM OF THE GOVERNMENT NEEDS TO BE CHECKED AND SUCH ARM NEED NOT BE A CHANNEL TO ABUSE THE DIGNITY AND THE POWER GIVEN TO SUCH ARM.

QUESTIONS TO THE COES ..

IN WHICH WAY DO YOU PLAN TO ENSURE THAT MEMBERS OF PARLIAMENT ARE LAW ABIDING AND DO NOT RELAX LAWS TO THEIR OWN BENEFIT AND THE DETRIMENT OF WELFARE OF KENYANS ?

IN WHICH WAY DOES THE HARMONIZED DRAFT TACKLE THE ISSUE OF ABUSE OF AMENDMENTS BY PARLIAMENT ESPECIALLY WHEN IT COMES TO ISSUES RELATING TO LAWS BENEFITING THEM ?

HOW CAN THE HARMONIZED DRAFT BE IMPROVED TO BARR INDIVIDUALS WHO HAVE ABUSED POWER BEFORE THIS DRAFT- FROM RUNNING FOR STATE OFFICE ?

HOW CAN THE COE LEVEL THE PLAY GROUND CANDIDATES RUNNING FOR OFFICE- TO ENSURE THAT NOT JUST THE PEOPLE WITH MONEY ARE ABLE TO DO THIS ?

POLITICAL PARTIES HAVE BECOME SHIPS FOR GREEDY POLITICIANS TO FERRY THEM TO PARLIAMENT THROUGH CRONYISM- HOW CAN THE HARMONIZED DRAFT ENSURE THAT THERE IS DEMOCRACY AND GOOD CONDUCT IN SUCH POLITICAL PARTIES ?

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Questions To COE Continued....

I know its almost Impossible to reduce TYRANNY TO ZERO..... Since we are talking about a persons demeanor in using power. So my question is

How does the COE plan IMPROVE the harmonized draft to reduce to TYRANNICAL TENDENCIES AND IMPROVE checks and balances by the National Assembly ??

Suggest solutions....

There needs to be an appraisal by the election board on candidates law abiding and conviction status before they have their names on a ballot paper....

There needs to be an - Political parties that do not abide by laws requiring full disclosure of party activities need to be de-registered.

Parliament needs to have their AMENDING Powers limited. This will reduce the Tyranny of MP's.

Laws that touch on issues that an MP has direct pecuniary interest need to be void.(This has been addressed partially in H.Draft)

Prime Minister, Deputy PM, Ministers assistant Ministers, Principal Secretaries need to STEP DOWN in the event of a scandal in which the minister has direct conflict of Interest OR is a SIGNATORY to ANY directive as to put Kenyans in a vulnerable position of losing.(Again this has been partially addressed in the draft. Needs more clarity).

All MONEY BILLS emerging from the National Assembly need to be audited for cost effectiveness and Infrastructure capacity of such Institutions as the money may be allocated. The Controller of Budget NEEDS to ASSESS THIS ASPECTS OF THE BILL and recommend the WEAKNESSES THAT SUCH BILL POSES ON WASTAGE AND MIS APPROPRIATION. This would CHECK TYRANNY OF THE NATIONAL ASSEMBLY.

Concluding thoughts...

The COE HAS ITS WORK CUT OUT HERE. There are many issue of TYRANNY that have not been addressed. For the COE to be in the GOOD BOOKS OF HISTORY THEY NEED TO ACT FAST AND EXPEDITIOUSLY TACKLE ALL THESE EMERGING ISSUE OF TYRANNY BY THE NATIONAL ASSEMBLY VS THE EXECUTIVE.

Finally we have someone who's seeing things the way they are. The problem will be made more worse if the current draft constitution gets adapted before checking these goons called MP's they are the ones who caused most of the problems in Kenya in the first place due to their tribal allegiances and alliances.

Thank you Leta Maneno,

You really brought up an Issues that are not getting addressed fully.

Tyranny by the Parliament Is one of the most dangerous things that has not been fully addressed. The COE needs to ensure that mp's can be recalled. This

I urge the coe to read this article an please help the common person from tyranny by the PARLIAMENT. Of-course the MP's are not going to follow the law. This is a no brainer. All these wealth declarations requirements are just going to end up ignored. Because there is no mechanism to force mp's to abide by what the harmonized draft requires.

In this day and age Parliament is has become the biggest abuser of power vested on it. Let us study different countries and make a good conclusion on how we can tame the tyranny by parliament.

I am willing to bet with anyone here that Chapter Nine will not be fully adhere to by most parliamentarians. Anyone want to bet ?

The coe needs to come up with a mechanism to ensure mp's comply or all their efforts will go down the drain.

Leta Maneno,

I think the best way to help Kenyans from Tyranny by parliament is to reduce their term limits to two or two and a half years.

It can be modeled like the house of representative in the United states. Its hard to convince the public to vote you back in the national assembly if you have not done anything in short time. This will also serve to break the cronyism that leta maneno is talking about.

Instead of having to recall Mp's let us reduce their term limits to two and a half years and focus on this because it will deter mp's from abusing power. It will also put the Mp's on toes to address issue that pertinent to the people that elected him/her. It will also reduce the problem that we are having where people run for parliament just for the money and not to help the people.

Two and a half years would just do the trick. The parliamentarians would have less time to accumulate wealth and would have to be responsive to the public to keep such seat.

Leta Maneno et al,

Do you know that In Nigeria's constitution they actually have clauses to require Politicians to deposit their Wealth Declaration form but every politician do not adhere to full disclosure. Even the state governors are required to do declare their wealth but none of these is ever followed or enforced.

The president in Nigeria is Head of State and Head of government. This has made Nigeria an authoritarian regime. Because the president has a hand in every thing in the government. When too much powers are put

in one office politicians use it for political expediency and not to serve the people.

It is very unfortunate Kenyans are trying to give the president too much power. Very disturbing to see politicians going around praising a strong president when they know the harbor aspirations to run for such office. Do Kenyans want a Authoritarian Government ?

Thank you Leta Maneno,

LET IT BE KNOWN BY ALL AND SUNDRY (including COE) THAT WE NEED/MUST! RECALL OUR MPS(GOONS) IF THEY ARE NOT PERFORMING AS PER THE COVENANT WITH THE PEOPLE. COE MUST ALLOW THIS CLAUSE TO PASS THROUGH AND IF PARLIAMENT TRY OR REMOVE THIS CLAUSE FROM THE DRAFT, THEN THE PEOPLE OF KENYA WILL VOTE OUT THEIR RESPECTIVE MPS(those who vote against this clause)
LAST BUT NOT LEAST:
OUR MPS MUST PAY TAXES JUST LIKE EVERYBODY ELSE. IF THEY DON'T THEN LET ALL KENYANS REFUSE TO PAY TAX WHATSOEVER.

Leta Maneno et al,

This whole process will turn out to be futile if the tyranny by national assembly is not checked. Transfer of tyrannical powers does not amount to helping the public. Lets look for real solutions for the problems we face or we'll be doomed to conflict and lack of development.

Tyranny by national assembly is what caused the post election violence. Tyranny by national assembly is what has exacerbated ethnic alignment and in parliament and ethnic divisions in the country. Parliament as it exists now is NOT a symbol of unity. Every mp is out to cater for their own interests or some group and not the people.

I agree we need to tame parliament. The coe needs to pursue the necessary laws as much as possible to reduce the tyranny potential of parliament on the harmonized draft. I think reducing the mp's term limits will decrease chances of making the scramble for wealth being witnessed in the run up to vie for parliamentary seats.

Term limits needs to be reduced to two and a half years like John. Siringi says. The Senators could go for five years but the national assembly for two years.

Leta,

Kenya has never been ready for having a western form of executive leadership. Having a president and having a prime minister are still not going solve the problems of tyranny.

Kenya just needs people who can lead. Our parliament has been known to be a place of corruption and cronyism. Our politicians are known to be the most selfish and greedy people that ever existed. Conduct from our politicians in public has been very disturbing. I agree mp's were the cause of the post election violence. Tribal alliances and political squabbles seem to have taken the center stage as opposed to solving development issues.

So how can we change this ? This is the Million dollar question that Kenyans are facing during the constitution making process. To answer this question we have to ask ourselves. Have we given the politicians too much power over our lives ? The simple answer to this is. YES.

Being an mp means you have a say on virtually any legislation touching on every Kenyans life. So how can we tame our Mp's. I still don't have an answer. But i support Reducing their Terms to three years and reducing their amending power. I support vigorous background checks to ascertain if politician has been part of any corruption past. I support giving more powers to the Senate to check and balance the potential tyranny problem that may arise through the National assembly. I support women empowerment and affirmative action for the disabled. I support having a curriculum that includes teaching public administration and creating awareness on government and constitution. I also support having a prime minister as head of the government with power to appoint ministers from outside parliament. I support the state president as in

the Harmonized draft. I support a resolution mechanism for potential conflict between the president and the prime minister

Parliamentary verses presidential leadership

I support the idea of having an executive president who is directly appointed by the people but whose powers are checked at all times by parliament. The PM on the other hand should be appointed by parliament from the party with majority MPs. He should however be totally in charge of government business including that of coordinating all government ministries.

I salute all patriotic Kenyans!

The hybrid system presented by the harmonised draft is workable if only we think objectively as Kenyans.

The idea of our president and thus presidency is long gone. Today we bear the brunt of a rogue presidential system. These (unchecked presidential system) are hot coals we have walked over for a long while now.

We need a structure that the executive authority is shared over a host of levels - the president, prime minister, parliament and the cabinet. Read! The draft constitution is very clear on this.

We should not run away from a system just because of personality of the office holders or our failure to make the office serve us rather than hurt us. Since we are introducing devolution, this will be another check to rogue president.

To have the president that serve the country, the following need to be done rather than introducing another centre or transferring powers;

A president should have a running mate from a different region and is elected by 50%+1 from at least 65% of the regions.

The senate should vet all presidential appointments

President should not be above any civil or criminal law

president should not be a member of parliament or senate

President and vice president should not come from one region

president will appoint ministers at least one from each region, and not exceeding 15% from one region including the president and vice president.

Kenyans should avoid the obvious danger that the hybrid system presents. We should therefore choose one system. In our situation the parliamentary one would be difficult because we would first have to resolve the tricky issue of constituency boundaries. This leaves us with the presidential one. And we need not fear it. The fear of an imperial president is misplaced. In fact the danger we face today is one of an endangered weak president as recent events in parliament show. Today, no president can be as powerful as Kenyatta or Moi, not even as powerful as Kibaki. So the worry should be one of a weak president who the constitution should empower.

Most of those arguing for power split between the President and PM continue to imagine a permanent PNU-ODM scenario. It won't happen like that. More likely, both the president and the PM will be from one party only. Examples:

1. President Raila and PM Kajwang

2. President Uhuru and PM Saitoti

At that point, most Kenyans will say: "By the way, why do we need both?". Think about that, dear Kenyans

I fail to see where the contention is on this issue. I realise it emanates from the fear of what has been happening since independence. There are many countries that got their first constitution from Lancaster House. These constitutions have been amended many times to suit the holders of the Office of the President. I suggest we talk about the PRESIDENCY as an Office and not the PRESIDENT as a person. This debate should be on the presidency and premiership. I do not see anywhere in the draft that an individual's name has been mentioned. In Botswana, where I stay, the President is the leader of the party with the majority members in parliament. He is not a member of parliament. There is no Prime Minister. Lately there has been a call for a directly elected President. My point is that no system is perfect. The

solution is to institutionalize these offices and have checks and balances that define the powers wielded by the occupants. And that is where parliament comes in. In our (Kenya) case, the president should not be a member of parliament. Parliament should vet all public appointments like happens in the US. If that is a parliamentary system, so be it. If I may ask, are the Republican and Democratic Parties in the US Constitution?

It is very simple from where I am seated. Article 1(1) declares that constitutive power vests in the people. As such the final person who wields overall executive power (president, prime-minister crime-minister, people's watchman, whatever his title) MUST be chosen DIRECTLY BY THE PEOPLE.

Secondly there must be a strong system of checks and balances in the form of a strong and independent legislature and judiciary. What are we bickering over?

KENYANS DO NOT NEED A PRIME MINISTER!

The chapter on the executive is an attempt to merge two different systems of governance-the parliamentary system and the presidential system. The COE should note that in the democratic principle of separation of powers, the separation of powers only occurs between the three cardinal arms of government-the Executive, the legislature and the Judiciary. It is not between individuals. Thus the constitution should vest power in the three arms of government to check and balance against each other. To split the executive into president and prime minister and hope that the two are going to check against each other may not work for this country. COE needs to consider that it is not always guaranteed that the president and the prime minister would come from different political parties or at worst different tribes. For this reason the person who wields executive power must be elected by universal suffrage and must be checked by legislature and judiciary and NOT by another creature within the executive itself. The draft presents a case of the executive expected to check against itself. The system of governance most familiar to Kenyans is the presidential one. The obsession with change should not lead to throwing away even what works.

Spot on!! I needn't say more

I beg to differ with the contributors. All the major developing democracies have the seat of prime minister and practice the parliamentary system of government. The only major exception of a developed democracy is U.S.A which practices the presidential system of government albeit with very strong checks and balances. The Imperial Presidential system of governance has been at the root of all Kenya's problems. At Independence, Kenyans were bequeathed with a parliamentary system full with a federal legislature, by the departing British Colonialists. The late President, Jomo Kenyatta, skillfully dismantled the Prime Ministerial position, which he was holding at independence and assumed the seat of the presidency with all the arrogated powers without going through an election in 1964. These are the same powers which the former President Moi, and current President, Mwai Kibaki, inherited wholesale. The President in the current serving constitution with the exception of the National Accord signed last year, is a constitutional dictator. It's up to Kenyans to decide whether they want to retain the presidential system of government or go fully parliamentary or adopt a hybrid system as currently envisaged. I personally would have preferred a parliamentary system with a ceremonial president chosen by an electoral college, but on account of the extenuating circumstances would vote for the hybrid system.

I had the same view until I read with a tooth-comp this contentious bit. Contrary to general perception this system offers more checks to the executive than the presidential system. The executive arm led by Prime Minister will explain their moves on the floor of the house on regular basis. In the presidential system the person elected seems responsible/obligated to none. My view is direct election without accountability serves no good.

Speak for yourself Mr. Ocharo. You are single Kenyan so don't say Kenyans don't need. Speak for yourself. Say I don't need a prime minister. Good Riddance !!

Yes! I agree with Mr. Ocharo. The notion of an 'imperial presidency' is a media cliché perpetuated by forces hellbent on rulling this country through the backdoor. Come on guys lets face it, Kenyans DO NOT actually "Need" a prime Minister when there is a president who has been elected through universal suffrage. I think contributors like Onyango and 'leta maneno' have missed the idea here, no one is opposed to the

parliamentary system, but if we choose it, let's go for it fully. Hii mchanganyiko maalum is not only dangerous, it is laughable! I mean we have only one country, let's not experiment with crazy ideas. If Kenya has had an 'imperial presidency' what then is the rationale of still retaining the imperial powers in the executive but delude ourselves that by splitting them between a prime minister and a president we will offer checks and balances. I think this kind of thinking postulates a situation in which the president's party/tribe is not the one with majority seats in parliament, which notion is fundamentally flawed. If we want the parliamentary system, good for Kenya, the presidential system, still good for Kenya, but to merge the two both with executive powers is untenable. We can't have our cake and eat it. Thank you!

I agree with Ocharo, Matata. Let the COE present 2 drafts—the purely parliamentary one and the presidential one. Let Kenyans vote to choose from among the two in the referendum. These experiments have failed elsewhere, our next door neighbour Congo, a good example.

I strongly agree with Mr Ocharo. We neither require an executive prime whatever but clearly defined strong institutions [b][b]NB:NOT OFFICES[/b[/b]] to avoid conflicts of interests. Creating positions will only aggravate the glutton characters of the greedy politicians (now and in future). A political hazard that can easily create turmoil in the country.

3 Religion and the Judiciary:

Evangelical churches fuelling Islamophobia

The issue of whether to include or keep out the Kadhis courts is increasingly being seen as the next battleground in the efforts to provide Kenyans with a new constitution dispensation.

While the courts are not listed among the three main contentious issues identified by the Committee of Experts who have just released a new draft constitution, rhetoric from some Churches is whipping up emotions of Kenyans to reject the existence of the courts in the constitution.

These hate speeches are gradually generating into Islamophobic remarks and may ultimately lead to sectarian strife among Kenyans of different religious persuasions who have lived together in peaceful coexistence for generations.

The main contention of the churches is that Islam is being favoured in the constitution and they see this as a contradiction of separating State and religion as encompassed in the constitution.

Prime Minister Raila Odinga, last week at a rally in Tononoka grounds, Mombasa, came out bluntly and rubbished off the claims by churches when he said that the foundation of the Kenyan constitution is mainly based on Christian beliefs and having a clause which protected the interests of Muslims will have no harm on the document.

Earlier last month, the Chief Justice Evans Gicheru was clear that the Kadhis' courts were included in the constitution as a result of an agreement signed between two different sovereign states—Kenya and Zanzibar.

He added that the agreement is governed by international law and is recognized by the United Nations and he went on to stress that Kenya cannot in anyway renege on its international commitment.

In essence, in the event that Kenya goes against this agreement could mean that the country could lose its sovereignty over the ten-mile coastal strip and they would have every right to secede.

The Kadhis' courts have been in existence for centuries under a comprehensive Islamic judicial system that was present along the East African coast. Prior to the entry of the British colonialists, the ten-mile coastal strip was under the jurisdiction of the Sultanate of Zanzibar.

In 1895, the Sultan transferred his administration over the strip subject on condition that the Kadhis' courts will remain in place and for eternity be guaranteed.

During the Lancaster House Constitutional talks in 1961, the status and fate of the coastal strip came up for determination. Members of the Muslim delegation expressed their fears that if the coastal strip joined independent Kenya, Muslims would be at the mercy of an upcountry government that would be unsympathetic with their ideals, culture and religion.

A joint commission appointed by the British Government and Sultan of Zanzibar headed by James R Robertson identified three matters related to the coastal strip. These were an option for the coastal strip courts to be incorporated as part of Kenya, be declared as an independent entity, or reverted back to the administration of the Sultan of Zanzibar.

In his recommendations, Robertson said the area be joined with Kenya subject to the Kenya Government guaranteeing to respect the existence of the Kadhis' Courts.

In a letter dated October 5, 1963, Jomo Kenyatta bound his government to respect this undertaking. "The Jurisdiction of Chief Kadhi and all other Kadhis will at all times be preserved and will extend to the determination of questions of Muslim law relating to personal status in proceedings in which all parties profess the Muslim faith," reads part of the letter to the prime minister of Zanzibar, Muhammad Shante.

The letter became a legal instrument binding the Government to respect the status of the Kadhis courts. Jomo Kenyatta dutifully respected this agreement and this was seen in the courts being enshrined in the 1963 independence constitution.

Successive governments also respected this agreement which saw the number of Kadhis rising from three at Independence to the current 17 Kadhis spread across the country.

Prior to the review processes by the now defunct, Constitution of Kenya Review Commission (CKRC), no voice was heard championing against the inclusion of the Kadhis' courts in the country's supreme law. The reform call which featured during the last years of the Moi era mainly touched on issues of governance and no mention was made on the existence of the Muslim courts.

The CKRC was mandated to collect, collate and analyse the views of Kenyans on changes to be made to the constitution and to recommend changes which reflect the views and wishes of Kenyans. Public hearings were held nationally and a wide range of views were gathered on the Kadhis' courts from individuals and organizations but no record was made questioning their existence.

The views from Muslims centered on improvement and the enhancement on the role and status of the courts and in some cases proposals were put forward for the full application of Sharia Law in Muslim dominated areas.

Others made a case for the retention of Kadhis' courts in their present form and among this group were a team of judicial experts and eminent scholars from the Commonwealth Human Rights and organisations such as the Kenya Human Rights Commission (KHRC), Law Society of Kenya (LSK), the Kenya Chapter of the International Commission of Jurists (ICJ) and the Kenya chapter of the International Federation of Women Lawyers (FIDA).

A model constitution prepared by the four groups working under the banner of the Citizens Coalition for Constitutional Culture went ahead to suggest that the Chief Kadhi's status and privileges be pegged on the same footing as a High Court Judge.

It is important to note that during the lengthy constitutional review exercise, the Commission did not receive any views for the creation of courts for Jews, Hindus or other faiths and groups. The draft released by the CKRC was therefore, a true reflection of the views it received from the Kenyan public.

Opposition to the courts first emerged during the Bomas constitutional conference when some evangelical delegates launched a campaign to oppose their inclusion in the constitution. Behind this group was an American evangelist and a director of a Nairobi health firm, Health Data Systems Ltd, Mitch Medina who orchestrated a campaign against the inclusion of the courts. The preacher was at Bomas as an observer where he circulated literature opposing the the existence of the courts.

After the failure of their efforts, there are now back again calling for the courts to be expunged from the constitution.

The issue is now being politicized creating unnecessary tension and disharmony between the Muslims and their Kenyan brothers and sisters. By spreading propaganda and whipping up emotions of other people who may not have all the facts before them, these people are undermining and attempting to scuttle the efforts to bring about a new constitution which Kenyans have yearned for.

The Kadhis' courts are part of the Muslim identity in Kenya, islamophobics are striving to erase. It is my contention that those fighting against the Kadhis courts ultimately want to erase the Muslim identity in this land and by all means Muslims will not and never allow this to happen.

While it is our hope to see peace and harmony continue to exist between the different Kenyan religious communities, this propaganda war being peddled by the likes of Bishop Margaret Wanjiru and Provost Peter Karanja of the NCK, against the Kadhis Courts is ultimately aimed at creating an atmosphere of sectarian strife among citizens of the country.

Peace loving Kenyans from all religious persuasions should stand up against this small clique of Christian radicals who want to satisfy their Western financial backers by inciting religious hatred among Kenyans. Those clamouring for their removal are working for foreign agents who have bad intentions for the country. These are not all the Christian leaders because I have spoken to many Christian leaders and ordinary Kenyans who said they support us to have the Kadhis' Courts entrenched in the constitution,

I further wish to dismiss claims that Muslims were being favoured by having the Kadhis Courts in the constitution. The current constitution was based on Judeo-Christian principles. We rest on Sunday, Christmas, Easter, New year holiday because these are Christian holidays and similarly many other laws in the constitution are of Christian origin. If they say there is no religion in both the current constitution and proposed one, it is not true because they (Christians) have already been accorded so many religious rights in the Constitution. In fact by current estimates up to 90% of the current and proposed constitution is Christian, though not explicitly stated as such.

We as Muslims will not engage in any debate with the opponents of the courts. If there is anyone to engage then it is the Committee of Experts. We were Muslims before even the colonialists conquered our land so our right to practice our religion comes even before this state was created, any other community cannot tell us what constitutes our right.

Mr. Onyango's article accuses evangelical churches of fuelling what he calls islamophobia without addressing the real issues.

In chapter six 33(4) under the heading "Limitation of rights or fundamental freedoms"--contradicts chapter two 10(3) which says that all religions shall be treated equally.

Also chapter thirteen 208(b)-The Kadhis courts contravenes or is also in conflict with chapter two 10(1, 2 and 3). More specifically Islam is not being treated equally with the other religions and is being given preferential treatment. The reasons could be historical but having looked at the two letters written regarding the Kadhis courts, I reach the conclusion that there was no treaty. Secondly after independence we are not obliged to keep such agreements and especially so if they are in conflict with the constitution. There are many agreements with the colonial government that are today not in place because they were not of benefit to us as a nation. Islam is also not a minority religion.

Since the courts are intended to deal with family issues, why put them in the constitution? They can be legislated by parliament and not necessary to put them in the constitution. It would also not be fair for other religions to pay for the workers (kadhis) of another religion yet all the religions are competing for members- this is ridiculous and unfair to say the least.

Furthermore Chapter thirteen 209 (5) can be used to lock out other religions within the so called protectorate.

The comment above fails to tackle issues

There are many reasons why kadhi courts should not be entrenched here. They are selectively being applied to Muslims to look at family issues. This is giving preference to Islam. I am not against kadhi courts, we can have them but be legislated by parliament and not necessary to put them in the constitution.

Two: why sustain a religion through our taxes. Christian Pastors doing weddings, reconciliation of families would also be eligible for pay

Tree: separate religion from constitution. Muslims are not a minority

four: Talking of protectorate is openly favouring one religion.

five: The issue was in contention even for the current constitution but it was included after negotiation. Kenyans were not asked of their opinions

I wish to disagree with the suggestions that Muslims are not a minority. Government statistical census reports of 1999 lists Muslims as comprising 29% of the total Kenyan Population. Current projections put their figures at 33 % of the estimated Kenyan Population of 40 million putting their numbers at approximately 13.3 million. Compare this against the estimated 27 million for Christians. If Muslims are not deemed a minority on account of these abstract statistics, then I really don't know what is the definition of a minority. The Crafters of the Independence Lancaster constitution put the Kadhi's courts there for very good reasons. The Muslims being a minority, their courts would not have been afforded sufficient protection, were it to be covered by simple legislation (act of parliament). An act of parliament comes into force or is repealed through a simple majority of parliamentarians. In our present case, a quorum is constituted by a mere 30 members of parliament. It would take a busy body with ulterior motives, enough to just summon a total of 16 Members of parliament to repeal the Kadhi's courts in its entirety. Since they are afforded constitutional protection, it would take the total number of 66% of all elected MPs or 148 MPs to push forth a constitutional amendment to do away with them. This is not an easy feat to pull. This is what has ensured the survival of the Kadhi's courts throughout the 46 years of Independent Kenya's history. The total number of Muslim MPs are about 18% of the Kenyan National Assembly and are clearly disadvantaged in numbers. We, the Muslims of Kenya are fully satisfied with the status of the Kadhi's courts in the draft constitution and would not wish for them to appear in any other format. The issue of the Islamic religion being mentioned in the constitution is purely a formality because they are there to implement the Muslim personal law. The Christian religion does not require constitutional protection because its principles and values predominate in many pieces of legislation and statutes. By one estimate as much as 90% of our Laws are of Judeo-Christian foundations. Most noteworthy examples are civil law marriages, Family law, Bigamy, weekly rest day of Sunday etc. Finally I wish to state that the Kadhi's courts did in fact come into force through the signing of an international treaty as clearly attested to, by the Chief Justice, Hon. Evans Gicheru. This treaty can be scrutinised at the Kenya National Archives records. Its abrogation would have international political ramifications with secessionist tendencies, with all its outcomes. Am sure we as Kenyans would not wish to go that way.

Having read all of the above, I have concluded that

1. Muslims need Kadhis courts
2. Some Kenyans are muslims
3. Most Kenyans are not muslims
4. There is no reason to have such courts in ANY constitution, least of all the Kenyan one.

Your conclusions, Mr. Wakha, to say the least are both baffling and confusing. Most former members of the Commonwealth with sizable Muslim populations have them enshrined in their constitutions. Their functions vary from administering Muslim personal law to outright implementation of full Islamic law wherein they are referred to as Sharia courts. Noteworthy African countries with Kadhi courts performing similar functions like the Kenyan model are Uganda, Gambia, Zanzibar, Tanzania (in the process of re-establishing), Egypt, Senegal, Guinea etc. In Nigeria they have both functioning Kadhi's courts and Sharia courts operating in different parts of the country. This rejoinder also strives to dispel the myth that Kadhi's courts is synonymous to Sharia courts.

Having read Mr Yahya Onyango's contribution above;

1. I still find no credible argument to have such courts put in any constitution
2. That they are not Sharia courts makes their presence even more spurious
3. That they exist in Egypt, etc, does not seem to me a compelling reason to have them in Kenya, USA (or even Egypt for that matter)

Mr. Yahya Onyango says that Muslims are a minority-I wish to submit that his definition of minority is incorrect-check the dictionary or operational definition for the word-Muslims cannot be a minority-The Hindus would qualify as a minority group but not the muslims. At 33% muslims definitely cannot be a minority. I think what Mr. Onyango wanted to say is that muslims are less than Christians which is not the same thing as being minority. The constitution seeks to protect rights of minorities such as ogiek. As an example it would be ridiculous if the Merus say since they are less than the Kalenjins, then they are a minority and seek special protection from the constitution. Islam is the second largest religion and is therefore not a minority. And now that the muslims are no longer a minority Onyango's argument of having kadhis courts is not necessary. I saw another argument that says muslims can demand that their taxes be used to pay for the kadhis-this is very dangerous-if every group insisted that since they pay taxes they need a specific project, how would the government plan? The absence of "quid pro quo" is implied as we pay our taxes.

I beg to respectfully differ with Mr. Michael Bowen regarding the definition of the term Minority. He avers that since Muslims make up 33% of the Kenyan Populace and by deduction the Christians about twice the number, at around 66%, the rest 1% comprising other faiths like Hindus, Sikh, Bahais etc, then Muslims don't qualify to be called minorities. The Oxford Advanced Learner's dictionary defines the term minority as being and I quote 'be in the smaller of two groups or the smaller number or part, especially of a total of votes or racial or religious group. Similarly a minority government would be one which has a minority of seats in a legislative assembly'. Therefore as per the dictionary both the Muslims and Hindus and whatever other minor (small) groups qualify to be called minorities. Those people opposing the Kadhi's courts and making allegations of bias for Muslims are politicising the issue and creating unnecessary tension and disharmony between the Muslims and their Kenyan brothers and sisters. By whipping up emotions of other people who may not have all the facts before them, these people are undermining the goals of the constitutional review process, which is to inter alia, to unite the country and to respect and promote the ethnic and religious diversity of the people of Kenya. The argument that the provisions in the draft constitution treats other religions less favourably is clearly without merit. Chapter six of the draft constitution on bills of rights (read human rights) is a basket clause containing several sections guaranteeing and protecting the freedom of religion for all. The Kadhi's courts which fall under the chapter on judiciary could not have been brought under the ambit of Chapter six of the draft on bill of rights. Lastly I would like to say kudos to our Catholic Brothers and sisters for their presentations to the CoE yesterday, especially with regards to the issue of Kadhi's courts. They through the Kenya Episcopal Conference, were able to see through the hate campaigns, propaganda, distortion of facts, fanaticism, to soberly support the retention of the Kadhi's courts in the spirit of religious diversity and harmony. They at the same time asked that a clause be inserted to recognise the agreements between different religions and the state, as existing in other countries. These sentiments are aptly captured under article 10 of their presentation, under the title, State and religion. Other Christian religious bodies ought to emulate the fine example set by the Catholic Clerics with regards to the Kadhi's courts.

I object to the manner in which Mr. Onyango is carrying out the debate-When issues are raised, he brands those who hold opposing views as whipping up emotions of other people. I think the purpose of such a forum as this is to have as divergent views as possible. To label others would not be useful-actually it is some kind of a veiled threat so that others can keep off. This is clearly seen in the subject of the discussion which he initiated. He gives a narrow definition of the word minorities from only one source-bear in mind that there are many definitions of the word (both operational and from dictionaries). Secondly contradictions (and I pointed out a number of them regarding the kadhi courts) within the constitution should not be allowed since the same constitution allows any person to challenge this in a court of law. We don't want a constitution that will be challenged.

I wish to assure Mr. Bowen, and others who hold similar dissenting views, that I fully respect their rights to hold contrary opinions. Nobody is out to muzzle anybody. We are all at liberty to interpret statements or articles appearing in this thread and others, according to our own level of understanding and intellect. We might not necessarily agree on everything under the sun but at the end of the day we are all Kenyans who have to live with each other amidst our differences and diversities. The hallmark of any democracy is that the views of the dissenting minority should be taken on board, just as there should be no tyranny of the majority over the minority. I also wish to remind him that is he, who introduced the angle of the Dictionary definition of the word 'minority', and cannot now turn around and retract his own statement by saying that there are other socio-political definitions besides this. Regarding the issue of inherent contradictions in the Draft constitution as appertains to the establishment of the Kadhi's courts, I am sure that the wise men and women who sit in the committee of Experts will act on them if they deem them appropriate.

I agree totally with Michael Bowen.

There is a thinly veiled attempt to intimidate anyone who disagrees with these Kadhis courts. If you raise a valid point, the words used against you are:

Islamophobia
Evangelical Churches (even when its your indiv. view)
Whipping up emotions
Ignorance
Muslims are also Kenyans!
Muslims also pay taxes!
Unnecessary tension
Non-contentious issue
etc.

Yet none of these slogans answer the concerns raised.

I am surprised by the attitude taken by Philista. I don't understand which are these issues surrounding the Kadhi's courts which have not been answered in this thread and others in the same site on the subject matter. The issues which has raged on include a) that Islam as a religion is being favoured b) that its improper to entrench Kadhi's courts in the constitution and should be covered by subsidiary legislation c) that Kenya is a secular state and there should be separation of state and religion d) have a provision for establishment of religious or special courts for other religions or groups and last but not least e) that tax payers money is being used to finance the operations of one religious group without regard to other faiths. I wish to inform her to read all the thread articles under Kadhi's courts before making sweeping statements. It would be monotonous and duplicative for me and other contributors to restate them here today.

non-representative courts be excluded.

For all good reasons, let's not have any religious or sect courts in the constitution. These can be done by a parliament resolution or an act. The constitution should have what is generally and wholly representative.

The issue of the Kadhis court is very puzzling especially when the argument being floated to support it is an agreement between Kenya and a certain Sultan of Zanzibar.

There is also talk of an agreement with the UN. Why would Kenya pretend to be reweaving its constitution if it already has some agreement with some certain groups of people who are by the way not Kenyans.

It beats all logic that we are so careful about what we promised foreigners at the expense of our own people. Do what the Christians in Kenya want really matter?

Let us be sincere and listen. The Kadhis court is sure can exist elsewhere but they do not have to be in the constitution.

Alpha

No religious group should be given special treatment in the constitution however minority it may be. Unlike the Harmonised Draft, Kenyans never participated in the making of the current constitution. Therefore, Kadhi

courts shld hav never been in our current constitution in the first place!
Majority of Kenyans hav said NO to these courts, why don't you CoE listen to their voices?

I agree...no "common mwananchi" participated in drafting the current constitution. We didn't have a say as to whether the Kadhi's court (or for that matter, any other religious court) should or shouldn't be in the constitution. The beauty of the current process is that I, LIKE EVERY KENYAN, DO HAVE A SAY, AND A RIGHT TO BE HEARD!

Let me give a very poor analogy. If, say, I have a painless mole or swelling or something on my back or face or wherever which normally doesn't bother me, then I wouldn't even consider doing anything about it. I may not even be aware that it is there. But if somehow someone points it out, OR I somehow become aware of it, I start getting the urge to do something about it. I may even have been aware of it all along, and have it nag me everytime I see it, BUT not have an opportunity to do anything about it maybe because cosmetic surgery is "beyond my reach". But suppose "the gods" somehow bring it within my power to do something about it, should I just be dismissed with a callous... "you have been living with this mole all your life and it has not ever bothered you, so just stay on with it?" Or wouldn't it be my moral and inalienable right, even an obligation, to go ahead and rectify that anomaly? I work in a hospital that does a lot of corrective surgery for children who are born with various unfortunate "deformities". Often, they cannot do something about it... it is simply "beyond" their reach. Thousands simply live lives in misery just because they think nothing can be done about it. Many are "blissfully" not even aware that they have a problem! But when "benefactors" avail the resources and "opportunities" to allow something to be done about it, they actually move to do something about it! It doesn't matter what prior agreements, pacts, blood covenants or other arrangements they had with their neighbours about how to hide or live with their conditions! When they find that there's finally an opportunity within their grasp to correct the birth defects, no one in the world has the right to stop them, unless they are very callous and heartless! No one wants to live with a problem they can sort out if they can. The fact that they have been "blissfully ignorant" of the problem doesn't mean they can now continue living in some sort of "blissful awareness" of the said anomaly.

The point of this poor analogy is this: the church is NOT opposed to the Kadhi's court in principle. It is opposed to the fact that having it in the constitution, as it currently is, in effect elevates the status of one religious group above all the others, breaking the PRINCIPLE of separation of state and religion and the stated fact that THE STATE SHALL TREAT ALL RELIGIONS EQUALLY!!! IS ANYONE OUT THERE LISTENING????? The Muslims have their own special requirements, yes... like Sharia compliant banks (a major part of the ECONOMIC SECTOR), Halal foods (probably an important element in the PUBLIC HEALTH and SOCIAL SECTORS) e.t.c. which carry on pretty well without interference from anyone (just like the Kadhi's courts have done all along), without ever having these enshrined in the constitution.... probably not even by Acts of parliament. Why, in the sector of justice, should this group be treated in a special way, AS A MATTER OF PRINCIPLE?

Therefore the church probably finds it VERY unjust, when the opportunity to correct a "birth defect" has finally presented itself, after years of struggle as a nation, only to be told that ... "you have lived with it all along. Just go on as if there's nothing wrong... after all, it has never, ever affected you and will never affect you." I am not in any way suggesting by my poor analogy that the Kadhi's courts are a "birth defect" in the current constitution. In fact it plays a very important and crucial role in Kenya, and should be encouraged... BUT everything has its rightful place. In a field of roses, which you cannot even eat, something very useful like maize or papaya or wheat is indeed... a weed! It's useful, BUT it's in the wrong place! Therefore, it stands out like a sore thumb and will ALWAYS be a source of throbbing pain. And therefore, religious courts of any kind should just not be included in a secular constitution. Hypothetically, and in principle, Christians, traditionalists or whoever, even Satanists, in pursuing equality of treatment by the state, will be right to DEMAND their own courts in the constitution, should they want to do so, IF we allow the Kadhi's courts in the constitution. Indeed, should it be enacted, it will open a can of worms that the C.O.E will regrettably have been responsible for! There is always a certain element of the society that is crazy enough to demand such rights. I know quite a few. Of course this argument has been trashed by our experts, with predictably disastrous results in the last referendum, but the constitution should be an instrument not only protecting ALL KENYAN'S rights, BUT that does so EQUALLY.

In reality, in my (probably very ignorant) view, Muslims find it relatively easy to live and worship undisturbed AS MUSLIMS anywhere in Kenya. Even in the middle of rural Alego, Siaya, you will find mosques and a famous family called "Obama Hussein." But in "Muslim strongholds" like Isiolo and other regions in N. Eastern Kenya and the coastal belt... the areas I understand from the ongoing debates were initially under the Kadhi's courts jurisdiction under the treaty with the Sultan (whose name WE don't even know!) local Christians have to go "underground". It is almost impossible to put up churches therein. It is therefore NOT entirely true that

Christians are NOT affected by the Kadhis courts. The Kadhis court, through whatever agreement with the sultan of Zanzibar, in effect led to the creation of such "religious enclaves" whereby the predominant dispute resolution process, an inherent and necessary part of social interaction and order, would have to be based on religious rather than secular order...and have all taxpayers (majority of whom are Christians!) pay for it! In these enclaves, where Christians are the minority...the Christians and other religious groups ARE affected by the Kadhis courts, even if indirectly, because it is part of the social order therein and they have to live around it. But the church is NOT complaining about this low-key "fundamentalism" in such enclaves. On the other hand, Christians who have tried to point out the discrepancy and glaring contradiction in allowing Kadhi's courts in a secular constitution as a matter of principle and simple right-ness are being accused of being "Christian fundamentalists". The REAL issue is being clouded and in the process, stifled. Why isn't it seen or even thought of as an act "fundamentalism" for some to insist that Kadhis courts MUST be entrenched in the constitution even though they can exist, as a matter of equity and the equality of treatment by the state, as espoused by the very same draft constitution, quite comfortably and effectively through other instruments like Acts of Parliament, and still have Kenyan taxpayers foot the bill for their religious courts?

Therefore, it must be so painful for Christians to be told to "put up or shut up", that the matter is not even "contentious", yet we all know it is one of the major things that brought down the Wako draft in the last referendum. How can it fail to even qualify to be "contentious", regardless of whatever narrow definition the C.O.E have been given in their mandate about determining what is contentious? It is a historical fact that it IS contentious and it led to the felling of the previous draft in the referendum. The C.O.E will be denying a historical reality to see it as anything but contentious. It will be self-destructive to take the alternative perspective because it is almost a guarantee that the Christians will mobilize to shoot down the work of the C.O.E. It beats logic for instance, as it is reported in the media, for the C.O.E. to deny the "gay movement" a voice in this draft on the grounds that it is morally offensive in our culture and therefore specifically including their "whims" will definitely lead to the rejection of the draft on MORAL grounds... AND YET consider the concerns of millions of Christians about issues of EQUITY in the treatment of religions by the state a "non-issue". It is a fact of history that it is the church, by and large, that HAS BEEN KNOWN to have mobilized itself as a social institution against the Wako draft. Does the C.O.E therefore fear the "gay movement" more than it does the mighty army that is the church in Kenya????

I think, on the matter of international treaties with (a defunct?) Sultanate of Zanzibar and U.N. or whoever is involved...the thing we need to do is for us to determine for ourselves what WE want for Kenya. Zanzibar or whoever, in principle, should NOT determine how we are governed. Where then is our sovereignty as enshrined in the same said constitution? Treaties should be between a sovereign state and another sovereign state, each with their own independent, stand alone constitutions and governance structures. As Alpha Kilo says below...how can we, a sovereign state, choose to determine our destiny based on treaties with a defunct Sultanate AND yet refuse to listen to the worries of its own very huge Christian population? Is the voice of the Sultan of Zanzibar more important to Kenya than the voice of the reputed 80% Christians in Kenya? WE should sort out our own mess, then if necessary, go back and negotiate with that Zanzibar Sultanate (or is the heir to this treaty...Tanzania?), telling them that "this treaty doesn't conform with the desires, aspirations and the sovereign constitution of Kenya's people." If that leads to war or international sanctions...so be it. The sovereign citizens of Kenya should be ready to defend their constitution and their borders! But no one should determine OUR destiny for us... the sovereign people of Kenya should NOT be "colonized" by the Sultan of Zanzibar. Self determination is our inalienable right! How low can we sink as a people? Where's our sense of dignity?

It has also been mentioned that Christians should not be unduly bothered by the Kadhi's courts because, after all, even though Kenya is a secular state, Kenya's constitution and laws are based on the British constitution and laws by and large, and that these are based on the Judeo-Christian tradition. The Kadhis court is just a small "concession" to the Islamic culture. In which case, then, we should NOT be concerned by the issue of a ceremonial president and a powerful prime minister, since that is exactly how the British are running themselves. Or like Israel, which has a president whom we hardly ever hear (ceremonial) and a very powerful prime minister, who calls the shots and holds the whole world at ransom by his actions and utterances. Is that what we are saying? Why should we treat one part (THE EXECUTIVE) in the draft constitution any different from another like the Kadhi's courts? Why is that part (Executive) contentious, and yet it is in every bit as Judeo-Christian as can be? What traditions do those very secular countries like Algeria, Egypt, e.t.c. with a large chunk being Muslim derive their legal and constitutional frameworks from, if not the very same Judeo-Christian traditions? Have all the Arabic and even Islamic states all "constitutionalised" Kadhis courts? I doubt it. Some see the wisdom of separating religion from state, and keep it like that. Others see it differently, and create the kind of "theocracy" situation in Iran. The point is, having a Judeo-Christian background doesn't mean we MUST have a Kadhis court in the constitution as

some sort of "concession" to other backgrounds. It is also an anomaly to see these laws as Judeo-Christian: lots of it is actually from the ancient Greek and "Pax-Romana" civilizations, carried on from the sophisticated Roman empire and therefore mistakenly interpreted as part of Christendom when state and religion got married when Emperor Constantine "grabbed" Christianity for political ends! A perfect example of why we need to keep state and religion worlds apart as far as governance is concerned. It is not about "concessions" in this constitution (meaning someone is lending it over another and is just doling out concessions)... it is about CONSENSUS... what do we collectively agree on as equals whose "one man, one vote" principle counts. We are NOT talking of a constitution for Christians or Muslims. We are talking about a constitution for secular Kenya... a hotchpotch of all sorts of cultures and belief systems from the East, the West... even the North and the South!

My take is that we want to assuage the Muslim psyche by keeping the Kadhis court in the constitution BECAUSE Muslims in Kenya have been unjustly treated BY THE INSTRUMENTS OF GOVERNANCE AS VESTED IN THE EXECUTIVE... not by the legal system. The legal system is rotten to the core (having been manipulated by the Executive) for everyone and should be corrected along with the Executive, which is even more rotten to the other core! That is why we ended up with this bloated "grand confusion" government, lost like sheep without a shepherd. No one believed that justice would have been done in the courts in the disputed elections. It would simply be manipulated by an IMPERIAL PRESIDENCY (which is why C.O.E is trying so hard to have a hybrid system to share power with a P.M.). What we are trying to do and what has been done historically through the constitution is hoodwink the Muslims to see that they need some sort of "affirmative action" so that they can have some form of solace that "at least we can sort out our own disputes in our own courts which have been included in the constitution". Could having Kadhis courts actually be telling us that these dear folks are seen as "second class citizens" in a secular state when they are not? Has anyone ever looked at that angle... and seen that the fact that we have had Kadhis courts in the constitution in the first place might have been a clever means to "hoodwink" them by pretending to treat them as "special" when in reality they have been oppressed by successive regimes? The whole system needs to be overhauled fundamentally, so that the Muslims in our country wouldn't even HAVE TO passionately feel the need for a special court to address their special needs. If justice could truly be gained in our courts, and if the governance structures in our land would NOT discriminate against ANYONE, whether Hindu, Muslim, pagan or whatever, giving every Kenyan an equal opportunity to participate in running this country and knowing that they can derive justice even in our secular courts, why would anyone need a special religious court at all, maybe apart from cultural reasons? Didn't our African forefathers have their own court systems that settled disputes for centuries before Mzungu came? Are we saying we should also recreate them for those who believe in the traditional ways, as a concession to them as well? Someone will soon check the treaties the cunning Brits signed with our famous Nabongos, Laibons, Orkoiyots e.t.c. and say that those treaties hold to date and DEMAND certain things in the constitution concerning certain cultural and traditional religious understandings. Are those legally any different from the treaties with the sultans, if these are the treaties that created Kenya? In the USA, native rights lawyers have kept making certain demands based on such treaties. They might not just be historical pieces of paper, you know. Sooner or later a light bulb will light up in the brain of some bright descendant of our ancestors, and they will arise with a demand for all of Maasai land or Luhyaland or Nandiland... and what will the C.O.E. have to say then? Don't the secular courts cater for them as well? They have not asked... but what if some crazy Alice Lakwena type arises and demands for a special court in the constitution? Shouldn't the state protect ALL citizens equally? That is why Christians have never seen the need for a "Christian" court. Of there was such a need, they would have demanded for it. They see the secular courts of the state as being all that is needed. That is not to say that the church doesn't have its own dispute resolution mechanism "for matters pertaining to The law is supposed to be blindly impartial."

Thanks C.O.E for letting a young Kenyan rant and rave, maybe very ignorantly! That is a right many have died to protect for ALL OF US... regardless of my religion. As sons and daughters of this great land, let's AGREE and have CONSENSUS on a constitution that PROTECTS ALL OF US and TREATS US ALL AS EQUALS... since when it comes to voting, my vote counts just as much as anyone else's, no matter the colour, religion, sex, age, whatever!

God bless Kenya!

God bless Kenya!

Before independence, Muslims were a minority. Currently, they are not. Religion is a matter of choice. In the event the 80% Christians and those who ascribe to different religions willingly convert to Islam, will the same

constitution be changed to favour the minorities? 🤔 Hindus and others are for sure the minorities and they are not complaining. Why pretend we are amending yet the views of Kenyans who are crying that we separate state and religion is being treated as NOT contentious? 🤔 When and under which laws was Sharia banking introduced in Kenya? 🤔 For this reason we may never get a new constitution unless what is presented to us is a reflection of our wishes. SEPARATE STATE AND RELIGION

Some of us assume Kadhis courts to be contentious. In fact they have been in existence in our constitution for a time longer than the age of a good size of our population.

We need to clearly understand that these courts don't affect you if you don't profess Muslim faith.

Lets focus to understand more important issues like human rights, the land question, government structure and representation in the national, regional and the county's to ensure that these areas bear a Mwananchi say.

as a christian ,what is the purpose of a constitution?i believe it is to protect the people of kenya.whether a majority or a minority.HAS THE KADHIS COURT STOP THE SPREAD OF CHRISTIANITY ?NO.NO.it is not correct to attribute the worlds problem to a religion but rather to poor leadership.most xtian were not even aware of those courts.PILIPILI USIYOILA YA KUWASHIA NINI?i stand by the coe that kadhis court are not contentious.tolerance understanding and the cardinal rule of love for others should be our shield and defender

Wambua Mutuku, you are wrong in 4 counts:

1. Yes, Kadhis courts ARE contentious. That's why we are both writing in this forum.
 2. Yes, Kadhis courts affect non-muslims who will have to pay taxes to prop up the religious activities of one select group of Kenyans. The argument that they only affect muslims is still-born.
 3. No, human rights issues may be important but they are not the only reason a constitution is written.
 4. We don't have to accept this draft just because "we must have a constitution this time round".
-

therein goes the ignorance of a normal Kenyan, What happens if you convert to Christianity from Islam and you have an Inheritance or marital dispute with your family members? do you think it will be easy to resolve it outside a Kadhi court? Me thinks not! Why? you may ask, because your muslim relations will insist on sorting it out in a Kadhi court that's why, because you were born a Muslim as the clause states. But lets expand the Argument further, this courts will have Kadhis paid for by the state in different parts of the country who can essentially spend their free time preaching Islam on taxpayers money and on this i say a BIG NO WAY. Not on my taxes. And if the coe insists on cowardice on this issue we shall meet at the referendum 🤔

I totally disagree with my brother Mbijiwe regarding the deletion of the Kadhi's courts.Just to educate him and pull him out of ignorance.Kadhi's courts exist as part of the subsidiary judicial system of Kenya to deal in matters pertaining to muslim personal law where both parties profess the muslim faith.Appearance before the courts for both Muslims and non-muslims is wholly voluntary.One can chose to overstep it and proceed to the Family law courts division of the Kenyan judiciary and have his or her matters adjudicated by a Magistrate or Judge who will be guided by muslim personal law.Furthermore even when matters are adjudicated by the Kadhi's courts,their decisions can still be challenged or appealed against at both the High court and court of appeal.In both cases verdicts are not made by Kadhis.In conclusion i would wish to urge to research further on the topic of the Kadhi's courts and not fall victim to Christian fanaticism,disinformation and propaganda on this subject.Kadhi's courts were and have never been a contentious issue in this country. God willing i will address this issue further in this forum soon to set the record straight.

KADHI COURTS BELONG TO MUSLIMS NOT CONSTITUTIONS

I find this debate about Kadhis courts ridiculous.

Kadhis courts are part of Islam and will always be there. They do not need to be in any constitution. Muslims do not need statutory recognition of our faith.

Since Kenya is a "secular state", religious laws can be kept out without damage to anyone's faith.

Muslims are capable of paying for Kadhis courts without using taxes from state coffers.

There is no need for Kenyans to be divided any further by this issue. Remove Kadhis courts from the draft.

I humbly disagree with the views expressed by Brother Bakari Ahmed. We Muslims are as much a part of this country as our Christians counterparts not to forget other denominations. We have every right as Kenyan tax payers to dictate that the taxes we pay be used to finance our personal laws courts. Our Kenyan legal system is heavily biased towards the Christian faith. Our personal laws are complex and cannot be accommodated within the mainstream courts. For the information of brother Bakari, the Kadhi's courts is not a creation of the Islamic religion but rather the Colonialist British. Islam has the all bearing Sharia System which is a complete code of life. The jurisdiction of the Kadhi's courts as defined by section 66 of the present constitution is limited to the resolution of disputes in the areas of marriages, divorce and inheritance, where both parties profess the Islamic faith and willingly subject themselves to it. Debate on the Kadhi's courts is healthy and we are able to exchange ideas and at the same time educate each other, on issues which are unclear or misunderstood. Kadhi's courts perform a very important function in the Kenyan Judiciary, complimenting the work of the Family law courts division. It is both right and proper that its operations be safeguarded and catered for from state coffers and not otherwise.

i still do not understand how an institution of a religion is in the constitution, and it is just one out the many available locally. that really amounts to running two sets of different laws for one country whichever way one look at it. how do muslims cope in other secular environments?

For the benefit of my sister Tina, and to educate others on the operations of the Kadhi's courts. They are judicial institutions and not religious bodies. The Kadhis are judicial officers employed by the judicial service commission of Kenya. The Kadhis are not religious officials and hold their proceedings in court chambers and not Mosques. The courts are run just like any other courts with due respect to the rules governing court proceedings. The Kadhi's courts operate as a subsidiary court with the Kadhis enjoying the status of magistrates. Appeals from the Kadhi's courts lie with the High court and courts of appeal. The Kadhis are in terms of hierarchy ; Chief Kadhi, Deputy Chief Kadhi, Principal Kadhi, Senior Kadhi, Kadhi 1 and Kadhi 2. To answer the second part of her question briefly. In Most secular Muslim countries, the aspect of Family law is strictly governed by Islamic law whereas the criminal and civil code is what the colonial masters bequeated them albeit with modifications here and there. In Western countries like the UK, Norway and German, Muslims citizens run their personal laws through the Islamic tribunals which operate as an alternative dispute resolution court. They operate under the umbrella of the arbitration act. Currently the British government with the support of various legislators and the Anglican Head, Bishop Rowan, are looking into the possibility of transforming these Islamic tribunals into fully functioning courts to complement the mainstream

judiciary. So, you see the issue of merging the two systems of jurisprudence is not unique to Kenya, and is the way of the future in the face of a country with a diversity of faiths and cultures.

Adam Ali. wrote:

For the benefit of my sister Tina, and to educate others on the operations of the Kadhi's courts. They are judicial institutions and not religious bodies.

Not true. These courts are institutions made ONLY FOR PEOPLE OF THE ISLAMIC RELIGION and the Kadhis follow muslim religious tenets only. If that does not make them religious institutions, we are stretching the meanings of words beyond the boundaries of honesty.

Adam Ali. wrote: *The Kadhis are judicial officers employed by the judicial service commission of Kenya.*

Tina was right that there exists no credible reason for this. It is unfair to non-muslims who also pay taxes. A part of their tax money is being used to support these religious courts. Muslims are under the same tax regime as everyone else but tax money is not used to prop up other groups' religious structures.

The kadhi's courts should be seen in the context of the judiciary and the legal system and not as a religious or Muslim issue alone. Those opposing the Kadhi's courts and making allegations of bias for Muslims are politicising the issue and creating unnecessary tension and disharmony between the Muslims and their Kenyan brothers and sisters. By whipping up emotions of other people who may not have all the facts before them, these people are undermining the goals of the constitutional review process which is to inter alia to unite the country and to respect and promote the ethnic and religious diversity of the people of Kenya. The argument that the provisions in the draft constitution treat other religions less favourably is clearly without merit. Chapter six of the draft constitution on bill of rights (read human rights) is a basket clause containing several sections guaranteeing and protecting the freedom of religion for all. The Kadhi's courts which fall under the chapter on Judiciary could not have been brought under the ambit of chapter six on bill of rights.

Are you implying that if a Moslem and a Christian were litigating before a court in Kenya the Christian would have an upper hand over the Moslem just because he is a Christian?

Nothing can be further from the truth!!!!!!!

Dear Miasma. Your contentions are totally off the mark. It's obvious that you have thoroughly acquainted yourself with the train of arguments in this thread under the discussion of the Kadhi's court. Just to recapitulate briefly when we say heavily biased towards Christianity, we imply its ethics and moral codes are heavily influenced by Judeo-Christian principles. It has nothing to do with whether a Christian or Muslim litigant would enjoy preferential treatment. Please kindly read critically before giving any commentary.

We are truly tired with the current system and would sincerely wish to have a more devolved governance structure. The best way to do this is through a parliamentary system. Please note that a Prime minister is never directly elected anywhere in the world and that when we are electing our reps, we already will be knowing the next premier as he/she will be leading the troops to garner the most seats. Please give us a parliamentary system.

KEEP KADHIS COURTS! HERE IS HOW...

I suggest we keep Kadhis Courts on the following conditions:

1. All Muslims pay x-percent more tax than other Kenyans.
 2. If at any time in the future, any religious group demands to have their "personal law" then this will AUTOMATICALLY be written in the constitution.
Example: Mungiki sect's personal law: All women must be circumcized.
 3. All family and personal religious laws of all minority groups be written in a list to be part of the Kenya constitution Chapter 1.
-

The ideas expressed by, Aman Odanga, for increased taxation on Muslims is not equitable. The laws of taxation talk of equal and fair taxation for all. Secondly his suggestion that groups like Mungiki's so called 'personal laws' be also included, especially as appertains to circumcision are not workable. These can never be as it would be repugnant to justice and general well being of the society. As regards the other minority groups, they never made representations to either the defunct CKRC or Committee of experts (CoE) that they were desirous of having special courts. If you will recall the 2005 Wako draft, it did have a provision for the creation of religious courts for the Christians and Hindus plus also the Muslims. The first two groups strongly came out against this clause because they had not asked for it and were not in need of them. So, our Muslim brothers and sisters, cannot be blamed for having asked for the special courts, whereas the rest did not.

James Musyoki did not get the point:

1. Tax the Muslims more IN ORDER TO MAKE TAXATION EQUITABLE. (If this is not easy to understand, I can elaborate further).
 2. If in the **FUTURE**, the Mungiki or Akorino want their personal law in the constitution, we have no reason to discriminate, no group should be treated special.
 3. List all "personal laws" in the constitution so that people (like Musyoki) will not later claim that anyone's personal law whether Muslim, Mungiki, Akorino, Hare Krishna is "not workable", (remember it "**only affects persons of that faith**", not the rest of you).
-

Mr.Odanga's views on increased taxation for our Muslim brothers,though sounding convincing on the face of it,could open up a pandora's box if implemented.The Muslims could hit back using similar arguments.They could for instance answer back that the amount of money they similarly pay as taxes are used to finance the runnings of the Liquor Licensing boards and the Betting control and Licensing board without their consent or regards to their sentiments.Both of these bodies are charged with the task of promoting and control of Alcohol and Gambling,which are clearly outlawed by their faith.These bodies could be construed to be catering for the needs of the compliant Christian majority.On the issue of the establishment or inclusion of a clause for the establishment of special courts or cognisance of other interest groups,this is a worthy suggestion,but the CoE cannot pre-empt their need or purpose by including a clause in advance.This was tried in the rejected Wako draft of 2005,where a special clause entitled Religious courts was inserted in the constitution.This provision allowed the Christians,Hindus and Muslims to have personal laws courts if they so wished.This clause was vigorously rejected by the Christian and Hindu clergy because they had not asked for it and neither saw the need for it.Am sure a similar preemptive attempt this time around would also be soundly opposed by the very same same groups which, your proposed clause wishes to cover.

Joseph Musyoka wrote:

...The Muslims could hit back using ...taxes are used to finance the runnings of the Liquor Licensing boards and the Betting control and Licensing board ...charged with the task of promoting and control of Alcohol and Gambling,...catering for the needs of the compliant Christian majority.

I have checked and re-checked my Bible and have found, contrary to the above,

Alcohol and gambling are NOT CHRISTIAN !!

Joseph Musyoka wrote:

On the issue of the establishment or inclusion of a clause for the establishment of special courts or cognisance of other interest groups,this is a worthy suggestion,but the CoE cannot pre-empt their need or purpose by including a clause in advance.

Why not? Everything in a constitution is pre-emption. They can pre-empt anything if they so wish.

Let's not cheat ourselves about Modern day Christianity not allowing alcohol consumption and gambling.It is our colonial Christian British Masters who introduced us to the culture of wine and Beer drinking.Since that time our country which is predominantly Christian has held the record for being the third most country in Afica with the most number of drunkards.If you read your Bible carefully you will see that the first Miracle performed by Jesus Christ was turning water into wine at a marriage ceremony in canaan.This is a tacit approval for the consumption of Alcohol if you ask me.Since the above stated miracle,wine has flowed throughout the world of Christendom including Kenya like a river.Furthermore the biggest Gambling nations in the World like Monaco,UK,USA,Spain,Italy,France,including Kenya etc are all Christian dominated countries governed by Judeo-Christian ethics.To conclude Constitution making the world over is the art of negotiations.It involves the gesture of give and take and compromise.One cannot get everything that he or she desires.There's no good or bad constitutions.The Committee of Experts cannot be expected to include everything in the draft document.Constitutions are generally supposed to reflect broad principles of

governance,with the other areas of legislation left to the legislative National assembly.Individuals are supposed to make representations to the Constitutional review mechanisms like the CoE and defunct CKRC,on what to have and not to have in the Constitution.To say that Constitution making is a pre-emptive process is to negate the works of the CKRC and the CoE and the billions of shillings spent to collect and collate the views of Kenyans,upto the point of releasing the Harmonised Draft constitution currently in the public domain.

Kadhis courts.

I do not understand why anyone would want to have religious issues in the costitution like the kadhis courts while kenya is said to have saperated religion and state.

Considering kadhis courts makes me pay for them as a citizen and i do not prescrib to islam. i feel offended by it as a christian.

For those who are saying kadhis have been there since independent so cant be changed, issues of too much power on the president have been there too for this long and that is why we are crying for a new costitution to remove the things that we feel are offensive to us.

I will not vote for this constitution if the kadhis courts will still be there.

I as a Muslim totally disagree with the sentiments expressed by Raphael Gikonyo.For his information its a fallacy to state that the Kenyan constitution is secular.Its not and is based to a great extent on Judeo-christian ethics.Examples of Christian jurisprudence are bigamy,Family law,weekly rest day of Sunday,religious public holidays of Easter,Christmas,Boxing day etc.These are all courtesy of our former British Christian colonisers.Muslims number close to 33% of the Kenyan population and have every right to decide how they wish for their personal law status to be managed. We are also tax payers in this country. You don't hear Muslims complaining for instance that the taxes they pay are used to finance the operations of the Liquor Licensing board which is an anathema to their faith.Kadhi's courts are here to stay either way.If gullible Kenyans vote down the draft constitution for myopic reasons like the Kadhi's courts,they still remain as they are currently enthrenced in the constitution. Vote for the proposed draft constitution and they continue subsisting.So you see the opponents of the Kadhi's constitution are caught in a quagmire.I urge my fellow Kenyans to reflect more soberly on the draft constitution and stop wasting their time on the Kadhi's courts which really is a non-issue.Sections of the Christian churches are engaging in brinkmanship and grandstanding on this matter,in the same fashion as our hypocritical politicians.They issue threats and blackmail purporting to speak on behalf of all Christians who are assumed to be so naive that they cannot reason for themselves

Adam Ali. wrote:

I as a Muslim totally disagree with the sentiments expressed by Raphael Gikonyo... the Kenyan constitution ...is based ...on Judeo-christian ethics. ...bigamy,Family law,weekly rest day of Sunday,religious public holidays of Easter,Christmas,Boxing day etc.

Please Note:

1. None of these so called "Judeo-Christian ethics of Bifamy, Sunday and Easter" are in the constitution. They are in subsidiary legislation NOT IN THE CONSTITUTION. Likewise, Kadhis courts do not belong to the constitution.
 2. The draft constitution does not include Sunday, Easter, Christmas, etc etc. In fact it does not even mention the word Christian once. Why does it mention the word muslim five times?
 3. Both the Christian and the Muslim religions have THE SAME ROOTS in Abraham and Mosaic law, which is what most people refer to as Judeo-Christian ethics.
 4. The Liquor Licensing Board that Mr Adam Ali mentions is NOT ENGRAVED IN THE CONSTITUTION. It is not a good example to quote for his argument. Unless he means that parliament should pass a Kadhi Court Licencing Board Act. No one is oposed to subsidiary legislation.
 5. The argument that "whether we vote Yes or No, Kadhis Courts remain is an arrogant "wapende wasipende" maxim which is a good reason to vote down this draft. Nobody has the right to force Kenyans to swallow a new poison just because they took poison before
-

With due respect to my brother Odhiambo, i beg to differ. He seems convinced that Kadhi's courts should remain but as a subsidiary piece of legislation. Why should it matter so much if its enshrined in the supreme law of the land (constitution) or subsidiary legislation (a simple act of parliament), if in principle we have agreed that it should continue existing in our statutes. The constitution and other laws of Kenya are all part and parcel of the Kenyan Judiciary. When i was referring to the Kenyan Legal system being heavily Christian in its orientation, i was focussing on the entire area of Jurisprudence and not Constitution in isolation. The Muslims are a minority in this country and only about 16% of the current Legislature are Muslims. A simple act of parliament requires just 16 Members of Parliament to either be passed into law or be repealed. This is based on the current parliamentary quorum requirement of 30 MPs. On the other hand a Constitutional amendment bill requires support of 66 % of all MPs or currently 145 MPs, no doubt a herculean task to enlist. If the Kadhi's courts were not afforded constitutional protection, it would just take a busy body, with an unsavoury attitude towards Muslims, just to summon 16 MPs to his side to repeal the Act creating the Kadhi's courts through subsidiary legislation, in the process depriving the millions of Kenyan Muslim Citizens, judicial safe guards to practice their faith as regards their personal law. We as Muslims do not want to be subjected to these kinds of perils and uncertainties and would much rather they continue remaining entrenched in the proposed draft constitution. To conclude the Kadhi's courts came into existence through the Kadhi's Act, the only difference being that they have been accorded Constitutional protection, hence their mention in both the current and proposed constitution. It has completely nothing with the propagation of the Islamic faith or its superiority. Kadhis are judicial officers who serve as officers of the court. They have no religious roles or functions. Kadhis operate at the level of the Magisterates and their courts are subsidiary to the High courts and Courts of appeal. Their main roles are to adjudicate on matters of personal laws to willing Muslims who both profess the Muslim Faith. The Kadhi's courts perform a very

important function of aiding the Judiciary in the performance of its role of adjudicating over marriage, divorce and inheritance disputes.

For once I have seen a good and convincing argument (from Mr Adam Ali).

It is this kind of seasoned debate we want to see, not threats or statements like "It is not contentious".

Although I disagree that "the sum total of jurisprudence" is Christian; the argument by Mr Ali for keeping the courts in the constitution rather than in subsidiary legislature is powerful and I accept it.

My only fear is what will happen in the future when the minority Hare Krishna sect also demands to be in the constitution. And then a flood of others...

Thank you Mr Adam Ali. Christians are not as intolerant as some want you to believe.

Thanks Mr. Philip Odhiambo for your intellectual honesty and sobriety. It's refreshing for a chance to come across an understanding and level-headed Christian. I wish the rest of Kenyans were like you who reason with their heads rather than their hearts. Constructive debate is healthy and I am sure as you engage more in this forum with like-minded Kenyans, you will still be enlightened about the evolution of the Kenyan legal system and sources of its laws.

Majority of Christians are [b]not opposed[/b] to existence of Kadhi court more than they are to *Njuri Njeke* arbitrating cases among Merus or to *Kithito* when applied to willing Kamba men and women.

Unfortunately the draft constitution goes beyond what is necessary to guarantee their existence. Kadhi court doesn't require to be defined in the constitution or be supported with state resources for them to exist in freedom and flourish.

It is erroneous to suggest that only Muslims have religious court. The Catholics have had their Canon Law with marriage tribunals that determine, among other matters, validity of marriages and divorce between Catholic spouses. It would appear illicit and unnecessary to demand that such tribunals be defined in the constitution and their operations be supported by the state in every diocese.

Almost, if not all, indigenous and religious communities in Kenya have their own trusted justice administration systems and institutions. All these, and not just Kadhi courts, need to be supported so long as they help to make administration of justice efficient and cost-effective.

The draft constitution fails to convince why it is necessary to single out Kadhi court and have it defined and supported by state for it to exist in as much as *Njuri Njeke* and others are not defined and are hopefully guaranteed to exist even after passing of a new constitution.

It's refreshing to hear from Paul that the majority of Christians are not opposed to the existence of the Kadhi's courts per se. His only bone of contention is why the other groups like *njuri ncheke*, Catholic canonical law etc have not been accorded equal similar constitutional protection and mention. That's a question that I would wish to throw back to Paul. When the defunct CKRC and the CoE when round the country soliciting for views from the Wananchi on what they would like to be featured in the new

constitution,how come not a single Christian or tribal elder made submissions that they would wish for their Canonical church tribunals to be included or for instance for the njuri ncheke to be transformed into a tribunal or court paid for by the state.As per the records of the CKRC and CoE,its only the Muslims as a group who sent submissions calling for the elevation of the Kadhi's courts and streamlining of its operations.Attempts by the state to placate other religious groups like the Christians and the Hindus in the rejected 2005 Wako Draft,through inclusion of a banner under Religious groups making a provision for the establishment of Christian and Hindu courts.This provision was aptly rejected by the Christian and Hindu leadership who saw no need for it.

This issue with protectorate is not clear then I believe the courts should be part of the Islamic faith only.

Why should they be in the constitution that says 'No religion is superior' then mentions religion related issues in the document. this is a contradiction

These courts should be there but in a separate registration via Act of Parliament.

Dear Bwana Willis.The issue of the protectorate is an anomaly appearing in the draft constitution.Hope it would be rectified when the final draft is printed.The term protectorate was used the British colonialist to refer to their administration of the ten mile coastal strip which nominally belonged to the Sultan of Zanzibar but was in reality part of the British Protectorate,as per the treaty between the Sultan of Zanzibar and the British in 1870.The term protectorate has clearly been overtaken by events and it should be replaced by the term, Republic of Kenya.The jurisdiction of the Kadhi's courts currently extends to all the legally defined 67 districts of Kenya,as Muslims these days are to be found in all the corners of the republic.There are currently 17 Kadhis who service the whole of Kenya,although there are plans to boost their numbers to 30 to ease their enormous work loads.As regards the justification for entrenching the Kadhi's courts and not through Subsidiary legislation,this i had discussed last week with a Mr.Odhiambo,in this same thread and i request you to acquaint yourself with the response by going back about two articles.

Ndugu Gikonyo, your threat of not voting is typical of those who are not open minded. The way I understand it (I beg to be corrected) the Kadhis court shall apply only to those who confess the Islamic faith, so you have nothing to fear if you do not confess the Islamic faith. I am not a muslim but I admire the religion. The Christians have the laws of Moses and are happy to apply it. Let the Muslims apply their laws too. The Kadhis Court is not about Sharia Law in total but its administration. So having the Kadhis Court does not mean having Sharia. In any case the decisions of the Kadhis Court are secondary to the Laws of the country.

Patrick Lumumba Odeny wrote:

Ndugu Gikonyo, your threat of not voting is typical of those who are not open minded.

Mr Gikonyo is entitled to have a view. Having a view different from yours does not make anyone "typical of those not open minded"

The way I understand it (I beg to be corrected) the Kadhis court shall apply only to those who confess the Islamic faith, so you have nothing to fear if you do not confess the Islamic faith.

Stand up now and be corrected: everyone will pay taxes to support the religious activity of one group specially protected via this draft constitution which also contradicts itself by declaring "separation of state and religion"

I am not a muslim but I admire the religion.

Quite clearly so. Actually it is even more fashionable nowadays to start an argument like "I am a staunch Christian but..."

The Kadhis Court is not about Sharia Law in total but its administration.

This is a very important statement that should have priority when arguing AGAINST Kadhi's courts.

Church leaders busy sowing hatred between Christians and Muslims

The inclusion of the Kadhi courts in the draft is apparently unpalatable to sections of Christian leaders. Its unfortunate our religious leaders are the major stumbling blocks towards a new constitution. Their opinions don't portray Christian values; they should air their views in their individual capacities. Pretending to talk for Christians gives a bad image to the entire Christian family. We should be making efforts to live in peace with all men. If including Kadhi courts will mean peace, so be it. It has been there before and it affected not a single Christian. Some have even threatened to throw out of church ministers who support the draft. Are they not supposed to be fishers of men? Don't be intolerant!

I wonder why this debate has now become a matter of "preaching peace". Why should I be threatened with lack of peace just because I don't like Kadhis courts.

The only intolerance I find in this debate is coming from those who don't want us to debate this issue at all. Why was this draft issued if we are not supposed to freely air our views?

I find Janet Okongo's comment that "If including Kadhi courts will mean peace, so be it," loaded with innuendo. Are we being asked to accept these courts or else violence will be meted out?

I concur totally with the article by Janet Okongo. As debate on the draft enters the home stretch many agree that this is an opportune moment to have a new constitutional dispensation. The aftermath of the 2007 elections drove us into an orgy of bloodletting. History teaches that good laws are written when a society emerges from a crisis. But churches seem intent on throwing spanners in the works. Whereas their views enrich the discourse, some comments are in outright bad taste. To some of these churches, the sticky issue has been the Kadhi courts. In paid-up advertisements, churches say they don't want the courts. Though the rights of expression are enshrined in our laws, by voicing their views against these courts, the churches appear to be vehemently against Islam. They are whipping up emotions of their followers. If our churches campaign against these courts, then as a nation we refuse to respect, cherish and celebrate the diversity of our religions. To say that the government is deliberating favouring Islam is to miss the target, excite fear and incite Kenyans to have predetermined mind-sets against the good contents of the draft.

The issue of whether Kadhi courts should be entrenched in the constitution has created hatred between Muslims and Christians. More than 90% of its content is based on Christian foundations. It beats logic for fellow Christians to claim that entrenching Kadhi courts will be tantamount to favouritism. Kadhi courts only deal with marriage, divorce and inheritance, and both parties must be willing to subject themselves to it. Even traditional law was used in the SM Otieno case, as it was neither repugnant nor inconsistent with written laws. Those who complain should reason logically.

How about addressing the concerns rather than raising doomsday scenarios of inter-religious strife? The issues are very simple:

1. It is possible to have Kadhi's courts without engraving them into the constitution.
2. Putting one religion in the constitution is inconsistent with the "principle of separation of state and religion".
3. Just because "they have always been there" is not enough reason to keep them there.
4. Don't make everyone pay taxes to support the religious activities of only one group.
5. If the Kadhi's courts must be there, let it be through an Act of Parliament, not the constitution.
6. It is not correct to claim that the constitution is currently Christian.
7. The so called "Judeo-Christian ethics of anti-Bigamy, Sunday, Christmas, Easter, etc" are NOT IN THE CONSTITUTION and are NOT IN THE DRAFT. By the way, Christianity and Islam have the same ethical roots based on Abraham and Mosaic Law.

If we stick to the issues only without calling each other names, we can have a healthy debate. There is no reason why this issue cannot bring Kenyans closer together in consensus and understanding.

I concur with Odhiambo that the issues bedeviling the Draft Constitution are not insurmountable and can be tackled through understanding, dialogue and an attitude of give and take. The most important aspect is that at the end we all consider ourselves as belonging to the nation of Kenya. I believe the reasons why Muslims want Kadhi's courts in the constitution, and not as a mere act of parliament, and reasons for their continued existence, have been adequately addressed by Mr. Adam Ali, elsewhere in this forum. Regarding the issue of using tax payers money to fund their operations, I beg to respectfully differ with my brother Odhiambo, and inform him that Muslims too are tax payers in this country, and have every right to insist that the taxes they pay be used to run the Kadhi's courts if they so wish. Other groups who feel aggrieved have every right under the sun to petition the review commission to afford them similar rights if they so wish. For instance the rejected 2005 wako draft had made provisions for the establishment of Christian, Muslim and Hindu Courts under the banner of religious courts. This gesture was aptly rejected by the Christians and Hindus, as they had never asked for it and saw no need for it. If other groups like Akorinos, Hare Krishnas, Mungikis etc, feel they need special courts, they are free to petition the relevant authorities for consideration. Furthermore, I would like to state that though Islam and Christianity are of Abrahamic origins, they have major doctrinal differences in terms of jurisprudence. For instance the weekly rest days for Mainstream Christians is Sunday, For Muslims its Friday and for Mosaic Jews its Saturday. The Jews and Christians permit alcoholic brewing and consumption whereas the Muslims forbid it and so many other issues. The whole area of common law existing in our statutes called Family Law is predominantly Christian, the crime of Bigamy punishable by up to 5 years in prison, currently in our statutes is a Christian import as Muslim law is potentially polygamous. Lastly I wish to inform you that the Constitution is a document of broad principles and does not specifically have to mention every thing under the sun. It does not follow that for the country's laws to be adjudged Predominantly Christian, the constitution has to precisely say so. The Christian leanings is seen in everyday administration of government operations and judiciary.

I disagree with John S. It's precisely stated by Odhiambo why most Kenyans want Muslims to have all they want, but better under Act of parliament. It's not even mentioned that Kadhi courts was still a contentious issue at drafting of the current constitution. Kenyans did not have a chance to vote for it hence everything including what was better done by parliament ended up in the constitution.

By the way, have you ever read USA's constitution? You will get the foundation on why many of these things should be done by Parliament. Long live Kenya and Love for all brothers regardless of their religion.

I am just so amazed that when Christians voice their concerns its termed sowing hatred between Muslims and Christians or they are a stumbling block to the realization of a new constitutional order in this country.

Remember that the Church has been speaking even when groups like SuPKEM were quiet. NCKK for a long time spoke against tyranny in this nation. Is it because of short memory?

As for entrenching the Kadhis Court they are in the first place blasphemous to Allah and his prophet Muhammad. Surah 33:36. The Kadhi can only function if only its Caliphate. As for now the subordinacy of the KCourts are trampling Islam underfoot.

They are equally contradictory to Common law. A case at hand is about marriage. Muhammed is the perfect example for Muslims and he is of noble Character. BUT he married a six year old girl! Ayesha was just six when he married her and consummated the marriage when she was nine and he was about 53 years old! This is the law of Islam and is contradictory to the Constitution of Kenya which states that only adults can marry. Art 311 adult is one who has attained the age of 18. If Muhammad was to be in Kenya what would be done to him?

These are but a tip of the iceberg of the myriad inconsistencies that there are in Islam itself and with the Constitution is this to be abated.

Committee of Experts actively seek a consensus on this matter.

Tim.

This is not the forum to engage in comparative religious studies. It is outright dishonest and illogical to compare the moral values and codes prevailing 14 centuries ago against current social conventions to make a decision on whether the Prophet Mohammed married an underage girl or not. The customs then and even presently now amongst some traditional African communities was to marry a girl once she attains the age of puberty. For the benefit of Mr. Tim Wanyonyi, the word Kadhi is an Arabic word meaning Judge or Magistrate. No where in the Islamic faith does it say that for a Kadhi to function, there must be a caliphate. There are many Kadhis operating in many Muslim nations with a secular democratic state. The Kadhi's role in those countries, as in ours is to arbitrate strictly on matters of muslim personal law. We even have Kadhi's courts entrenched in the constitution of our next door neighbour, Uganda. This was done at the time they were re-writing their constitution in 1996. Mind you the Muslims are fewer in Uganda than in Kenya. There was no serious hullabaloo from the Ugandan churches and what you. The Tanzanians are currently in the process of restoring the Kadhi's courts to their former glory. President Nyerere, at Tanzania's independence in 1963, had them abrogated since he was guided by communist ideals, which viewed anything religious undertones to be the 'opium of the masses' and hence retrogressive to a country's development. With regards to the Kadhi's courts being in collision with various other statutes, I wonder why no one went to court in the last 46 years to have them deleted if he or they strongly felt so. That's why the Kenyans appointed the Committee of Experts to guide the review process. Am sure they would not have retained the Kadhi's courts in the draft constitution, if they deemed them incompatible with other provisions. Anyway that's why we have Constitution dispute resolution court, as an organ in the draft constitution. The NCKK and other Christian bodies, no doubt did a commendable job during the second liberation of Kenya, but this time around am afraid they have overshot themselves and are not being honest and truthful to their calling.