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Part I

Towards a new constitution: this stage of the process

This booklet is produced as a contribution towards the debate on the Proposed Constitution of Kenya, in the run-up to the Referendum on August 4 2010.

If the people vote “No”, the current constitution will remain in force. If they vote “Yes”, the new constitution will come into force, no later than 14 days after the publication of the result of the referendum (see the last section of the booklet on “Bringing in the new order: Transition”).

Is it possible to change the Proposed Constitution?

You may have read about people saying “We won’t vote YES unless the proposed constitution is changed before the referendum” and some others saying “We can change it after it come into force”.

Before

The only way to change it before the referendum is to change the law under which this whole process has been carried out (which is rather what happened in 2004-5 so that the then government could change the Bomas Draft to the Wako Draft). But this time the present Constitution must be changed too. This is because a new section 47A was introduced as a result of the National Accord in 2008, setting up the broad outline of the review process, and steps have been taken under it. Those steps have taken the process out of the hands of Parliament. They cannot take it back again without changing the constitution. For this they need the support of 65% of all the National Assembly members, which they were unable to muster to propose a single change in the Proposed Constitution as it came before them.

Some people have suggested there can be a change by means of an “Executive Order”. There is no such thing in this country. The President can do only the things that the law allows him.

After

If the constitution is approved by the people, the only way it can be changed is by the new processes set out in the new Constitution. The processes are far more demanding than those that now exist for changing the current constitution.

After a proposed amendment is introduced into the National Assembly, 90 days must pass before it is debated. Then there must be two separate votes where the amendment obtains the support of at least two-thirds of the members (slightly more than under the current constitution!). If the Senate exists this must happen in both houses.

Changes to some provisions require a referendum as well. And that must get the support of half of all those who vote, and of at least 20% of the votes cast in at least half of the counties (which will mean the counties as defined under the new

constitution, that is the 47, old “legal” districts). A referendum will be necessary to change Bill of Rights provisions (such as the right to life, including the abortion issue), the structure of devolved governments (but not their powers) and probably some aspects of land that we understand some people are worried about.

It is true that in some circumstances a popular initiative, supported by the verified signatures of at least one million voters, can compel Parliament to move on the question of amendment. It is unlikely that this will ever be used – surely any plausible position for amendment will be able to get support from some MP to move an amendment in one or other house! The same referendum requirements apply.

This Booklet and its Objectives

It is important that at this final stage, when the people of Kenya will decide the outcome of the constitution making process, that they should use their vote after a proper understanding of the Proposed Constitution. Although they are asked if they approve the Proposed Constitution, the fact is that they have a choice between retaining the current constitution or replacing it with the Proposed Constitution, so that if they vote “No” the present constitution will remain in force. Therefore to exercise their vote responsibly, they have to understand not only the Proposed Constitution, but also the current constitution.

The Question

The Review Act requires that the referendum question must be answered by either Yes or No. The Interim Independent Election Commission has decided that the question is to be: “Are you in favour of the Proposed Constitution?”

That is not really the real question – or not the complete question - that voters are being asked. Whatever the ballot paper says, the real question is “Do you want the Proposed Draft Constitution or the current Constitution of Kenya?” The question is NOT:

“Would you prefer the Proposed Constitution to the Bomas Draft?” or

“Would you prefer the Proposed Constitution to the Harmonized Draft?”

In other words, if the vote is “No” what Kenya gets is the existing constitution.

Unfortunately, almost everyone who understands both documents reasonably well would want to answer “In some ways the Proposed Constitution is better, in some ways it is worse, in some ways it is just the same, and in some ways we cannot tell, mainly because we do not know how new rules and institutions will actually work”.

So each person must decide whether overall they think they proposed is better than the present constitution. “Is it better for Kenya?” must surely be the main question. If it better for a particular group but worse for the country as a whole, it is not really better. And a particularly foolish way to approach the question would be to vote “No” because of some point that is important to you – but which is actually the same in the present constitution.

The purpose of this booklet is to assist the reader to understand both the documents. On all issues the proposals in the draft are compared to those in the current constitution.

The authors have tried to be as objective and accurate as possible in their explanation of the contents of the two documents. Although they personally support the “Yes”

position, they point to some weaknesses of the Proposed Constitution. Throughout the two documents are assessed by reference to the goals of constitutional reform as stated above, and their capacity to solve the problems that led to the review process.

We believe strongly that the people should read the actual Proposed Constitution. We hope that this booklet will help readers do that. This is why we have given the relevant articles of the Proposed Constitution in brackets after a point that summarises a provision.

There has been a good deal of misunderstanding of the proposals, and, unfortunately, some deliberate misrepresentation. The best shield against this is the willingness of the people to read for themselves and make the effort to understand. We have tackled some of these misunderstandings at the relevant points in the booklet. But we would not want you to take our word for it, any more than the word of those who try to mislead you. Please read the draft for yourselves.

Structure of the booklet

Next the booklet provides an overview of the proposed constitution and the current one. It points to their main features, and brief comparisons. This is followed by a historical introduction to the issue that faces Kenyans.

The sections that follow focus on specific constitutional issues. It is not divided entirely in the same way as the Proposed Constitution, but focuses more on issues, which may bring together points from more than one chapter of the constitution. We hope this approach makes it clear that different parts of a constitution interact with each other, and it is important not to look at one provision or even one chapter alone.

Finally: at the end of most sections there is space to make your personal assessment of the Proposed Constitution in comparison with the current constitution. And there is a separate page [sheet] on which you might want to summarise your views as you decide how to vote on August 4th.

Proposed and current constitutions: comparative overview

The proposed and the current constitution are fundamentally different in many respects: style of drafting, structure, scope, and orientation. It seems as if they belong to different generations. The current constitution reflects the approach and ideas of the 1960s (as developed by the British, without a tradition of written constitution). The Proposed Constitution of Kenya (PC) reflects a contemporary style and purposes. It should therefore be easy for Kenyans to decide which they prefer— which is more responsive to values and aspirations of the people, more likely to solve our problems, particularly of poverty, inequality and social justice, more likely to promote democracy and citizens, rights, and above all, which offers them a better vision of their country, and the possibilities of reaching it.

Drafting style

The current constitution relies much more than the PC on legal terminology and jargon. It assumes that its readers are lawyers and judges, while the PC regards the people its primary audience, and is drafted so that they can understand it if they make the effort.

The current constitution gives relatively little guidance to the purposes of the institutions it establishes. The PC provides precise purposes and responsibilities of institutions. For example, it sets out the principles of the electoral system (both of franchise and administration), defines the role of parliament, and therefore of parliamentarians, tells us about the reasons for land policies that the state must follow, prescribes the ways and the purposes for the exercise of state power, and states the objectives of devolution. This not only tells institutions how power is to be exercised, but provides valuable education to the people about democracy, human rights, accountability, national integration and social justice. People can relate more effectively to the constitution, and indeed be inspired by it.

Values, aspirations and policies

The current constitution does not tell us what the constitution is about: it is dry as old bones. It does not even have a preamble (the only constitution that we know which does not). The PC has an inspiring preamble: it acknowledge the sovereignty of the people to give us the constitution; it salutes our heroes; expresses pride in our ethnic and other forms of diversity and commitment to national unity; and recognises essential values by which we want to organise the behaviour of the state and of ourselves: human rights, equality, social justice, democracy and the rule of law—above all the well being of individuals, families and communities. An important chapter sets out the framework for resolving land issues which have deeply troubled the country. It aims to restore land taken illegally from communities or the state to them and institute sensible social and economic policies for the use of land.

The PC reiterates these values in Article 10 (2) making clear that they legally binding (particularly on the state). They appear elsewhere too, in sections on institutions or policies (as for example that of parliamentarians and public officials). But more importantly, they appear in the Bill of Rights which provides an elaborate vision of Kenya and Kenyans. Another approach taken in the PC is the necessity of national integration which can only be achieved by fair and inclusive policies.

There is almost nothing of the vision in the current constitution. It cannot inspire us!

It is perhaps not surprising that judgments by our courts seldom refer to national values and goals in the interpretation of the constitution or laws. The PC specifies that those who are responsible for interpreting them should so in ways that enhance the achievement of these goals.

Structure of the constitutions

The orientation of the constitutions also appears from the sequence of their different chapters. The first effective chapter of the current constitution is on the presidency, and is perhaps the longest chapter. Human rights do not appear until more than halfway through, followed by citizens! This gives the impression that the drafters regarded the executive in the shape of the presidency as the most important part of the constitution—perhaps contributing to the imperialism of that office!

By contrast the PC starts with what constitutes the nation and so gives prominence to citizenship (Kenya after all is not merely territory and government). It then goes on to discuss national values and human rights, integrity and honesty of state officials, essential policies on land and environment, and the representation of people, before turning to the system of government. This is meant to indicate the purpose and responsibilities that state institutions must carry out. And when it turns to the system

of government, it places the more democratic institution, the legislature before the executive.

Scope of constitutions

The current constitution deals primarily with the structure of government. It does have a bill of rights, but even there more attention is paid to exempting the state from obligations flowing from human rights than giving rights to the people. It establishes the three principal arms of the state, and covers the public service and the appointment of the police but says nothing about other armed forces, or even of the obligations of the police. There is no provision for local government. There is a chapter on trust land (most provisions on land in the independence constitution were deleted), to reassure minority communities, and one on finance, confined essentially to the budgetary process. Even the chapter on the judiciary is incomplete, at both the lowest and highest levels: it says nothing about magistrates who handle the majority of cases (the PC barely mentions magistrates, too), and does not provide a proper court for constitutional litigation.

The scope of the PC is extensive; issues covered there but not by the current constitution include devolution, socio-economic rights, the regime of land and environment, independent commissions, devolution, political parties, representation including principles of fair elections, budgetary process and other aspect of state financial procedures, integrity of state services, security and armed forces (although there are few provisions on the transparency within and the accountability with security forces).

Even where the PC covers ground similar to the current constitution, the differences of the treatment are striking. Examples are the bills of rights, the current one confined to civil and political rights, the PC including additional political rights (such as the right to information), but more importantly social and economic rights, and rights of members of vulnerable communities. The PC is concerned with people and their problems; respect for the dignity of all individuals and all communities, particularly minorities; with social justice and nation building—not merely in rhetoric but in the dispersal of power and design of institutions. Perhaps it is less successful in this respect, because of undue deference to the PSC's Naivasha recommendations.

Structure of power

After values, we turn briefly to institutions, principally the system of government (these issues are discussed at some length in following sections of this publication). The current constitution says little about the principles of government. Section 1A (which brought an end to one party rule) says that Kenya is a multi-party democracy. But it gives no indication of the implications of democracy for the purposes of the constitution: there is no mention of the separation of powers, checks and balances, the representation of the people or principles of free and fair elections, or the responsibilities and accountability of the state. Perhaps it is not surprising that many political and administrative practices changed relatively little despite Section 1A.

On the other hand, the PC reads like both a thesis and a manual on democracy; some examples have been given and more details are provided in following pages. Here we make some principal comparisons.

Under the current constitution, the state is unitary, with all power vested at one level, the central. The PC requires the devolution of legislative and executive powers to

counties, assures them minimum allocations of funds, and the authority to raise some limited revenue of their own. A chamber of the central legislature, the Senate, is to represent and protect the rights, of counties. We show later that more powers should have been devolved, but at least there is now a framework for democratic and participatory politics at that level.

The current constitution established an extremely powerful office of the presidency, with relatively little accountability. The cabinet is advisory. The president has various immunities. There is an aura about the president's office (and his powers to reward or punish) that places its holder essentially above the law. A great deal of corruption has been and is associated with wide executive powers, minus accountability. All other office holders, not excluding the judiciary, obey his instructions without question and regardless of its lawlessness. Creating such a powerful office, with the ability to favour one's tribe and exclude some or all others, has greatly politicised ethnicity.

The PC retains the presidential executive but aims to make it more accountable, with the separation of powers and checks and balances. The present close links between the executive and the legislature will be removed: separating presidential elections from any link with the legislature; ministers drawn from outside; limit on size of the cabinet; approval of ministerial and several other key appointments; and a strengthened parliament are expected to reduce the influence of the president forcing him or her to negotiate with the legislature and in some cases with the counties. Whether the constitution will work in this way or the past presidential practices, many of which were of doubtful legality, remains to be seen. Some may argue that a fundamental break with executive presidentialism is needed (as the CKRC, Bomas and initial Committee of Experts drafts sought to achieve).

A critical factor leading to the dominance of the executive and the rise of the culture of impunity was a weak judiciary which was largely subordinated to the executive and the wealthy. Although the current constitution has a judicial service commission for appointment of judges, who cannot be dismissed by the executive except through a process that prevents arbitrary dismissal, the judicial service commission has turned out not to be really independent. Collusion between the chief justice and the president who appoints the chief justice, aided by subservient attorneys-general, can easily lead to manipulation of the judicial and legal system. Whether the judiciary under the PC would be in a stronger position to resist executive pressures and be generally more competent remains to be seen. The Bomas and the original Committee of Experts drafts were much better than the PC—again due to pressures from the PSC.

The current constitution has few other checks on the executive. The legislature is unlikely to use its power to remove the president because the president can retaliate by dissolving parliament. There is no independent and effective ombudsperson to look into abuse of administrative powers. The PC has a constitutionally protected and independent human rights commission which can also look into abuse of these powers, in addition to the general protection of human rights. There are several other independent institutions in the PC— controller of budget, auditor-general, and electoral and public service commissions, that could help to protect sensitive tasks from political control. In the past the presidents have not honoured the independence of the smaller number of commissions, but it is likely that the more robust framework under the PC might make a difference.

Rules for constitutional amendment

Until recently any part of the current constitution could be changed by a vote of 65% of the members of the National Assembly; no attempt was made to distinguish the more important aspects from the less. This was no real barrier to the change of the constitution, especially during the one party days, and Moi did remove many safeguards against abuse of presidential powers, sometimes within a matter of years. However in the Rev. Timothy Njoya case, the constitutional court (Justice Ringera and Wendoh) held that a constitution could only be replaced through a referendum. Just before the present review process started, the constitution was amended to provide for a referendum if the constitution was to be replaced by a new constitution.

The PC provides now for two methods of amendment, one of which, for the more important articles, requires a referendum in addition to 65% support in the two houses. Otherwise the 65% support alone is required. It will be possible for the people to initiate the process of amendment by a petition signed by one million voters. It is important to give time for the new constitution to develop and become rooted, rather than change it at the first time a difficulty appears.

Implementation of the constitutions

The current constitution has some good provisions but no attempt was made to implement them (such as human rights or legal aid). The implementation of the proposed constitution will be even more of a challenge. It is very ambitious, sets out new values and goals, and makes many changes to the structure of the state and the distribution of power and resources. Realising this, the CKRC and now the Committee of Experts have included a whole chapter which sets out what must be done to fully implement it within a few years, and which institution must implement which provision, including making necessary laws. A commission, working with the National Assembly, will be appointed to ensure implementation. Its work will start as soon as the constitution comes into effect, even before the next election (which will probably not take place before 2012. If the National Assembly fails to pass laws within the prescribed period, it will automatically be dissolved. There is thus a reasonable chance that some at least of the new constitution will be put into effect.

Conclusion

You will find that we are quite critical of certain aspects of the Proposed Constitution. We are worried about the system of government and the possibility that the one office of President will prove so alluring a political prize that the unscrupulous may again be prepared to risk the lives of Kenyans. We do recognise that there are some checks on presidential power that do not exist in the current constitution. We are also disappointed by the weak devolution provisions.

Overall, and after a careful reading of both documents, we believe that the Proposed Constitution is better than the current constitution in many respects. But the purpose of this publication is not to convince you of this but to help Kenyans to undertake their own careful consideration of the issues.

A brief constitutional history

On becoming independent in December 1963, Kenya got a new constitution, negotiated between Kenyan political parties and the British government. It established a constitutional order that was very different from the colonial system. It provided for a democratic and accountable system of government. The national government was based on the principles of the parliamentary system, with executive powers to be exercised a cabinet headed by a prime minister (normally the leader of the largest party in the legislature). The head of state was the governor-general with limited but significant powers, to maintain the principles of parliamentary government.

There were also seven regions, with their own executive and legislature which had authority over a number of matters, including land, local taxation, police, law and order, and other issues of local importance. The powers and institutions of regions were protected by the constitution. The reason for regional governments was to bring power closer to the people and safeguard the country's ethnic diversity, particularly the rights of minorities. A significant element of devolution was the protection of the land rights of communities. There was a complex system of land ownership and regulation, in which county councils had special responsibilities in relation to community land designated as trust land.

In order to protect this form of devolution, a second chamber of the national legislature, the Senate, was established, with one representative from each of the 41 districts which existed then. It had very significant powers, including a key role in the process for the amendment of the Constitution. For the amendment of some provisions, the majority required in the Senate was as high as 90%.

The Constitution provided for a public service which was largely independent of the executive, managed by the Public Service Commission. It also included important safeguards for the independence of the judiciary, with a Judicial Service Commission responsible for appointments and dismissal of judges. Appeals went to the East African Court of Appeals, over which no national government had control, and finally to the Privy Council in London - completely independent of the Kenya government. The independence of the auditor general and the attorney general was also guaranteed. More importantly, the operational autonomy of the police was established, prohibiting political directives to the police.

The Constitution contained a Bill of Rights which protected the essential political and civil rights of citizens. However, it allowed a large number of restrictions on these rights; and it did not include socio-economic rights. Otherwise there was no statement of national values or principles of state policy (it did not even have a preamble!).

Fundamental amendments

The independence constitution did not survive for long. Kenyatta's government promoted fundamental changes to it on the first anniversary of independence. In a short time, his government changed the system of government to presidential, combining the offices and powers of the governor-general and prime minister in the president, creating a powerful new post, which in effect weakened the legislature. The second major change was the abolition of regional governments leading to a highly centralised government at the national level. The Senate was also abolished, reducing

checks on the administration. The land chapter was reduced to a few provisions on trust land, giving the national government increased control over land matters. Both the civil service and the police were brought under executive control. Appeals to the Privy Council were abolished, and the East African Court of Appeals ceased to exist with the breakup of the East African Community.

The dismantling of the democratic and accountability mechanisms continued under President Moi, who reduced Kenya to a one party state, and abolished the security of offices of the auditor-general, attorney-general and judges, so that the president could dismiss them at will. Many amendments under both presidents were rushed and often all stages were disposed of in one day. Fundamental rights were systematically violated, and courts provided no effective protection. In these ways the careful sharing and balancing of power and the safeguards of citizen's rights and freedoms were done away with, giving rise to destructive ethnic politics and sowing seeds of disunity.

In the 1990s, with the end of the cold war and the loss of interest of the West in supporting Moi's regime, some of these amendments were repealed, and some laws which had been used to harass and penalise the regime's political opponents, such as detention without trial, were amended or repealed. But by now people had lost respect for the constitution and confidence in the political system. Few public institutions enjoyed legitimacy and most lost the ability to resolve differences among the political parties or the people or develop consensus. There was little accountability of the president, ministers or senior civil servants. Rights continued to be violated, and corruption, which had started at the very beginning of Kenyatta's rule, continued to flourish.

Consequences

Corruption; poverty and disparities of wealth and opportunities; exclusion and intensification of ethnic discrimination and tensions; violation of human rights; land related problems; violence in and militarisation of politics; lack of human security; unchecked powers of security forces; all these were the consequences of the distortion of the constitution.

These, and other negative social and economic developments, impoverished numerous families and communities, and led to huge disparities between them and few rich families, were attributed by people and commentators alike to the absence of accountability and the rule of law.

More specifically, the major consequences were:

- The centralisation of power in the hands of one person, the president. This resulted in the lack of democracy and accountability, patronage politics, ethnicisation of politics (as each community focussed on this one important political prize).
- The lack of accountability of the government and the near impossibility of holding the president to lawful acts and procedures led to massive corruption, with impunity for him and his cronies. The corruption drained away billions of shillings which belonged to the state on behalf of the people and is a primary cause of the poverty, under which the majority of Kenyans live.
- The concentration of power in the president enabled him and the attorney general to direct the judiciary as to how to decide cases in which the president or his friends had an interest. The Attorney-General's powers of prosecution,

although meant to be exercised independently, were in practice used to further the interest of the president and his friends.

- There was massive violation of the rights of Kenyans for which there was no redress judicially or administratively.
- The repeal of the 1963 constitution provisions on regional governments and the gradual removal of the administrative and financial powers of local government weakened democracy and participation at district and sub-district levels. Operating through the Provincial Administration, the president acquired control over much of the country in matters that properly belonged to provinces and districts.
- The control of land by the government and county councils, and in particular the president's power to grant land without any legal process or consultation, led to massive abuse, illegal transfers of land, dispossession of many of their land, and began the division between rich and poor Kenyans.
- There are no provisions for parliamentary civilian control over the security forces which have grown in numbers and in the quantity and quality of weaponry. The independence of the police guaranteed in 1963 was removed. The result was that the president and his government had complete control of the armed forces, and often used (and use) them to repress the people. Consequently the public has lost confidence in the impartiality and competence of the armed forces.
- All these developments produced distrust of government, and distrust and conflict among ethnic communities, as politicians played upon ethnic fears and promoted ethnic animosities. This has greatly weakened national solidarity and unity, threatening the very integrity of the country.

People struggled for constitutional reform because they considered that only in this way could the negative consequences of the amendments under Kenyatta and Moi could be removed.

Constitutional Reform Agenda

The struggle for constitutional reform led to a consensus between Moi's government and other political parties and civil society (including on major religions) on the process and the agenda for reform which was given effect to in the CKRC Act of 2000. The reform agenda there was repeated in the 2008 Constitution Review Act. All organs of review, then and now, are bound by the constitutional principles that make up the agenda.

The important goals of review are:

- peace, national unity and integrity of the country
- respect for ethnic and regional diversity, and inclusion of all communities in institutions of the state
- the well-being of the people and the basic needs of all
- democracy, good governance and the Rule of Law (protected in part by the separation of powers and checks and balances)
- devolution of powers to facilitate the participation of people in the governance of the country (and presumably to provide for sharing of power, and effective government at local levels)
- full participation of the people in the management of public affairs

- human rights (especially equality and non-discrimination), as essential to economic, social, religious, political and cultural development
- gender equity, giving women equal rights to men, and fair representation in state institutions
- independent institutions that review the abuse of power and violation of rights, and provide redress. Independent institutions also for politically sensitive tasks, like managing the electoral process
- competence, accountability, efficiency, discipline and independence of the judiciary.

The 2000 and 2008 processes both emphasise the importance of transparency, and participation of and accountability to the people. They require the organs of review to reflect the people's wishes in the constitution. They also emphasise decision making by consensus (in order to resolve national differences and to create solidarity). Only if consensus is not possible should decisions be made by two-thirds majority.

Both the CKRC and the Committee of Experts followed these requirements faithfully. In both cases the people have expressed their views freely and they have been analysed with care. We are now at the final stage of a long drawn out process. That stage is the referendum to be conducted on 4th August 2010.

Part II What will a “Yes” vote mean for Kenya and Kenyans?

Principles and Symbols

The long struggle for a new Constitution for Kenya has not merely been for a new document, but for a new society. The Constitution cannot achieve that alone – it will depend mainly on the efforts of the people to USE the Constitution.

The principles and values of the vision of that new society have been hammered out by activists, writers, professionals, and politicians, from the late 1980s, in conferences and negotiations in the 1990s, through the review process of 2000-2004, and finally in the aftermath of the post-election violence of early 2008, and the agreement that followed it.

These values are:

- **Democracy**
- **Participation** – here many people would stress that this does not mean just voting every five years, but involves something more active and continuous
- **Constitutionalism and the rule of law** - no-one is above the law, meaning that all laws, and the policies that underlie them must comply with the constitution, the laws must be obeyed and enforced – which means an end to impunity, requiring an effective judiciary and other enforcement mechanisms
- **Good governance** – including accountability of government, public servants and legislators, openness, and effective checks and balances between different parts of government
- **Human rights for all**
- **Equality** – including women, and persons with disability, and effective recognition of the need for affirmative action for disadvantaged groups to achieve that equality in a true sense
- **Respect for Kenya’s diversity** – ethnic, linguistic and religious, which includes ensuring that everyone can be involved in the life of the nation, and the right to live the cultural life of one’s choice
- **Satisfaction of the basic needs of the people** – which for many would involve enforceable right to health, food, housing and education, as well as equality of access to resources
- **Deconcentration of power** – which people felt had become too focused in one place (Nairobi) and one position (that of the president); the implications of this include for many people (though by no means all) some sort of geographical devolution of power and some major change in the system of government.
- **Rectification of historic injustices**

Most people would agree with these values – though some might differ on means to realize some of them.

The current Constitution

The constitution we have now is very weak in terms of express values. It could have been used to realize these values. Its human rights provisions are not bad, though not broad enough, and there is nothing in it that condones corruption and abuse of power. It is tainted in some ways by its past; especially it is weak in terms of machinery for enforcement, and it sets up an excessively strong presidency. It has come to symbolize everything that has been wrong in Kenya. The Proposed Constitution could be used to inspire a renewed belief in values, and in the possibility of a Kenya guided by those values.

In the Proposed Constitution

Where do these values appear in the Proposed Constitution? Some might be seen as symbolic – but symbolism in a constitution is not unimportant. The present Constitution has no Preamble. The Proposed Constitution does – setting out a little of the aspirations of Kenyans, and twice invoking God. The Preamble has a very limited role in formal legal interpretation of a constitution, but a court can use it to help resolve a doubt. This preamble is unlikely to have any such role as all the words used appear elsewhere – many times. Its main function is to set the scene by its emphasis. It may help to attach the people to the document – provided it is actually reflected in the “working parts” of the document.

National days are symbols – and the Proposed Constitution adds Mashujaa (Heroes) Day to the existing Madaraka and Jamhuri Days. Presumably the Heroes are intended to be those who struggled for Independence – but the day could be used to honour a wider range of national heroes and heroines.

Article 10 lists the “national values and principles of government” – which include most of the values identified above, plus patriotism and sustainable development. These values are supposed to be binding on “everyone” who applies the constitution or law, or makes or applies public policy.

The current constitution

The current Constitution has no Preamble and no express statement of national values. Only in the human rights chapter do we find anything that approaches a statement of values. Symbolically that chapter appears after those in the President, Parliament, Executive and Judiciary. This constitution is primarily about machinery of government.

Comment on the Proposed Constitution

That binding force may be more political than legal. They will have to be used, by being relied upon in political argument, in order to have any effect. They can be used as mobilisation tools and to criticise the performance of leaders – especially of those who voted for the inclusion of values in the constitution!

A creative legal profession and judiciary can breathe life into these principles – by using them as criteria for evaluating behaviour in public life in court cases.

To make them more than words on paper, maybe they should be required by law to be inscribed over the entrance to every major public institution, including Parliament, on

letterheads and so on. Maybe that way they may eventually be inscribed in the hearts of Kenyans and the consciences of the leaders.

Constitutional Values

Patriotism || Democracy

Rule of Law || Good Governance

Human Dignity and Basic Needs of All

Human Rights Equality and Inclusion

Sustainable Development

Are you in agreement generally with the principles and values that the Proposed Constitution embodies?

Are you happy with the way the Proposed Constitution specifically mentions principles and values?

Are there things in relation to principles and values that you are worried or unhappy about, or things that you would have wanted to include that are not there? If so you might want to note them on the next few lines:

Overall: do you think that the Proposed Constitution is better or worse in relation to principles and values than the current constitution? (you can note your conclusion by ticking one of the boxes):

Much	Better	Much	Worse	Much
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better		the same		worse

Citizenship

A country is its citizens. Citizens have certain rights and privileges in any country that non-citizens do not have. In most countries only a citizen can vote, and usually only a citizen can be an MP, or hold certain posts (for example many countries would not permit a non-citizen to be an army officer). A citizen always has a right to be in their own country; other people have to get special permissions such as visas and work permits.

Citizens also have obligations over and above those they share with other residents (such as paying taxes). In some countries citizens have an obligation to serve in the national service, and are liable to be called to join or fight with the armed forces..

Although the general principle is that all citizens are equal, many Kenyans have been excluded from full citizenship. Many citizens, among women as well as minorities, complained to the CKRC about discrimination. Although the Proposed Constitution has retained existing categories of citizenship, carrying differential rights, it removes some forms of discrimination, as follows

- both men and women can pass citizenship to their children (Art. 14(1))
- both men and women married to Kenyan citizens may become citizens (Art. 15)(1)
- a person born outside Kenya is a citizen, provided that at least one parent is a citizen (though this could be limited by law to prevent citizenship passing from generation to generation through people who have no active connection with the country) (Art. 14)
- a citizen who becomes, or has become in the past, a citizen of another country is entitled to be a citizen of Kenya as well – and it seems that the intention is that the reverse is to be true, namely that a person who becomes a Kenyan may retain a previous nationality, but this will require a new law (Arts. 14(5), 16 and 15(4))
- a child adopted by a Kenyan is entitled to take Kenyan citizenship Art. 15(3))
- a child who is in Kenya and who seems to be less than 8 years old, but whose parents are unknown, will be assumed to be Kenyan
- all citizens are entitled to identity cards and passports (Art. (1) 12(b))

How does this differ from the current Constitution?

Under the existing Constitution children born outside Kenya only become citizens if their fathers are citizens; now having a citizen mother will be enough. Until now a man married to a Kenyan woman had no right to become a Kenyan, but a woman married to a Kenyan man did (the foreign husband would have had to apply after living in the country for some years, in no different position from any person not married to a citizen). Now a wife will have to wait longer to become a citizen, but both men and women married to Kenyans will be in the same position as far as becoming citizens is concerned.

At present the constitution prohibits any person from holding Kenyan citizenship and that of another country (except for children, who can hold dual citizenship until they are 21 and then must decide).

It will now be harder for foreigners living in Kenya to become citizens in the sense they will have to wait longer (7 years' continuous residence instead of 4 years in the preceding 7 years).

The existing Constitution says nothing about adopted children or children whose parents are unknown.

The provision about a right to ID cards and passports can be used to prevent officials punishing unpopular people by withholding a passport.

Why dual nationality?

People sometimes feel that one ought to be – or even can be - loyal to one country only. A clear majority of those who expressed a view to the CKRC felt that it should be possible to have dual citizenship, though others felt that a person ought to make a choice. In the modern world many people spend part of their lives in one country and part in another. That is good not just for them but for international understanding and international commerce. Dual nationality means that they can more easily travel between the countries in which they have an interest. The arguments in favour of dual citizenship include that such a person might actually be more inclined to retain a connection with Kenya if it is possible to retain citizenship.

Another issue in Kenya relates to pastoral peoples; some of these groups move across national boundaries with their herds. This may make it very difficult to obtain citizenship (because there is a tendency for officials to suggest that they 'belong' on the other side whereas the truth is that they belong on both sides of the border).

In reality many people even now do have two or more passports. Not to permit this to be done lawfully is an invitation to deception and corruption.

What do other countries do? The UK has always allowed dual nationality. Until recently the USA was firmly against it, but in recent years the law has been relaxed. Canada has recognised dual nationality since 1977. There is a definite trend towards recognizing dual nationality, though most African countries have not followed the trend.

Comments

Citizenship provisions in the Proposed Constitution are much better than under the current constitution. There are still some distinctions between citizens, for example, only a citizen by birth has a constitutional right to keep their citizenship while acquiring another nationality. And only citizens by birth may hold certain offices.

Overall: do you think that the Proposed Constitution is better or worse in relation to citizenship than the current constitution? (you can note your conclusion by ticking one of the boxes):

Much better	Better	Much the same	Worse	Much worse

Ethnicity, minorities and national integration

Prevalence of ethnicity in public life is major political and social problem facing Kenya. Our politics have become largely the politics of ethnicity. Politicians find that an easy way to build support is by playing on ethnicity, by stirring up ethnic loyalties on one hand, and ethnic animosities on the other. Sometimes they incite people against other tribes, even to violence, as is well demonstrated by the Waki Commission. They promise their tribe development and other benefits if they have their vote. They claim political monopoly over “their tribal area” and insist that no outside politician can enter control over it without their permission. Tribe is set against tribe, no matter that politicians are able to change their own strategic tribal alliances routinely. The politician’s principal interest is to grab state power, for only in this way can he or she accumulate wealth and influence. Through politics of stealing public resources, and patronage for cronies, successive presidents and their associates have corrupted public morals, and given the impression that the advancement of a tribe is through the capture of presidency (though the only beneficiaries are president’s relatives and cronies). Many people respond to ethnic appeals because of their vulnerability, brought about by the market and the state, which have fundamentally disrupted the rhythm of their traditional life, and exposed them to the vagaries of mechanisms they neither control nor understand. Negative ethnic feelings then spill over into other spheres of lives.

The country has paid a heavy price for the politicisation of ethnicity. Tribal politics are based on patronage which is one cause of corruption, whether in the form of money transfers, grants of land, contracts, evasion of bureaucratic procedures, or jobs for relatives and friends. It has led to the abuse of the electoral process, bussing in voters from outside, using state agencies to rig elections or declare fraudulent “results”. The obsession with ethnicity means that it becomes the sole criterion for judging people. Very little attention is paid to social, economic and environment policies (other than on how they impact on one’s tribe). Some people are all too eager to defend their ethnic “leaders” against even well founded allegations of corruption or violence; and in this way the whole question of illegality is transformed into an issue of “harassment or guilt of tribe”, and weakens the whole concept of guilt and accountability.

Ethnic politics have influenced people’s attitude to state institutions: either they are “ours” or they are the “enemy”. The lack of trust in government is pervasive. Many communities, often justifiably, feel they have been deliberately marginalised, denied opportunities of education, ignored in recruitment to public service jobs, discriminated when they tender for government contracts, their land illegally taken away from them. The notion of equal citizenship, the foundation of justice and unity in any state, is greatly debased. All these unequal policies and practices lead to ethnic tensions and conflicts. As we saw in the 2007 elections and the subsequent election violence, they have become a major threat to human security, and ultimately to national unity.

Increasingly, various groups related to politicians are examining the Proposed Constitution from the ethnic angle, particularly the provisions on the executive, devolution, electoral system, and land reform, ignoring the impact on the national good. Such a myopic approach threatens constitutional reform. It is very important that people have an accurate idea of what the Proposed Constitution has to contribute to this important issue.

Proposed Constitution

The Proposed Constitution is based largely on the approach developed by the CKRC to the balance between the respect for ethnic diversity and the promotion of a Kenyan identity and national unity. In a multi-ethnic state it is important that each community should feel, or be made to feel, that it is part of the wider nation and be accepted as such. It should be able to practise its culture, including religion and language. All citizens should enjoy equal rights and equal opportunities. All communities should be included in state institutions and other spheres of life. If a community has been disadvantaged in the past, (like Nubians and residents of the North East) they should be compensated. In this way a state may be able to promote social solidarity which is essential to the running of the country and effectiveness of the state. As shown below, the Proposed Constitution incorporates these features and provides a good framework for promoting justice and solidarity. But we do have reservations on major points which we state at the end of this section. Before looking at the details – what does the current constitution have to contribute?

The independence and the current constitutions

The independence constitution addressed a number of issues relating to ethnic interests, particularly the fear among racial and tribal minorities about the hegemony of larger tribes. From a highly unitary state Kenya moved to a quasi-federation state through the system of regional and county governments. A second legislative chamber, the Senate, was established. At the centre a parliamentary cabinet system that allows for a collective executive was established. The response to worries about land was to set up the system of trust land to which most customary land was converted and responsibility for management given to county councils on behalf of communities. The police were re-organised, to provide autonomy on operational questions, and to regionalise it, both directed to abuse of police by the central government.

Most of these provisions were removed or diluted by the Kenyatta government within very few years, beginning on the first anniversary of independence. The parliamentary system was replaced by the presidential system in which most executive power was vested in one person. Regional government and the Senate were abolished. The police were centralised, and their operational autonomy removed. The practices of the state became highly discriminatory on both racial and tribal basis.

The current constitution does not offer any vision of a multi-cultural Kenya. There is no preamble - which is where one might expect a vision. It has a provision to prohibit discrimination on ethnic grounds, but there are several exceptions to it. It protects some aspects of culture, particularly in relation to family laws. It has a first past the post (majoritarian) election system which works against minorities. In some respects it maintains the colonial legal basis for keeping races or tribes separate.

Features of the Proposed Constitution:

Positive features

- The Preamble talks of “pride in our ethnic, cultural and religious diversity” and of determination to “live in peace and unity as one indivisible sovereign nation”, the two ideas requiring that national identity and other personal and communal identities must be balanced

- Art. 1 (4) says that the sovereign power of the people is exercised at the national level and the county level, meaning that we must share state power, and not let it be monopolised at one level (and implicitly, by one tribe or a coalitional of tribes)
- Art. 6 (3) requires the state to ensure access to services throughout the country (unlike in the past when some areas were gravely neglected)
- Art. 7 makes English and Swahili official languages, but requires the state to promote and protect the diversity of language in Kenya
- Art. 8 declares that there is no state religion, and by implications that all religions must be treated equally
- Among the national values and principles of governance are patriotism, national unity, sharing of power, inclusion, social justice, equality, non-discrimination and protection of the marginalised, all of which aim at fairness and national integration (Art. 10)
- Art. 12 (1) assures all Kenya citizens equal “rights, privileges and benefits” (but Chapter 3 provides for various categories of citizenship with differing rights)
- Chapter 4 (“The Bill of Rights”) has a number of provisions to ensure equal rights to all and affirmative action for groups who have been disadvantaged in the past (set out in bullet points immediately below); the underlying theme is human dignity (see the section on “Human Rights”)
- Art. 21 requires the state to address the needs of, among others, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities
- Art. 27 guarantees equality and freedom from discrimination (direct or indirect discrimination is prohibited on any ground including race, ethnic origin, colour, religion, conscience, belief, culture or language); affirmative action *must* be taken to redress past disadvantages due to discrimination (see also Art. 56)
- Art. 33 (2) (c) and (d) makes it clear that freedom of speech does not cover “hate speech” or advocacy of ethnic hatred
- Art. 44 protects the rights of minorities to the use of their language and the exercise of their culture (and thus protects diversity); Art. 45 upholds marriages and personal law under a variety of religious or customary systems; and Art. 56 requires affirmative action for minorities and marginalised groups in respect of participation in state affairs, access to education, economy and employment, basic needs, and their culture
- Chapter 6 (on land) while not directly addressed to minority rights, will vest trust land directly in the communities whose life style is tied to forests or grazing or hunting-and-gathering (Art. 63(2) (d))
- Art. 91 specifies that political parties must have a “national character” (presumably meaning that they must have members from all over the country and in their governing bodies), must uphold national unity, cannot be based on bases of religion, language, race, sex or region, and must not advocate hatred on any of these grounds
- Art. 100 requires Parliament to make laws to promote the legislative representation of ethnic, minority and marginalised communities

- When members of Parliament are to be elected through party lists (this mainly affects gender in the Senate) those lists must reflect the diversity of Kenya (Art. 90)
- Art. 130 (2) requires that the national executive (that is, the President, Vice-President and the Cabinet) must reflect the ethnic and regional diversity of the people (although it is not clear how this would be enforced; perhaps by Parliament as it has to approve presidential nominations of cabinet secretaries (that is, ministers) (Art. 152 (2); see section on Parliament
- Art. 170 provides for Kadhi courts to apply Muslim law - only on matters of personal laws; and although it has upset some Christian clergy, it seems compatible with the value of respect for diversity
- Art. 232 on the civil service requires the representation of Kenya's diverse communities in the service
- Article 131 says that the President has a special responsibility to promote respect for Kenya's regional and ethnic diversity.

Worrying Features

- A majoritarian system of voting (such as is retained for Kenya with mostly single member constituencies) disadvantages minorities. There is a requirement that a law is passed to promote the representation of minorities and marginalised groups. This has to be done within five years (Article 100 and Schedule 5) - but a proportional system of representation (PR) which is better for ensuring the representation of minorities and women will not be possible
- The system of presidency which does not provide effective power sharing at the national level; and so may continue ethnic hegemony and exclusion of many; and continue ethnically based politics (see section on Presidency). Most seriously, even before people understand how the new system and its limits on presidential power will work, the focus on this one office may stimulate violence.

Summing up

The Proposed Constitution provides a good framework for protection of minorities, social justice, and national integration, but whether Kenya can move from ethnic politics and conflicts to the politics based on policies regarding land, economy, environment, education, health, and so on, depends significantly on the attitudes of politicians. It may not, by itself, produce our Mandela or even our Obama!

Overall: do you think that the Proposed Constitution is better or worse in relation to issues of ethnicity, minorities and national integration than the current constitution? (you can note your conclusion by ticking one of the boxes):

Much better	Better	Much the same	Worse	Much worse

Human rights

The importance of human rights

We have rights because we are human; the government does not give them to us, and in a sense has no power to take them away from us. In reality we all know that governments are major violators of human rights. We also know that other citizens, commercial organisations, militia groups and institutions within society violate rights.

Recognition of rights in a constitution gives people a tool. Perhaps, more than any other part of the constitution, human rights need the active involvement of the people to leap off the printed page and become effective. Government may recognise that to achieve their objectives (good or bad) they need to follow the constitutional rules about the exercise of power. Without vigorous insistence by the citizenry they may be less scrupulous about observing human rights obligations that stand in the way of their own view of the uses of power.

What does the Proposed Constitution say?

➤ An important preliminary point: people often misunderstand human rights provisions, and think that something that says “everyone has a right [to freedom of speech or religion or anything else]” means that everyone can do as they please without any possible limits! This is responsible for all sorts of misunderstanding. So as you read about the rights, please bear this in mind. There is a box below that explains about limiting rights.

The main features of the proposed human rights chapter are:

- strong provisions on non-discrimination, including a long list of prohibited grounds of discrimination, such as disability, pregnancy, marital status, health status (Art. 27), as well as the more familiar gender, race and belief, that are in the current constitution
- banning of indirect discrimination – that is laws or conduct that discriminates in effect even if not intended to be discriminatory (Art. 27(4))
- rights are to be respected by all and not just by the state (Art. 20)
- in addition to the most familiar rights (such as freedom of expression, assembly, association, movement, right to property and to a fair trial) that are recognised in the current constitution, various other rights are recognised, including a wider right to privacy (Art. 31), information (Art. 35), media freedom (Art. 34), right to vote (Art. 38) and right to fair working practices, including the right to strike (though not the right to work) (Art. 41), right to use the language of one’s choice (Art. 44), equal rights in marriage (Art. 45), consumer rights (46), right to fair administrative action (Art. 47) and right to a clean environment (Art. 42)
- clear rights to health, housing and sanitation, food and water and social security (economic, social and cultural rights (Art. 43), and the state has the obligation to take measures necessary to achieve the progressive realisation of the rights (Art. 21) (see below)

- clarification of how rights apply to various specific groups: children, youth, persons with disability, marginalized groups, the elderly (Arts. 53-57)
- requiring the state to have policies of affirmative action to ensure that disadvantaged and marginalized groups can achieve true equality (Art. 27(6))
- a duty on the state must carry out its human rights obligations under international law (Art. 21(4))
- a provision that treaties (many of which relate to human rights) that Kenya is a party to are part of Kenyan law (Art. 2(6))
- remedies – the procedure for going to court to protect rights includes the possibility of bringing an action on behalf of groups or even of other people who are unable to do so for themselves (Art. 23); the procedures must be simple and there must be no court fees for bringing a case to protect human rights (Art 22)
- a human rights commission with a constitutional status, role and protection (Art. 59).

Limiting Rights

It would of course be unreasonable for everyone to claim that freedom of speech means that there is no limit on what they can say. The Proposed Constitution is clear that the law can limit rights (except for 4 rights specially protected in Article 25). But the limitations must be reasonable. And it gives clear guidance about how to decide whether limiting a right would be reasonable. The main test is “is such a limitation on a right justifiable in a democratic society like Kenya”? The courts would decide if there is any dispute, but Parliament should also think about this, and the Human Rights Commission will also give guidance.

Whether it is justifiable to limit a right will depend on what objective is to be achieved by the limit and whether the limit is greater than would be needed to achieve that objective.

So – it will be justified to limit freedom of speech to protect reputations (though the current law on this topic may be too restrictive of freedom of speech), and freedom of religion would not protect Mungiki as someone seems to have suggested!

Some constitutions limit each right individually. This tends to make limitations appear more prominent than rights! That is the case with many of the rights in the current constitution. The Proposed Constitution takes a different approach, one that is legally neater, and more protective of rights.

Affirmative action

Like many modern constitutions, the Proposed Constitution recognises that sometimes more than equality is recognised. Affirmative action may be required for a while to achieve true equality of groups that are held back because of past practices of discrimination. But the Proposed Constitution not only says that such affirmative action is not discriminatory, but is also says that measures needed to overcome the consequences of past discrimination, including affirmative action, must be taken (Article 27(6)).

Overall impression

The Proposed Constitution is a considerable improvement on the current constitution which bans fewer forms of discrimination (and does not include a general ban on discriminatory behaviour); it does ban laws that discriminate in effect as well as by intention. In its style of drafting the Proposed Constitution is clearer, whereas the current constitution lays far more emphasis on when rights do not apply! The Proposed Constitution is very specific and firm about how human rights may be limited (see box). The recognition of economic social and cultural rights is very significant (see below). The right to information may prove to be valuable not just for the protection of individual rights but to facilitate citizens' scrutiny of government (see section on "Participation").

Poverty, Basic Needs and Economic, Social and Cultural Rights

Many people do not understand the idea of socio-economic rights (which are new for Kenya in the Proposed Constitution, though Kenya is a party to international treaties that recognize them). Some people ask questions like "how can government have a duty to feed everyone or house everyone?" In the years since the International Covenant on Economic Social and Cultural Rights and other treaties such as the Convention on the Rights of the Child were adopted the rights have been analysed and spelled out by courts, and international bodies in some detail. It is now clear that the main point of these rights is that people must be free to fulfil them for themselves. The state, and others, should not interfere with people's rights to feed and clothe themselves and to live decent lives. Some rights require more state intervention, especially education (and there is a right to free and compulsory primary education). But the state must do more than stand aside: it must prevent infringement of these rights by others, and if necessary (for example in cases of extreme poverty or drought) must take positive steps.

The Proposed Constitution says that the State must realise the socio-economic rights progressively (Art. 21(2)), and it is for the State to show that it does not have the resources to fulfil the rights if this is its justification for failing to do so (Art. 20(5)). The courts in South Africa (and other countries) have been able to give some remedies for the victims of violations of socio-economic rights, and they should not be regarded as utopian "aspirations" or empty words, but a genuine tool for social justice.

These rights are not only a matter of legal enforcement. They are an agenda for the state (and one that, as we have mentioned, the state of Kenya has accepted). The State (meaning the government and its servants and agencies) must constantly think about how its policies affect the welfare of the people, ensuring that their socio-economic rights are promoted. At the time of the budget preparation, government should take into account its obligations.

Using the rights

The courts and the human rights commission will be stronger under the Proposed Constitution than under the existing law. People should take advantage of this to press for their rights and the rights of others. Traditionally courts usually allowed only people personally affected by wrongful acts to take a case to court, but the Proposed Constitution says that a person or organisation may bring an action to protect the

rights of others who cannot bring cases for themselves (this would cover those who are too poor, for example, or situations where large numbers of people are the victims of violations of rights) (Art. 22).

The courts are directed to some extent how they should approach human rights cases. They are told to interpret the law, including the constitution, so as to achieve the realisation of the human rights, and the values that underlie them (Art. 20).

Many people may be unaware that Kenya is required to report on its own human rights performance to the UN Human Rights Council, and to the mechanism under the African Charter for Human and People's Rights. These occasions can be used for civil society to present counter reports showing where the country falls short. The Bomas draft tried to make the UN process a national event by requiring that the government make the process public and ensure that it was debated at home (it should have included the African process in this provision). Unfortunately, this provision disappeared from the recent drafts.

Misunderstandings about the Human Rights

Right to life: On abortion, the Proposed Constitution says

Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.

This does not give anyone a right to demand an abortion. If an abortion is carried out to save the life or the health of the mother it would not be a crime. Parliament could pass a law to make abortions possible in other situations (for example if the pregnancy is the result of rape). But this would have to go through Parliament, and full public debate would take place. In fact, as the current law of Kenya is interpreted, it is very similar to the Proposed Constitution. Many years ago a Kenyan court applied English law and decided that abortion to save the life of the mother or avoid serious risk to the health of the mother was not unlawful. The Kenyan medical profession works on the assumption that this is the law. The mention of a "health professional" in the Proposed Constitution was included to deal with the possibility that in a rural area a doctor might not be available to certify the need for the abortion. The significance of the mention of "emergency treatment" is probably that it covers treatment that is not intended to harm the foetus but that would have the side effect of causing or necessitating an abortion (for example, in some countries with strict abortion laws, women suffering from cancer have been denied treatment because it would damage the foetus they are carrying – thus almost certainly condemning the women to death).

The current constitution actually has a very weak right to life: "no person shall be deprived of his right to life intentionally....". Almost certainly that would not benefit an unborn child who is not legally "a person".

Striking soldiers and police Almost certainly the Kenyan courts would decide that limiting the rights of the disciplined forces would be "justified in a democratic society" and therefore satisfied the requirements of Article 24. However, the Proposed Constitution says explicitly that Parliament can pass laws to deprive the forces of various rights including association and assembly. Such laws already exist in fact – so nothing will change. Apprehensions of rioting soldiers with guns as the result of the Proposed Constitution are nonsense. In fact the provisions seem rather hard on the

forces – why should they have no right to privacy, no economic, social and cultural rights and no rights if arrested?

In other words, voting “No” because of concerns about abortion or the fear of the forces going on strike will make no difference: the current constitution would remain in force, and under that constitution the situation is no different.

Are you particularly pleased with certain new rights that are included in the Proposed Constitution? You might want to note them on the lines below:

Are there issues that particularly worry you about human rights in the Proposed Constitution? You might want to note them on the lines below:

Overall: do you think that the Proposed Constitution is better or worse in relation to human rights than the current constitution? (you can note your conclusion by ticking one of the boxes):

Much better	Better	Much the same	Worse	Much worse

Gender

Driven perhaps by a sense of past injustice and exclusion, women have always been very active in the constitution review process in Kenya. And gender equity has been a central value of the various Review Acts – though curiously the 2008 Act is less forceful and detailed on this than the 2000 Act. It is of course also important to remember that there may be some instances in which laws or practices work against men. You may have read some claims that women will do very well under the Proposed Constitution, and some suggestions that they have lost out.

The Proposed Constitution

Equality and non-discrimination

The most basic of all rights for groups that experience discrimination is of course the right to equality. The current constitution does say that there must be no discrimination on the grounds of sex. But the Proposed Constitution is fuller and more

explicit: there must also be no discrimination on the grounds of pregnancy, marital status and birth (the last refers particularly to whether a person was born in wedlock, and can cover the place or other circumstances of a person's birth) or health status (that would refer to being HIV positive) (Art 27). It emphasises that women have the right to equal treatment including rights to equal opportunity in the fields of politics, economy, culture and society (Art. 27), in equal rights to marry, during the marriage and in the case of divorce (Art. 45). There are also equal rights to pass citizenship to children and to become a citizen or have one's spouse become a citizen (Arts. 14,15).

Much discrimination against women comes from society and not the state. It is important therefore that everyone is supposed to respect the rights (Art. 20), and also that the state must protect the rights against interference (Art. 21). Land policy should include elimination of gender discrimination (Art. 60); gender discrimination is probably particularly found in customary law, and there is also a provision that customary law must respect the human rights (Art. 2(4)).

Representation and inclusion

Other important provisions relate to representation in elected bodies, appointed bodies and in employment in the public service (there is some further discussion of these below):

- special seats for women in the Senate (16 at least, plus one woman representing youth and one representing persons with disability)
- seats for women in the National Assembly (1 from each county)
- a requirement that a law be passed to promote the representation of women in Parliament
- special seats in county assemblies to ensure that at least one-third of the members are women (and at least one third men)
- a certain number of women in the Parliamentary Service Commission (at least 4 out of the 11 members – Art. 127(2)) and at least 3 women among the 11 members of the Judicial Service Commission (Art. 171(2))
- the Judicial Service Commission must be guided in its work by the principle of gender equality (Art. 172(2))
- the State must implement “the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender” (Art. 27(8))
- there must be equal opportunities in the public service for men and women in appointment, training and advancement (Art. 323(1))
- national security organs must “reflect the diversity of the Kenyan people in equitable proportions” (Art. 238).

Protective measures

In various ways the state and its organs are to protect the interests and rights of women:

- the right to health care includes the right to reproductive health care (Art. 43)
- there is a duty on the State to have programmes (including affirmative action) for groups disadvantaged by discrimination (Art. 27(6)), which would include women

- land legislation must recognise and protect matrimonial property including the family home, and the protection of dependants of deceased persons including those in actual occupation of land – who will often be women (Art. 68)
- the Human Rights and Equality Commission has a number of specific mandates including to promote gender equality and facilitate gender mainstreaming in national development (Art. 59(1(b))).

What will the provisions mean?

On elective representation

The guaranteed 47 seats in the National Assembly (one per county) is similar to provisions in Rwanda and Uganda (Rwanda has one of the highest proportions of women in parliament in the world). By itself it guarantees only 47 out of 349 members (excluding the Speaker) or 13.5% - not much better than now. The position of the 47 women will not be easy. They will have larger constituencies – a bigger area to campaign in, and a bigger area to “take care of” as constituency member. And there may be some risk that they are not treated really equally by their parties (that might think “those are just women’s seats”). On the other hand – they are to be elected by all the voters of the county, so if they do a good job they will be respected by all.

Within 5 years there must be a new law to “promote” the representation of women, among other groups. Women should participate actively in the debates in parliament on this law (and there will be probably be 47 county seat women to play their part in those debates). “Promote”, however, does not mean the same as “guarantee”. In the long run, it is surely better for women if they occupy seats voted for in the same way as men. Parties should be prepared to nominate them to stand for regular constituencies that they can win. After the constitution is adopted women can start to plan for this important piece of legislation, and for women to play their full part in political life.

In the Senate there are to be at least 18 women out of a total of 67 (26.7%). Again this is not as many as one-third, but there could, and should, also be women put forward for winnable county seats. The position of the 18 guaranteed women will be even odder than that of the 47 women in the National Assembly. They will sit in a body that has power only over matters related to counties. They cannot force any position on their county representatives – they are only required to be consulted about how the county vote is to be cast. But again, the law to be passed within 5 years covers representation in the Senate as well, so our comments in the preceding paragraph apply here too.

The situation in the county assemblies will perhaps be easier for women. Right from the beginning there are to be one-third women. And in the smaller assemblies the women members may find it easier to play an equal (or even more effective) role than men. But the peculiar rule about special seats in county assemblies - to ensure that no more than two-thirds of the members are of the same sex - probably means that for some time to come one-third women is the maximum number of women. Indeed there is perhaps a risk that it will delay full equality for women – because parties know that there will be special seats for women they will not bother to nominate women for regular seats. On the other hand – it will give women a chance to perform well, as we

have seen, so hopefully by the quality of their contribution women will persuade parties to nominate them, and maybe the “special seats” will become unnecessary (unless and until there are so many women ward members that men have to be protected by special seats!)

On appointive presence

The State is supposed to take active steps to ensure that at least one-third of appointive state bodies are women. This will include commissions and even the national and county governments. It will be part of the responsibility of the Human Rights and Equality Commission to monitor this issue. And if there is inadequate action it might be possible for a case to be taken to court and ask the court at least to declare that the government is not carrying out its responsibility. The way the provision is worded does not seem to suggest that a body is unconstitutional if it is not gender balanced in this way. But, if over time parliament and the government do not manage to achieve this balance, the courts might be persuaded to be bolder in their response.

In the case of the judiciary there is a different provision – about gender equality, as we have seen. What does this mean? You might argue means they should aim at having 50% women judges. On the other hand, it might be interpreted to mean equality of opportunity. But as Article 27 says “Equality includes the full and equal enjoyment of all rights and fundamental freedoms” - and equality of opportunity for those who have been persistently discriminated against is not enough to achieve full equality, not for many years. This is why affirmative action is permitted, indeed sometimes required.

It is also important that cases can be brought before the courts to protect the interests of groups (Art. 22). Such a group could be women.

On land

Removing gender inequality in connection with land does not mean that a person who chooses to leave his land only to his sons in a will cannot do so. But it will mean that there must be no laws that disadvantage women (or men). Existing laws that do that are mainly customary laws (see below).

The requirement to protect especially the matrimonial property home will be partly satisfied by a law that has been waiting for parliamentary enactment for some time – giving women a better position on divorce as far as property is concerned. Another protection (usually for women but it could be for men) is a rule developed by the courts in some countries that a spouse who is the registered owner or tenant of the family home cannot sell it over the head of his or her husband or wife, leaving them without a home. The provision about dependants of those who have died may not add much to the existing Kenyan law.

On family and custom

Female circumcision is unlawful under the Children Act. “Early marriage” is also banned – but the Matrimonial Causes Act seems to assume that African girls are

married by 13! We know that illegal practices persist. Women especially, and society more generally, must use the provisions in the Proposed Constitution that emphasise women's rights, or these will be as much as dead letter as existing laws.

The Proposed Constitution encourages traditional dispute resolution mechanisms. But very often, unfortunately, traditions were not favourable to women. Various Kenyan laws, and the present constitution, protect customary law from the impact of the human rights provisions. Laws which discriminate are not contrary to the current constitution if they relate to 'adoption, marriage, divorce, burial, devolution of property on death, or other matters of personal law'. That will no longer be the case as any law, including customary law, as we have seen, that is inconsistent with the constitution will have no legal effect.

On Muslim law

There is an exception to this last rule: the human right to equality does not apply to Muslim law relating to "personal status, marriage, divorce and inheritance", if that law is applied in Kadhis' courts. This is mainly of importance to women – because the issues likely to arise are things like favouring the father in custody of children over a certain age, the limited provision for maintenance of wives after divorce, and the difference in inheritance by women and men under Muslim law. It is important to realise that this provision was inserted (as long ago as the CKRC draft) because Muslim women said they wanted it. Similar provisions exist under the current constitution, and under the Law of Succession Act. So even if the new constitution would not improve the situation of Muslim women in some people's eyes, it would not make it worse.

On language

May be this a symbolic issue, but symbolism is important in a constitution. Compare the current constitution:

"No person shall be deprived of his right to life intentionally...."

with the proposed:

"Every person has the right to life".

See the difference? The current constitution speaks always of males, and explains that this includes females. The proposed constitution is always phrased so that it is not sex-specific; if necessary it says "he or she". This is not as bold or as positive as the South African Constitution which always speaks of "a woman or a man" in the context of holders of appointments. The proposed constitution for Kenya moves from male-leaning (women invisible) language to gender neutral, while the South African constitution has what you might term "women prominent" language.

Do you think that the Proposed Constitution is fairer between the sexes than the current constitution? You might want to note one or two points that you have especially noted on the lines below:

Are you there issues that particularly worry you about the position of women in the Proposed Constitution? You might want to note them on the lines below:

Overall: do you think that the Proposed Constitution is better or worse in relation to gender fairness than the current constitution? (you can note your conclusion by ticking one of the boxes):

Much better	Better	Much the same	Worse	Much worse

Disability

In Kenya, as in all societies, it is estimated that about 10% of the population have some form of disability. But people with disability have been very much excluded from society. They are anxious not only not to suffer from discrimination, but also to play their full part in public life. In the modern world, people with HIV are among those who suffer from discrimination.

The Proposed Constitution:

The current constitution does not include “disability” among the grounds on which the government may not discriminate between citizens. Indeed, there is not even a general statement that “everyone is equal before the law”. But the Proposed Constitution does provide that there must be no discrimination on the grounds of disability (Art. 27(4)). It goes further and says that there must be no discrimination on the basis of “health status” (which would include being HIV positive). And there is also a general statement about people being equal before the law.

Being treated without discrimination is an important step towards true equality, but more is needed, especially when groups of people have been discriminated against and disadvantaged in the past. There is recognition of this in the Proposed Constitution, firstly by provisions emphasising that true equality means the full enjoyment of all rights. And Article 27 goes on to provide that there must be affirmative action programmes for groups that have suffered from discrimination in the past – which would surely include persons with disability. Another significant point is that the human rights are said to be binding on everyone (Art. 20(1)) – not just on the state. Discrimination is often a matter not of state but of society behaviour. And the Proposed Constitution says that the state must not only respect all the rights but must protect them, and fulfil them. In other words, if the state takes no steps to protect person with disability from abuse and discrimination by others, the state is in violation of its obligations (Art. 21(1)).

There is a specific article (54), which shows how equality should be achieved for people with disabilities. It stresses that they

- must be treated with respect
- have a right to access to education (integrated into society as a whole when this is compatible with the interests of those persons)
- are entitled to reasonable access to all public places and transport and to information and communications
- are entitled to use of sign language, Braille etc. (and there are specific references to the duty of the government to encourage the various means of communication for persons with disability (Art. 7(3)) and Kenyan Sign Language is to be an official language of Parliament (Art. 120)).

There are other measures relevant to persons living with disability:

- persons with disability are to be among 12 members of the National Assembly taken from party lists (Art. 97)
- there are to be two seats for persons with disability in the Senate – one for a woman and one for a man (Art. 98)
- a requirement that a law be passed to promote the representation of persons with disability in Parliament (Art. 100)
- requirement that law be passed to ensure that county assemblies are inclusive of persons with disability (Art. 177)
- the law about elections, setting up the procedure and so on, must take account of the needs of persons with disability (Art. 82)

Are there any problems about the provisions?

The provisions for the representation of persons with disability in Parliament and county assemblies may prove to be very successful. The position of those members may not be easy. Will they be able to put forward the issues of persons with disability? This will depend both upon the forcefulness of the persons elected, and upon the parties that put them forward, which should ensure that the persons with disability are able to contribute to the work of the legislatures from their own particular perspective. The position of the two members with disability in the Senate may be particularly hard. As well as being few, they will be member of a body with functions that seem to be mainly limited to issues that affect counties. It may only rarely be possible to bring a distinctive “disability perspective”. Of course it is valuable as such to involve all sections of the community.

Earlier draft constitutions for Kenya included a principle that all public elected or appointed bodies should have at least 5% persons with disability. This seems to have been distorted in the most recent draft to say that the members of the public in any elected or appointed body should be persons with disability (Art. 54(2)). It is not clear how this change happened – but it seems to have been a mistake, not a deliberate decision to weaken the protection of persons with disability. However, as we have seen, elected bodies are dealt with in separate and specific provisions.

As with rights more generally, the specific provisions to benefit people with disabilities will require a sustained effort, with cases being prepared with persuasive arguments to take to court and the human rights commission.

Are you particularly pleased with any aspects of the position of persons with disability under in the Proposed Constitution? You might want to note them on the lines below:

Are there issues that particularly worry you about the position of persons with disability in the Proposed Constitution? You might want to note them on the lines below:

Overall: do you think that the Proposed Constitution is better or worse in relation to the position of persons with disability than the current constitution? (you can note your conclusion by ticking one of the boxes):

Much better	Better	Much the same	Worse	Much worse
☐	☐	☐	☐	☐

Democracy

Democracy is a complex subject, consisting of values, attitudes, structures of power, representation, participation, accountability, and procedures. This section looks at some of these aspects, particularly representation, how democratic the system of government will be, and the people's right to discuss issues of public importance. Other sections deal with the centralisation of power, participation, elections, and institutions of government, particularly the legislature and the executive.

Kenya's political system was technically restored to democracy with the passing of Section 1A of the Constitution in 1992: "The Republic of Kenya shall be a multiparty democracy". But some attitudes and practices of the one party period persist and it has been difficult to make the government accountable, end the culture of impunity and the use of state coercion to silence critics, or to eliminate corruption in elections,.

What does the Proposed Constitution say about Democracy?

A major theme of the Proposed Constitution is the promotion of democracy. Looking first at representation of the people in elected bodies, it includes the following, none of which has a clear equivalent in the current constitution:

- Every adult citizen has the right to vote (Art. 38)
- Independent (non-party) candidates can stand for election (Art. 85)

- Parliamentary constituencies should as far as possible be equal in size (see “Elections”)
- The National Assembly and the Senate will have special seats for women (for more on this see “Gender”)
- Not more than two-third of the members of County Assemblies must be of one gender (see Art. 177)
- Other groups must be specially represented: persons with disability and youth (in the National Assembly, Senate and County Assemblies) and workers (in the National Assembly)
- The Independent Election and Boundary Commission members are to be people who have not been members of a legislature for 5 years, nor held any office in a political party during that time. This will help to ensure their independence. The appointment process has yet to be fully decided. A law will have to deal with this – as for other commissions. But it is clear that the appointments will have to be approved by the National Assembly.
- There are provisions designed to ensure elections are fair (see “Elections”)

Turning to the ability to express views on public issues – a very important democratic right, including on matters related to election campaigning – the Proposed Constitution provides that:

- Everyone has the right to freedom of expression (Art. 33) – this is also in the current Constitution
- Independent press, broadcasting and other media are explicitly guaranteed (Art. 34) – this would be covered by freedom of expression in the current constitution
- Even state owned media must be free from political control, and allow the expression of different views (Art. 34(4))
- The law must regulate the media to ensure fair campaigning, and also to ensure that broadcasting time is fairly allocated to parties (Art. 92)
- The right to information, which will be important to enable citizens to exercise their democratic rights (see “Participation”)

A number of other aspects of the Proposed Constitution will have significant effects on how democratic the whole system is:

- Political parties must be democratically run (see box below)
- The separation of ministers from Parliament may prove to be a liberating experience for democracy in Parliament (for more see “Parliament”)
- The procedures for the budget should enable more parliamentary input and better understanding (especially Chapter 12 Part 5)
- Devolution will bring government closer to the people (for more see “County Government”)

How is this different from the present constitution?

The present Constitution gives the President alone the power to appoint the Election Commission (though not the current Interim Independent Election Commission). After the IPPG in the 1990s agreement the Election Commission was appointed by

the President and the Leader of the Opposition, but this was not in the Constitution and was not honoured by the President when vacancies occurred around 2006-7.

Some provisions of the 2004 Bomas draft constitution were adopted into law – including on political parties and the budget process in Parliament. But it is important to have these in the constitution, not just in law.

Political Parties

Political parties are very important in modern government. The current constitution says nothing about the internal management of parties. But the Proposed Constitution says that parties must be:

- national in character
- be democratic in their organisation and procedures
- be committed to the Constitution
- observe a code of practice

There must be a political parties law – probably the existing law will largely serve the purpose.

Comments

The provisions on the size of constituencies should be more effective than those under those in force now. They will still not produce a very fair result (the rejected proposal of the CKRC for a Mixed Member Proportional system would have led to voters' wishes being far more accurately reflected in the make-up of National Assembly). And the parts of the country that now have sparse populations may find that constituencies are very large indeed. (For some more discussion see "Elections".)

Some of the provisions on special representation may be hard to operate in practice – see "Elections". Though the President will no longer appoint the Election Commission, no method of appointment is specified. It is up to Parliament to pass a law on this, and there is some fear that they will follow the approach used recently for commission appointments under which the National Assembly chose the members – which leads to a tendency to share out posts between parties. A suggestion adopted at one stage in Bomas for an independent Appointments Commission might have been better.

The provisions about political parties at Bomas would have required the political parties fund to be used to encourage parties to have candidates – and in winnable seats – from marginalised groups. This provision has disappeared.

Overall, however, the Proposed Constitution sets up a far more democratic system than the current constitution.

Do you think that the Proposed Constitution will be more democratic than the current constitution? You might like to note any particular points on the lines below:

Are there points that worry you in connection with democracy under the Proposed Constitution?

You might like to note any particular points on the lines below:

Overall: do you think that the Proposed Constitution is better or worse in relation to democracy than the current constitution? (you can note your conclusion by ticking one of the boxes):

Much better	Better	Much the same	Worse	Much worse

Participation

True democracy is more than representation. It will be far better assured if the people are active – in making their input into government policy making, in watching how their elected representatives conducts themselves, and in making its demands on government - not just at election time.

The Proposed Constitution supports active citizen participation in governance in a number of ways:

- participation of the people is one of the national values (Art. 10)
- “public participation in the management, protection and conservation of the environment” must be encouraged by the state (Art. 69)
- Parliament must not only sit in public unless there is very good reason but it must positively facilitate public participation in its work (Art. 118), including in “the legislative and other business of Parliament”
- There are similar provisions about the county assemblies (Art. 197)
- Any person may present a petition to Parliament (this might be asking for a law to be passed or for any other purpose) (Art. 119)
- Public participation is also to be encouraged in issues of public finance (Art. 201)

Participation of an active sort requires knowledge and organisation. The human rights chapter especially is important in this connection. As regards organisation it includes the freedom of association (allowing the development of organised civil society) (Art. 36). This is in the current constitution, but the proposed constitution expands on this

by providing that there must be fair processes for registering and de-registering civil society organisations.

And on the matter of information, the Proposed Constitution includes the right to information (Art. 35 – see box below); this has no counterpart in the current constitution.

Comment

Earlier drafts were more emphatic and even creative in their approaches to public participation issues. The diligent reader of the Bomas draft would find that there was an obligation on the state to take “measures to promote and encourage civil society participation in decision-making ...” under the freedom of association. And the provisions about registering NGOs was fuller including an independent body to register them, registration only if really necessary, and an independent body in charge of de-registration.

The provisions about the participation of the public in the work of Parliament included some more detail than the Proposed Constitution. There was a requirement that a committee of Parliament should have responsibility to ensure participation in law making and the other roles of Parliament. All Bills for new laws are submitted to Parliament with an “explanatory memorandum”. The Bomas draft said that the memorandum should set out, among other things, recommendations for public participation in considering the law.

And another participation proposal at Bomas was that when the government reports to international human rights monitoring bodies (such as the Committee on the Rights of the Child) it should also give notice to the public, and a chance to comment on the report, so that this reporting process should be made more of a national event so that a public debate could take place on the government’s record.

Unfortunately, some distrust of civil society seems to have motivated some elements in the latest process, and these provisions have disappeared. Nonetheless, the Proposed Constitution is more “participation friendly” than the current constitution.

Though there is nothing in the current constitution about petitions, the National Assembly rules of procedure do talk about them. Probably these rules will have to be changed because they require that a petition is presented by an MP – which means that the “right to present a petition” which could be defeated if no MP is prepared to take the matter up.

Although also cut back, the provision about “facilitating” public participation in law making etc. offers some hope of change. In South Africa, where the constitution has similar words to those now in the Proposed Constitution, the Constitutional Court decided that if inadequate public consultation was carried out in passing a law, that law could be declared unconstitutional. That was a very bold decision, and we cannot be sure whether a Kenyan court would reach the same conclusion.

Do you think that the Proposed Constitution will permit or encourage more participation by the people in the governance of Kenya than the current constitution? You might like to note any particular points on the lines below:

Are there points that worry you in connection with participation under the Proposed Constitution?

You might like to note any particular points on the lines below:

Overall: do you think that the Proposed Constitution is better or worse in relation to participation than the current constitution? (You can note your conclusion by ticking one of the boxes):

Much better	Better	Much the same	Worse	Much worse

Elections: How will they work?

Elections are a very important aspect of democracy, but there has been a good deal of misunderstanding about the proposals on this topic.

The Proposed Constitution

We can summarise the provisions on elections to the various bodies as follows:

In the National Assembly

- 290 constituencies (instead of the current 210) (Art. 97)

- Ideally constituencies are to be of equal size in terms of population, but for sparsely and densely populated areas there can be a variation of up to 40% (Art. 89)
- Even for other areas (not particularly sparsely and densely populated) there can be variation of 30% - so moving towards equality will be a gradual process
- There will be one woman elected from each county (by the voters of the county) in the National Assembly
- There will be 12 members to represent “special interests” including youth, persons with disability and workers. This will need a new law.

In the Senate

- One member will be elected by the voters of each county (Art. 98)
- 16 women members will be elected from party lists, and allocated to the parties in proportion to the number of seats they won in the county elections for Senate members (Art. 90) (these members will be additional to any women elected directly from counties)
- One man and one woman will represent youth and one man and one woman represent persons with disability, also taken from party lists.

In the county assemblies

- Each county is divided into wards each of which will have one member directly elected by the voters of the ward (Art. 177)
- There must be no more than two-thirds men or two-thirds women overall

Party lists

When the Proposed Constitution speaks of party lists, it means that before the election each party should publish lists of candidates (of women, youth, persons with disability) (Art 9). If, on the basis of the results of the geographical seat election, a party is entitled to some seats for women etc, it must take those members from their party list in the order in which they were published – if they get one woman seat they must take the person who headed the women list. A person on the list can also stand for a constituency. If elected for a constituency, they would of course be passed over on the list.

Article 90 speaks of “proportional representation”. This is quite misleading. “Proportional representation” refers to a system under which seats are allocated in proportion to the votes received by a party. But under the Proposed Constitution lists members are allocated in proportion to the geographical constituency or ward seats each party received. If the election system for the geographical seats produces a disproportionate result, the list members will, if anything, increase that disproportionality.

- Parliament must also pass a law about including persons with disabilities and the youth.

For the President

- A person will not be elected as President, in the first round of voting, unless he or she receives more than 50% of the votes cast (Art. 138)
- The person elected must also receive at least 25% of the votes cast in each of at least half the counties

- If no-one satisfies these requirements there must be a second election between the top two candidates, and the one who gets the most votes is elected President.

How is it different from the existing Constitution?

The existing constitution does not say how many constituencies there must be for the National Assembly. It does say there must be 12 nominated members. There will no longer be nominated members (the list members must be known to voters in advance, and are really elected but by a different mechanism). The constitution also now says that only candidates of political parties may stand for election (which seems to be a hangover from the one-party state that existed for many years until 1992).

The current constitution does say that constituencies ought in principle to be equal in size but in fact they have been very unequal. In 1997 there were under 4000 voters in Mandera West and 113,848 in Embakasi. This means that voters in very large constituencies are very under-represented in comparison with those in constituencies with few voters. It also tends to mean that the number of seats each party wins will not reflect accurately their support in the country.

Now there are about 40 million Kenyans, so if the size of constituencies was entirely equal, each would have about 138,000 people. So an urban constituency could have up to 193,000 residents, and a rural one as few as 83,000.

Comments

Parliament has to pass a new law about the special 12 seats for youth, persons with disability and workers in the National Assembly. There is no date for this but it must be done before the first elections after the constitution is adopted. Deciding on this law may be quite difficult. Similarly allocating the seats in counties to ensure that there are at least one-third women may also be quite complex. If you are really keen to see how the county provision would work – see the box above.

On how well this works for women see “Gender”

The Proposed Constitution leaves very little possibility for changing the electoral system. If any elements do not work well (the single member constituencies, the lists of women etc.) a change would require a constitutional amendment. Particularly this means that it would be very hard to implement a system of proportional representation (even though such systems are well-known to make it easier to elect women and members of minorities). So though Parliament must pass a law to encourage the representation of women and marginalized groups, they could not do so by changing the electoral system. There is not much scope for change when you have single member constituencies.

Do you think elections under the Proposed Constitution will be more better than under the current constitution? You might like to note any particular points on the lines below:

Are there points that worry you in connection with elections under the Proposed Constitution? You might like to note any particular points on the lines below:

Overall: do you think that the Proposed Constitution is better or worse in relation to elections than the current constitution? (you can note your conclusion by ticking one of the boxes):

Much better	Better	Much the same	Worse	Much worse

Honesty, competence and responsibility

Honesty, competence and responsibility are perhaps the key characteristics that any people would want of their governments and public servants. They are closely connected: if decisions are made corruptly, competence and a sense of responsibility do not mean much.

Corruption and selfishness have become hallmarks of Kenyan public life. A desire for a new beginning in this respect has been one of the drivers of the constitutional process. A constitution can do only a limited amount, and a culture of public service and honesty will develop from society rather than from a document. But the values of the PC, its criteria for appointments and the institutions and procedures it creates may contribute to the development of such a culture.

What does the Proposed Constitution recommend?

The Proposed Constitution sets out very clearly the values of honesty, competence, and responsibility in public life, including the statement that public office confers the responsibility to serve rather than the power to rule (Art. 73) (1)). And it lays down the general principle that holders of a state office must not permit their personal interests to conflict with their public duties (Art. 73) (2); Art. 75) (1)) In fact it specifies in some detail some ways in which personal interest may conflict with public duty, such as that a gift on an official occasion must not be retained by an individual, and that a person holding a full time state office must not at the same time be otherwise employed (Art. 76(1)); Art. 77 (1)).

There are a number of provisions designed to prevent public officers from enriching themselves personally, and money going into the wrong hands, or being generally used improperly. The Controller of Budget is a new office. The responsibility of the office is to certify before payments are made from the public purse that they are being made for an approved purpose (Art. 228), as well as the Auditor General who audits public accounts retrospectively (Art. 229. Strengthening of control over land, is

intended to prevent land grabbing (Chap. 5). And a system of procurement of goods and services for public use that is fair and excludes those with a record of non-performance or corruption from the process (Art. 227) is also a preventive measure.

Another new institution is the Salaries and Remuneration Commission, which would set and review salaries and benefits of all state officers – which means that MPs will no longer fix their own salaries (Art.230). And any law passed by Parliament that benefits members of parliament as such (not just because they are also members of the public) could not come into effect until after the following general election (Art. 116(3)) – so that the voters have the chance to throw out the MPs who have benefited themselves in this way before they have reaped the benefit.

There are a number of provisions to see that the rules in the constitution are enforced. One is the creation of an independent ethics and anti-corruption commission (Art. 79). It also reinforces the principles by providing that violations attract disciplinary action: state officers who are found guilty of serious misconduct will be removed from office (Art. 75), and any person who is removed from state office for this reason cannot hold any state office in future (Art. 75(2) and (3)).

Impunity has been a serious concern: the ability of those who are suspected of wrong doing to escape the consequences (see below). The Proposed Constitution tried to tackle this problem by providing for an independent prosecution system, taking away from the Attorney-General the ability to stop prosecutions, and providing that any application to withdraw a public prosecution must be approved by the court (Art. 157). Strengthening the independence of the judiciary, and creating a new court, the Supreme Court, to give leadership to the entire judiciary (Art. 163) are also relevant to this issue of impunity (see “Courts”).

An important tool in the hands of the public and the press to detect corruption and mismanagement is the right to information and a duty on the state to make public matters that are of public importance (Art. 35) (see “Participation”).

How is this different from the current constitution?

Like most constitutions of its era, the current constitution assumes that honesty and competence are generally to be assured either by the political process (especially by the votes of the people), by the ordinary processes of the law, and by appointments processes that identify appropriate employees. A few posts have specified qualifications (judges for example). A few appointments processes are supposed to be independent of improper influence (again judges, but see section on courts). Kenyans are all too aware that these assumptions have proved unfounded.

The prosecution system has been particularly defective. It is clear that the relationship between Attorneys General and successive governments has been unhealthily close. There has been a Deputy Public Prosecutor but not in the constitution, who is subject to directions of the AG. The AG has been able to stop prosecutions by use of the old remedy of *nolle prosequi*, originally developed to prevent abuse of prosecutions by private citizens when prosecutions were not a public matter. In Kenya as in other countries this process has been grossly abused to protect the wealthy and the powerful. The courts have also played their part in ensuring that justice is not done (see section on the courts).

Some changes in laws followed or were simultaneous with the Bomas process. The Public Procurement and Disposal Act, 2005, introduced the Public Procurement Oversight Authority and a process that reflected Bomas. The Public Officers Ethics

Act passed in May 2003 introduced the requirements of codes of practice and the system of regular – though not public – declaration of assets by office holders. But if these things are not in the constitution they can be repealed. And though procurement is, declaration of assets is not!

Comments

The Proposed Constitution contains provisions that are an improvement on the current constitution and could be used by the media and the people to ensure accountability, and consequently improvement in the honest, competence and sense of responsibility of those elected or appointed to serve them. Some of the provisions that were there in earlier drafts disappeared at various stages; notably there is no longer any constitutional obligation for state officers (including MPs, Cabinet Secretaries etc) to declare their assets. It was in the Harmonized Draft but was removed by the PSC and not reinstated by the Committee of Experts.

Perhaps this is the area in the constitution in which it is most important to avoid rose-tinted spectacles! We have only to remember that Nigeria has had provisions about corruption in its constitution for some time, or that the public procurement process in Kenya has had a bad press, and the declaration of assets provisions and a wide array of codes of practice have produced no discernible improvement. And most constitutions have some system of public audit, and valiant Auditors General repeatedly report to their Parliaments on the financial failures of public officers and servants to very little effect.

Rules and processes are not alone the answer. But reliance on moral standards is equally ineffective. Kenyans were diverted by the spectacle of British MPs being found out making excessive (though not necessarily illegal) expenses claims, and repaying the excess, in some cases indicating they would not stand for re-election, and some who stood again being defeated – and some being prosecuted. This sequence of events depended upon the legal procedure of careful declaration of the details of expenses (though the office that oversaw it fell down on the job), the right to information law, press able and interested in using the information law and pursuing the topic relentlessly and in detail, parties that cared about the damage to their reputations, and voters who care about waste of their money, as well as a prosecution system that does not spare the elite.

Do you think that the provisions of Proposed Constitution will be more likely to curb corruption and ensure competence than the current constitution? You might like to note any particular points on the lines below:

Are there points that worry you in connection with honesty and competence under the Proposed Constitution? You might like to note any particular points on the lines below:

Overall: do you think that the Proposed Constitution is better or worse in relation to honesty and competence than the current constitution? (you can note your conclusion by ticking one of the boxes):

Much better	Better	Much the same	Worse	Much worse

Land

Land is important for the economy, politics, livelihood, culture, and development of the people. Land policies have been the single most important factor in the shaping Kenya's history and caused many problems, including

- under colonialism, many communities were dispossessed of their land
- since independence, much land has been taken over illegally by a few families and individuals, much of it uncultivated
- many families have no land or such small parcels that they cannot sustain even subsistence
- thousands of families have been displaced from their homes and farms, often victims of politics
- many people live in informal settlements, without legal title
- land rights of many others are disregarded or under threat, particularly minorities like the Nubians, forest dwellers and pastoralists
- laws on land are voluminous, complicated and unfair, and open to abuse
- land administration is highly centralised, grossly inefficient and corrupt
- the quality of land has deteriorated and the environment been degraded.

Fundamental reform of land legislation is necessary to solve these problems. Chapter 5 of the Proposed Constitution sets out the principles and framework for reform. Government and Parliament will have considerable discretion in implementing them, and, on what some people have described as contentious issues, details will no doubt involve further negotiations in and outside Parliament.

Principles of land policy

There are seven major policies (Art. 60), aiming at

- equitable access to land
- security of land rights;
- sustainable and productive management of land resources
- transparent and cost effective administration
- sound conservation and protection of ecologically sensitive areas
- elimination of gender discrimination in law, customs and practices related to land and property in land; and

- the settlement of land disputes through recognised and fair local community initiatives.

More specifically, Parliament will have to protect, and provide access to, public land, and to prescribe minimum and maximum land holding acreage in respect of private land. It will have to ensure that all grants of public land are reviewed for their propriety or legality (presumably including past transactions and presumably providing for their invalidation or other means of redress) (Art. 68).

Categories of land ownership

Land is divided into three categories: public, community and private, under the fundamental principle that “All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals” (all freehold owned by non-citizens will be converted to 99 year lease, and all their leases, if now longer, will be reduced to 99 years Art. 65)). Public and private categories correspond largely to the system today. Public land is land held by a state institution, land designated as such by the constitution itself (such as rivers, lakes, specified roads, and the continental shelf) or by legislation, for public good.

A county government will hold (presumably within its territory) various kinds of land, including land not in private or community ownership, land which returns to the state, and land held or occupied by any state organ, giving it a considerable stake.

The land held by the national government includes government forests other than community forests, government game reserves, national parks, water catchment areas, water bodies, and specified roads. All minerals and mineral oils also belong to it.

Community land

Community land is a new category. The largest component of community land will be what is today designated as “trust land” and is vested in county councils (Art. 63). The concept of “trust land” was established shortly before independence, covering land which was still governed by customary tenure or under the Land Group Representatives Act. It was vested in the county council, for the benefit of persons ordinarily resident on that land, and to be governed by community law. However, it was possible for the council to convert trust land to another tenure or set it aside for other use, for the benefit of the community. The President also could set aside trust land for similar purpose.

The effect was that the community control over its land passed effectively to counties or the central government (and some customary rights were disregarded). There was widespread abuse of the law, much land being disposed of illegally by county councils. Land that was part of group ranches was disposed of by group representatives, in many cases without consulting the other members.

The objective of the Proposed Constitution is to return ownership and control of trust land to the relevant communities. Thus far from transferring control to the national government, as some critics have said, the law will pass control to the communities, in accordance with their traditional rules. However, the transition to community control will take time, as communities entitled to land are identified and the multiple interests of all land users are taken into account.

The conversion to community land can solve some pressing land issues. It could be used to restore ancestral land and land traditionally occupied by communities such as the Ogiek and coastal communities, and cover communally managed forests and

grazing areas. Land disputes could be resolved through traditional methods. Combined with the mandate of the Land Commission to investigate present or past land illegal transactions, injustices, the recovered land could well become community land. Community land cannot be disposed of or used without regard to the rights of members of the community.

Private land

Essentially, private land is land which is neither public nor community. It is held or managed under statutory tenure.

Regulation of land

The state would have wide powers to regulate the use of land for public purposes, including public health and land use planning, and a mandate to ensure that investment in property benefit local communities and their economies (Art. 66).

In the interests of fairness and economic development, the law has to prescribe the minimum and maximum size of land holding (Art. 68). .

To strengthen the regulatory framework, an independent National Land Commission is to be established. Its functions include the management of public land on behalf of the national and county governments, to ensure efficiency and integrity. It has important advisory functions and other administrative responsibilities, and general oversight of land use planning. Given the distribution of responsibility over land between the national and county governments, it will have to play a key co-ordinating role. (Art. 67)

Rights of special groups

The Proposed Constitution specifically recognises the rights of people who have occupied land in good faith and legally but without title (as is not uncommon) by providing that they must be compensated if their land is acquired compulsorily (Art, 40(4)).

It also protects the legitimate interests of marginalised communities, like Nubians, forest people and pastoralists, as mentioned above. Equitable access for all to land is to be ensured.

Women are special beneficiaries of the Proposed Constitution (See “Gender”). There entitlements are of particular significance to women who have suffered from massive discrimination and consequently much suffering.

Redressing historic injustices

In keeping with the general objectives of the Proposed Constitution, this chapter addresses the question of historic injustices regarding land. Some communities (especially the Masai and the coastal people) were deprived of their ancestral lands, first by colonialists and then by well placed families and individuals. Land was taken over illegally by leading politicians and civil servants (and granted to their friends). These developments have caused bitterness among communities, loss of critical economic resources to families and communities, brought poverty to thousands of people—and led to the consolidation of the ruling class.

It is widely acknowledged that without the redress of these injustices, Kenya will not truly reconcile communities or bring a sense of fair dealing and integrity in public life. Nothing has been done to redress past (and continuing) acts of illegality, despite

Careful enquiries. The current law, which provides legal protection even for illegally acquired land, has to be reformed to enable proper redress.

It is important that the law should ensure that these illegal acquisitions are not allowed henceforth. The legal authority of the President to grant land without any control or accountability must be removed (which is not expressly provided in the Proposed Constitution).

Environment and natural resources

Land is closely connected to natural resources and the environment. The Proposed Constitution requires the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and the equitable sharing of the benefits (Art. 69). Parliament has to approve all agreements for the exploitation of any natural resources, which includes land (Art. 71). If this provision had been in place when the President was negotiating the transfer of land to Qatar along the Tana River, about whose terms Kenyans have little knowledge, a deal from which Kenyans stand to gain little and lose much, would have at least been subjected to a searching scrutiny before the deal was done.

Myths and misunderstandings about the land provisions

There have been some misunderstandings, sometimes misrepresentations, causing unnecessary fears.

There is no reason to suppose that setting minimum sizes of land holdings will mean people will lose their land. In fact – there is already law designed to prevent the fragmentation of agricultural land (the Land Control Act, regulation under which say that no transaction may be approved if it will mean land being divided into separate plots smaller than one hectare).

The National Land Commission will manage land for the communities – it will not own the land, and it cannot take away the land; the intention is to protect land for the communities

Summing up

Land undoubtedly evokes strong emotions among Kenyans. It is therefore entirely appropriate that the new constitution should respond to the demands and proposals of Kenyans. The framework of principles and procedures has the potential to resolve many, complex problems. But it will not be easy, as most of them require further action by the government and the legislature, many of whose members are likely to have been beneficiaries of this legacy.

Implementation may face additional problems from somewhat poor conceptualisation and drafting. Some provisions seem to go beyond what is necessary to achieve the policies, others are ambiguous, while some lack firm and robust language to provide adequate authority for the necessary action. So public pressure on the government for the fulfilment of the promise of Chapter 5 must continue.

Do you think that the Proposed Constitution will be better than the current constitution in connection with land? You might like to note any particular points on the lines below:

Are there points that worry you in connection with land under the Proposed Constitution? You might like to note any particular points on the lines below:

Overall: do you think that the Proposed Constitution is better or worse in relation to land than the current constitution? (you can note your conclusion by ticking one of the boxes):

Much better	Better	Much the same	Worse	Much worse
☐	☐	☐	☐	☐

The “new model” presidency

One of the reasons that Kenyans wanted a new constitution was to move away from the “imperial Presidency” – under which a lot of power was given to one person. Somewhat surprisingly, the PSC decided to change the proposal of the CoE (based on Bomas) which was for basically a parliamentary system, to a presidential system. The model they chose was the US system.

Americans talk a lot about the “checks and balances” in their system– meaning devices that prevent any one person or institution (including the President) abusing their office. These are mainly:

- The President cannot control Congress in the same way as a head of government in a parliamentary system (or the current Kenyan system) can, so he has to rely on persuasion, and negotiation and cannot abuse his powers
- Government expenditure has to have Congress approval
- Laws must be passed by Congress and signed into law by the President
- The Senate has to approve many presidential appointments – so the candidates are scrutinised to ensure that they are the best qualified and suitable people
- The President can be removed for serious misconduct by the process of impeachment.

The Proposed Constitution is designed to work in a similar way. A main concern for us must be whether there are sufficient of these checks and balances in the Proposed Constitution to ensure that the President acts in the best interests of the nation.

The Proposed Constitution

Under the Proposed Constitution the President would be directly elected by the people (as now), but with a requirement that the person elected must receive over half of the votes cast. If this does not happen on the first round, the top two candidates must go forward to a second election – and the one who gets the highest number of votes wins. There is another requirement for a person to win on the first ballot – he or she must get the support of at least 25% of the voters in at least half the counties (at least 24 counties) (Arts. 136 and 138)

The President would be both the head of state (with certain formal and even ceremonial functions – Art. 132)) and also the head of government – and there would be no Prime Minister. The President would not be a member of Parliament. But the President would be elected at the same time as Parliament is elected – which means that probably there will be a good number of MPs who support the President.

Not only would the President not be an MP, but the Ministers (Cabinet Secretaries) also would not be. This would mean that the President could not both get the support of individuals by making individuals Ministers and rely on their support in Parliament (Art. 152(3)). And the President could not dissolve Parliament prematurely – thus removing one “hold” the President has now over the MPs.

The President could be removed from office by the process of “impeachment” which requires the National Assembly to propose (by a two-thirds majority) to the Senate that the behaviour of the President be investigated. The Senate must then set up a committee, and if the committee reports that allegations against the President of serious misconduct are justified) the Senate may vote (by two-thirds majority) to remove the President from office (Art. 145)

The President, as now, could not hold office for more than two terms, of 5 years each (Art. 142). The Deputy President would be a “running mate” of the President in the election – not someone who, as now, can be changed at will.

Many appointments that the President can make now (including of Ministers and ambassadors) will need the approval of the National Assembly (see also “Parliament”).

How will the system actually work?

It is not easy to answer this question. Though the proposed system is very similar to the American system, local traditions and expectations, party systems and other factors will affect how it all works here. It will certainly be a “Kenyan way”.

The relationship between the President and Parliament will be very different in this system from the way it is now. The President cannot rely on the support of MPs as he usually has been able to in the past, as we have seen earlier.

The President would therefore have to negotiate with Parliament to get his or her policies accepted and laws passed, as well as appointments approved. Kenyans who watched how President Obama had to persuade US Senators to accept his health care bill will have some understanding of how this might work. Unfortunately there has been a practice in Kenya of MPs expecting to be paid for their votes. This is illegal, indeed a crime, (under the National Assembly (Powers and Privileges) Act) and would be clearly unconstitutional under Article 122 of the Proposed Constitution. Can vigilance on the part of Kenyans stop it?

We should note that many Americans are not happy with their system. President Obama has had a hard time getting appointments approved by the Senate. And it was very hard for him to get his health care legislation through Congress – even though it was a central plank of his election platform. And impeachment is hardly a realistic possibility: it would be only in the most extreme case that two-thirds of the Senate would vote in favour of removing the President.

The potential for deadlock was shown in Nigeria soon after they adopted a US-type system. As a result of political manoeuvring one state Governor was of a different party from the majority of his legislature. The legislature refused to approve any of his appointments, so that he did not even have a Cabinet, and government in the state was paralysed until the legislature succeeded in removing the Governor by the impeachment process.

There are many uncertainties, including:

- Will ambitious and good politicians be prepared to stand for Parliament?
- Will Presidents take advantage of their freedom to appoint non-politicians as Cabinet Secretaries, or will they continue to appoint from the ranks of MPs (who will then have to resign as MPs) and other established political figures?
- Will Presidents have the skills to negotiate with Parliament?
- What will happen if the President does not have strong party support in Parliament? Will the MPs in other parties use their powers in good faith or will they focus on removing the government?

Many Kenyans hope for change in the future, including new faces in politics. In theory the new system would make it possible for a new person to be elected as President even without a strong party machine to back him or her. But it might be very difficult for such a person to be a successful President once elected if few MPs supporting the President were elected.

We also have to realise that adjusting to a new system will take time. But this raises another issue: it seems that one cause of the 2008 post-election violence was that all power under the existing constitution was in the hands of one person; people were prepared to do terrible things to get their hands on that one prize. Is there a risk that the new Constitution offers no improvement in that respect?

From the following Table we can see that, while the current constitution does little to restrain the powers of the President, the Proposed Constitution is designed to produce a President whose powers would be somewhat limited, especially because the President would have significantly less say in appointments.

Under the current Constitution the President:	Would this change under the Proposed Constitution?
Is the Head of State	Remains the same
Is the Head of Government	Remains the same
Chairs the Cabinet	Remains the same
Appoints the members of the Cabinet and may dismiss them	Appoints the members of the Cabinet <u>with the approval of the National</u>

	<u>Assembly</u> and may dismiss them
Appoints the Vice-President and may dismiss him/her	When standing for election must have a running mate who will become Deputy President if the Presidential candidate is elected; cannot dismiss Deputy President
Appoints Permanent Secretaries	Appoints Permanent Secretaries <u>with the approval of the National Assembly</u>
Appoints and removes members of the Advisory Committee on the Prerogative of Mercy	Does not have these powers
Appoints the members of the Electoral Commission	Will formally appoint the members of the Electoral Commission, but these must be approved by the National Assembly, and a law is to prescribe how nominations are to be made (which will probably not give any choice to the President)
	Appoints the Chair of the Commission on Revenue Allocation (who must be approved by the National Assembly)
	Appoints the Chair of the Salaries and Remuneration Commission
Appoints the Chief Justice	Must appoint the person nominated by the Judicial Service Commission (JSC) provided that person is approved by the National Assembly
Appoints (from among the judiciary) the only 2 members of the Judicial Service Commission who are not ex officio	Appoints two of the 11 members of the JSC, and these must be approved by the National Assembly
Appoints the Attorney General	Appoints the Attorney General <u>but the appointment must be approved by the National Assembly</u>
Appoints the members of any tribunal to consider the removal of a member of the ECK	Remains the same
Appoints the Controller and Auditor General	Appoints the Auditor General (<u>who must be approved by the National Assembly</u>)
	Appoints the Controller of Budget (who must be approved by the National Assembly)
Appoints the Public Service Commission	Appoints the Public Service Commission <u>with the approval of the National Assembly</u>
Appoints the Commissioner of Police	Appoints the Inspector-General of Police

	<u>with the approval of the National Assembly</u>
	Appoints 6 of the 9 members of the National Police Service Commission but it seems a law is to prescribe how nominations are to be made (which may not give any choice to the President)
Appoints ambassadors	Appoints ambassadors <u>with the approval of the National Assembly</u>
If no specific provision exists has the power to create offices and appoint to them and dismiss the appointees	This power is to be that of the Public Service Commission
Appoints tribunals to look into the question of removal of various commissions, the Attorney General, and the Controller and Auditor General, and decides whether individuals should be suspended pending inquiry	Appoints tribunals to look into the question of removal of various commissions, the Attorney General, and the Controller and Auditor General, and decides whether individuals should be suspended pending inquiry
Decides when and where Parliament sits	Decides only the date of the first sitting of each House after a general election
Can dissolve Parliament	Cannot dissolve Parliament
Nominates 12 members of the National Assembly	Cannot nominate any members of the National Assembly
Signs Bills passed by the National Assembly or may send them back giving reasons; if Parliament passes the Bill again by two-thirds, must sign it	Remains the same except that if the President fails to sign a law within a time limit it automatically comes into force
May pardon offenders, reduce or remit punishments imposed on someone convicted	May carry out these functions only acting in accordance with the advice of the Advisory Committee
May allow a person disqualified by an election court to vote or stand for election	Has no such power
May decide that an MP does not lose his seat even though he failed to attend Parliament	Has no such power
Not mentioned – presumably is a power of the President	Declares war with approval of the National Assembly
May bring into effect Part III of the Preservation of Public Security Act (declare a state of emergency) (lapses if Parliament does not approve within 28 days).	Declares a state of emergency which lapses if Parliament does not approve within 14 days. Is possible to challenge state of emergency in court and the court could declare it improper.
Appoints the chair of a tribunal to	No such tribunal is mentioned

consider case of persons detained or whose movement is restricted	
Is Commander in Chief of the Armed Forces	Remains the same – but the “Principles of national security” in Art. 238 are clear that this is subject to the authority of the constitution and Parliament
This body was in the 1963 Constitution but not in the current constitution, but it continues to exist, and is chaired by the President	Chairs the National Security Council

It is not only the Constitution that spells out presidential powers. Here is a list of presidential powers under other laws (not a complete list), with a note of whether they will still exist under the Proposed Constitution:

Under existing laws	Will the power be affected by the Proposed Constitution?
Under the Preservation of Public Security Act the President makes regulations for the preservation of public security.	Power remains – but must comply with human rights obligations
Under the Pensions Act, among other powers, the President may require public officers over a certain age or years of service to retire (s. 9) decides if a person receiving a pension and who has been convicted of a criminal offence should cease to receive the pension (s. 15) is the final authority to decide any matter arising under the Act	Nothing explicit to change this – though possibly unfair treatment could be challenged under the human rights provisions.
Under the Armed Forces Act, among other powers, the President is responsible for the organization and command of the armed forces (s. 3) appoints officers to be Chief of General Staff and commanders of each service of the armed forces (s. 5) may terminate the commission of any officer above the rank of major (s. 171)	Remains the same
Under the Commissions of Inquiry Act the President appoints commissions of inquiry to investigate any matter the President believes is in the public interest	Remains the same
Under the Land Titles Act, the President appoints the Principal Registrar of Land Titles (s.	Remains the same

56)	
Under the Land Control Act, the President has various powers including to exempt any transaction from the effect of the Act (s. 24)	Some of these powers would be affected by the National Land Policy already adopted and by the Proposed Constitution
The President is the Chancellor of the public Universities, unless he appoints someone else	Remains the same
Under the Government Lands Act (s. 3), among other powers, the President may make grants of Government land (except for cases where the power has been delegated to the Lands Commissioner)	This power would be inconsistent with the National Land Policy and the Proposed Constitution
Under the State Corporations Act (s. 3) the President may establish a state corporation and assign responsibility for it to the Vice-President or other Minister	Remains the same
Under the Central Bank Act (s. 11) the President appoints the Board of the Central Bank; and dismisses the Governor or the Deputy Governor in certain situations	Remains the same
Under the National Security Intelligence Services the President appoints the Director-General of the Service (s. 6) and appoints the Complaints Commission on the advice of the Judicial Service Commission (s. 25)	Remains the same
Under the Prisons Act (s. 48) the President appoints a Board of Review, to review the sentences of all prisoners serving sentences of or exceeding seven years and advise the President on the exercise of the prerogative of mercy.	May be overridden by Art. 133 of the Proposed Constitution setting up a committee on the power of mercy the advice of which the President must follow
Under the Police Act (s. 3) the President decides the size of the Kenya Police Force	Probably remains the same
Under the National Assembly Remuneration Act (s. 3) the President decides on the gratuity of the Speaker, Vice-President and Ministers	This power goes to the Salaries and Remuneration Commission under Art. 230 of the Proposed Constitution.

In conclusion we can say that the Proposed Constitution retains a powerful presidency, but that many of the specific powers are to be exercised on the advice of – or with the approval of – some other body. And precisely how the new structure of government will work, and affect the powers of the President, remains to be seen.

Do you think that the position and powers of the President under the Proposed Constitution are better than under the current constitution? You might like to note any particular points on the lines below:

Are there points that worry you in connection with the Presidency democracy under the Proposed Constitution? You might like to note any particular points on the lines below:

Overall: do you think that the Proposed Constitution is better or worse in relation to the Presidency than the current constitution? (you can note your conclusion by ticking one of the boxes):

Much better	Better	Much the same	Worse	Much worse
☐	☐	☐	☐	☐

Parliament

Parliament plays a central role in democracy: as form of representation, in some system choosing or approving the government, responding to people's preferences, particularly in law making, holding government accountable, custody and control of state finances and resources.

Kenyans have rather ambivalent views about their parliamentarians. On one hand they are often seen as greedy, and uninterested in their constituents except at election time, and lazy – having long breaks, and even failing to turn up for debates so that Parliament often has to be adjourned.

On the other hand, people have argued for more MPs – so that they can have better representation. This may be partly connected with the Constituency Development Fund. And people also generally welcome signs that MPs take their work seriously – as when committees carry out serious investigations into scandals.

Various drafts have tried to meet these concerns by both strengthening the ability of parliament to take an active role in decision making and in holding government

accountable and also by provisions designed to make parliamentarians more accountable, and parliament more open.

The proposals: the powers of Parliament

A different relationship will exist under the Proposed Constitution between Parliament and the government. Now Ministers must be members of Parliament. Under the Proposed Constitution the Cabinet Secretaries (as Ministers would be renamed) could not be members of parliament (Art 152); if appointed they would have to resign as MPs (see below for a comment on this).

Parliament would have to approve the appointment of Cabinet Secretaries, and the National Assembly would have the power to require that the President remove a Cabinet Secretary, on grounds of misconduct (after an inquiry by a select committee of the Assembly) (Art. 152(6)-(10), not loss of political support.

A potentially important new role of Parliament is the removal of the President by the process of impeachment (but see section on Presidency on the likely effectiveness of this). A vote of no confidence to remove the President (which under the current constitution needs only a simple majority vote in the National Assembly) would no longer be possible.

The Proposed Constitution proposes fixed dates for elections so Parliament could not be dissolved before its 5 year term ends (Art. 101)—unlike the current constitution, where the President can dissolve Parliament at any time. And if Parliament now passes a vote of no confidence in the President, and the President does not resign, Parliament would be dissolved – a serious disincentive for any vote of no confidence!

The main function of Parliament is to make law. The Proposed Constitution permits individual members or committees to introduce legislation (except Bills about public money) (Art. 109(5)). When Parliament has passed a Bill and the President does not want it to pass, Parliament can insist (but, to achieve this, the Bill must be passed by a two thirds majority). This is the situation under the current constitution, too – but it would become more important under the presidential system where the President's hold over Parliament is likely to be less (see section on Presidency). The Proposed Constitution proposes that if the President does not sign or send back a Bill within a time limit, it automatically becomes law (Art. 115) – so the President could not just sit on bills for some time without doing anything, as has happened in the past

Many other appointments must approved by the National Assembly, under the Proposed Constitution, including ambassadors, judges, the Attorney-General, the Director of Public Prosecutions, the Controller of Budget, Auditor-General, commissioners of independent commissions (like the Election Commission and the Human Rights Commission).

Among other acts and decisions that must have the approval of the National Assembly, are any declaration of war, and a declaration of a state of emergency (after the first 14 days) (Art. 95(6)). (When there is a state of emergency the government has some extra powers, including a limited power to infringe on human rights). The current constitution does not mention either of these matters, though there is an Act of Parliament that involves Parliament after 20 days. The independence constitution actually gave Parliament more power over this issue than even the Proposed Constitution.

Parliament and its committees have the power to require any person (which includes any public office holder) to give evidence to it/them (Art.125). Parliament now has this power only under an ordinary Act of Parliament.

The proposals: openness and accountability of Parliament

A proposal in the Proposed Constitution is that voters would, eventually, have the power to remove (recall) members of either house (Art 104); the current constitution does not say anything about recall of members (it is discussed below). Members of the National Assembly could lose their seats if they miss any 8 sittings of the house during any session (Art. 103 (1) (b)) The existing constitution says that they can lose their seats if they miss 8 consecutive sittings; now missing any 8 sittings in a parliamentary year is enough (again we discuss this a bit more below).

Other ways in which Parliament is to be more accountable and open are:

- Parliament must sit in public unless there is an exceptional reason (Art. 118)
- Parliament must encourage public participation in its work (Art. 118)
- Parliamentarians will not fix their own salaries (this will be done by the Salaries and Remuneration Commission – Art. 230) and if salary revision needs a change in the law it will not come into force until after the next election, like any other law that specifically benefits parliamentarians (Art. 116(3)).

The proposals: Senate

Under the Proposed Constitution there will be two houses of Parliament: the National Assembly and the new one -the Senate - that will represent the interests of the regions and counties.

All laws, taxation and expenditure must be approved by the National Assembly (Art. 95), while any law that concerns the counties must also be approved by the Senate (Art. 96). If the National Assembly and the Senate disagree on any proposed law concerning counties, a mediation committee is to be set up to try to resolve the differences (Art. 113) In the case of a law affecting the interests of the counties as such, each county has one vote (and the “regular” member elected for each county must consult any other members for that county before voting) (Art. 123).

The Senate has the primary role in approving the way in which national revenue allocated to counties is shared between them. A resolution of the Senate on this topic can be changed or rejected only by two-thirds of the National Assembly (Art. 217) (see also Devolution and Local Government).

Finally, the Senate would have an important role if the State President was impeached (that is the process for removing the President – see the section on Presidency)

Some comments

Here we discuss a few other issues about Parliament in a bit more detail.

Parliament without Ministers

At present there is a sense that MPs focus far too much on their prospects of becoming Ministers. And if they are Ministers they are very busy (or ought to be very busy) as Ministers, and have little time to appear in Parliament. Under the Proposed

Constitution, a person could not be both a Cabinet Secretary and a member of Parliament. Hopefully MPs will think of this as a career, and work hard for their constituents and for the country so that they can be re-elected, and build a reputation as a good lawmaker. If the members focus on their parliamentary role, they can make the body an effective way of supervising government. The people too will have to realise that the role of an MP is more than delivering CDF and bribing them to vote.

One device under the current Constitution has probably gone with the switch to a system inspired by the US. Ministers will no longer be expected to come to Parliament and answer questions at “question time”. That is not a feature of the US system – Cabinet Secretaries there only appear before congressional committees, on rather formal and structured occasions, and involving major investigations. Interestingly various groups have campaigned for the introduction of question time in the US. It was perhaps a failure of imagination that no-one seems to have thought to introduce something like that in the Proposed Constitution, even though there are various constitutions with presidential systems where Ministers are required to appear to answer questions. The switch from parliamentary to presidential was so swift in the drafting process that perhaps no-one thought of it.

MPs losing their seats

Even under the current constitution MPs can lose their seats for failure to attend. In 2009 the National Assembly had 112 “sittings”, so missing eight would not be a very large proportion. But if the Speaker is generous in giving permission, or the relevant committee (made up of other MPs) is lax, this will come to nothing.

Under the current constitution, and under the Proposed Constitution, MPs who change party, or independent MPs who join parties, lose their seats. This has been ineffective in the past. Now that support in the National Assembly will not determine who forms the government it will be less important.

Recall

Voters are supposed to be able to recall their MPs. This is something that many people have wanted in the constitution. However, a new law will have to be passed by Parliament. Presumably MPs will not be enthusiastic about the idea and may well pass a law that makes it very difficult to recall them.

Recall is possible in various countries, including various US states and Canadian provinces. It is also under serious discussion in the UK. Recall procedures have often been ineffective because of the difficulty in getting enough signatures, however, requiring too few opens the possibility of abuse. There are risks in such a system – especially of abuse for personal reasons, or to cause confusion. The law to be passed will have to decide also whether removal is to be possible because of loss of political support or only because of misconduct. And it may be necessary to restrict the use of the procedure for a period after an election, and before the next election. The CKRC draft suggested a balance between the danger of abuse of the process and the worthwhile motivations behind it (which may provide assistance in the drafting of the legislation).

Parliamentary approval of appointments

The idea of requiring the National Assembly (or the Senate) to approve government appointments is not in the existing constitution, though since the Grand Coalition

agreement parliamentary approval or even parliamentary appointments have become quite common.

Requiring appointments to be approved by Parliament (which usually means the National Assembly in the Proposed Constitution) is based on the US system where the Senate has to approve many appointments. The US Senate has equal representation from each state, indirectly elected. Its members hold office for longer, must satisfy a higher minimum age requirement, and were expected to offer stability and experience and to counteract the inexperience and populism of the other house. Parties in the modern sense were not known when the US constitution was drafted in 1793, and anyway the different electoral cycles of the two houses often mean that their philosophies differ. Won't the Kenyan National Assembly be very different from the US Senate?

Moreover, in 1793, independent commissions charged with appointing judges did not exist. It seems perverse to set up an independent mechanism for appointing judges only to allow the highly political parliament to reject its choice; but the Proposed Constitution does that.

A number of countries do have parliamentary scrutiny of some appointments, including Nigeria and South Africa. There is some experience in Canada. The UK has recently introduced on a trial basis parliamentary committee hearings, in public, on appointees to various public positions – not including judges and ambassadors, permanent secretaries or heads of services.

The US system has been criticised: it delays appointments, so that the US has sometimes been without an ambassador in a country for over a year; the process can be very intrusive into the private lives of nominees; it is often evaded by Presidents who make appointments in Senate vacation time. The process can become highly politicized, even in the US.

In Ghana there have been comments that instead of MPs being able to exercise their individual judgment, the party whip is used. In another country, although members of a committee scrutinizing a senior judicial appointment said they could not approve an individual because he was corrupt, in the end party deal-making triumphed over scruple.

Providing for parliamentary approval is probably better than the existing system. But will it prove to be slow, dominated by party or personal politics? And if the President has majority support in the National Assembly, will it prove any check at all on abuse?

Majority and Minority leaders in the National Assembly

This is an idea imported from the US system. In the Proposed Constitution there is no mention (found in some earlier drafts) of the Leader of the Opposition. That office is associated with parliamentary cabinet system, and often the Leader of the Opposition is seen as the prime minister in waiting and appoints the Shadow Cabinet who would not only take office if the prime minister is voted out of office, but until then has the obligation to track, scrutinise and criticise the government.

Because it was establishing a presidential system, the CoE (following the decisions of the Select Committee) proposed the offices of. Majority Leader and Minority Leader in Parliament (it is not clear that there will be such leaders in both Houses). The US system developed from US circumstances. The Majority and Minority Leaders are

elected by the largest and the second largest party in each house. The House of Representatives majority leader's website explains that the majority leader's responsibilities include the scheduling of work session in the relevant house and "to consult with members to gauge attitudes and prevailing sentiment on the issues of the day, urge party colleagues to support or defeat a particular piece of legislation and communicate the party's overarching policy messages to the media and public at large." How these roles will develop in the Kenyan context will depend on local conditions (no role is specified for the Leaders), and it is not clear why they were even included in the draft constitution.

Do you think that the powers and effectiveness of Parliament under the Proposed Constitution will be more greater than under the current constitution? You might like to note any particular points on the lines below:

Are there points that worry you in connection with Parliament under the Proposed Constitution? You might like to note any particular points on the lines below:

Overall: do you think that the Proposed Constitution is better or worse in relation to Parliament than the current constitution? (you can note your conclusion by ticking one of the boxes):

Much better	Better	Much the same	Worse	Much worse
☐	☐	☐	☐	☐

Courts

Most citizens probably never have any involvement with the courts. But the courts are a vital part of the machinery to enforce the constitution – and the rights of people generally. The rulings they make on the constitution and the law should be followed by everyone in a similar position. So a court case that involves only a few people can still have a major impact on the rights of people generally. To perform these functions properly, judges need to have independence, guarantees of non-interference by the government and other groups, as well as independence of mind.

The Kenyan courts have been a major disappointment to Kenyans. Part of the underlying cause is probably the legacy of presidential power, reinforced by one-party rule which removed their independence. Judges have taken bribes. Judges have done

the bidding of the government, regardless of the law. Judges have twisted the law to benefit the rich or the powerful. Judgments of the Kenyan courts have been weak in their reasoning. It is of course not true that every judge is weak, corrupt or subservient to government. It would be most unfair to give such an impression. And judges who on some occasions seem to be subservient to government do on other occasions deliver good decisions.

Those involved in drafting a constitution for Kenya have wrestled with the problem of what do you do when a large number of the existing judges are poor or corrupt. How can they be weeded out, replaced or somehow neutralized without undermining the independence of the judiciary? South Africa was faced with a problem: that many of the judges were too close in attitude to the old racist regime. For this reason their new Constitutional Court was created to give a totally new leadership to the judiciary. In Kenya the Bomas draft proposed that all the judges be subject to inquiry and replaced if necessary by a new generation of judges appointed by a process that was not dominated by government. Existing judges were to be given the chance to retire.

The keys to an effective judicial system are competent judges, adequate finances and independence of the judiciary. Independence is often protected by the following constitutional devices:

- a system of appointment that is free from political or other improper influence
- protection of judges' salaries and other benefits from the possibility of reduction to punish or threaten the judges if they are tempted to decide against the government
- protection of the judiciary from dismissal except for serious misconduct
- independent control of the judiciary's finances
- protecting the judges from the possibility of being prosecuted (criminally) or sued (for damages) for what they do in their capacity as judges.

What does the Proposed Constitution say about the courts?

Generally the structure for the courts would be the same as under the current constitution, except for the potentially important creation of a new Supreme Court, to be above the existing structure (Art. 163).

To ensure the independence of the judiciary there are a number of proposed changes including

- a new system for appointing judges, much less dominated by government than the current system (Art. 166)
- the benefits etc. of judges cannot be reduced while they hold office, (Art. 160); this is to prevent their being affected in their judgments by fear of having their benefits cut; even their post-retirement benefits cannot be reduced once they retire
- judges can be removed from office only for a limited number of reasons (Art. 168(1)) (but see the comments below)
- the process for removing the judges is independent of the government and politics (Art. 168)

- the judges cannot be held legally liable for what they do in good faith in their judicial work (Art. 160(5)) – so they cannot be intimidated by the fear of being sued for large sums in compensation
- The Chief Justice is appointed by the President, who has no personal choice in the matter; the Chief Justice must then be approved by the National Assembly, and holds office only for 10 years (Art. 166(1) and 167(2))

A table below compares the current and the proposed constitutions on these points.

Vetting?

The dissatisfaction with the judges has led to many discussions about what to do about the existing judges – how is it possible to have a transition to a “new judiciary”, without weakening the important principle of the independence of the judiciary? The CoE worked hard to devise a vetting mechanism that would be effective but also fair to the judges. But this was all abandoned in favour of leaving it to Parliament. Now the Proposed Constitution says:

- within one year there must be an Act of Parliament to decide how to “vet” the existing Judges so that those who are unfit can be removed (Schedule 6 para. 23)
- Within 6 months the existing Chief Justice must resign as Chief Justice (Schedule 6 para. 24)

How does this differ from the current constitution?

Under the current constitution the protection for the independence of the judiciary is a good deal weaker. The following table highlights some of the differences (a blank in one column means there is no mention of the issue in the opposite column). You can see that the main differences are the fact that the President has no personal decision to make about judicial appointments, that the Judicial Service Commission is much less likely to be executive (government) influenced than before, even including some non-lawyers, and that it will be more difficult to threaten the Judges with dismissal or reduction of their benefits than before. On the other hand, there is provision for some regulation of the Judges, through the guidance of a Code of Conduct. There is no mention of the possibility of temporary Judges – this can be a danger to judicial independence, because Judges may be tempted to favour the government in order to be re-appointed (though less of a risk when the government does not appoint, as would be the case under the Proposed Constitution). Some comments follow the Table.

Current Constitution	Proposed Constitution
Chief Justice is appointed by the President alone	Chief Justice is appointed by the President acting on the advice of the Judicial Service Commission and with the approval of the National Assembly
Other judges of higher courts (High Court, Court of Appeal) are appointed by the President acting on the advice of the Judicial Service Commission	Similar (and applies to Supreme Court, also)
	Supreme Court to be appointed as the

	highest court in the system
	Principle of independence mentioned specifically
Can be acting (temporary) High Court Judges	
Qualifications of Judges are having been a Judge in a Commonwealth country, or 7 years experience as a lawyer	High Court and court of Appeal Judges to have at least 10 years experience and Supreme Court Judges at least 15
	Salaries etc. of judges cannot be reduced while they are in office
Judicial Service Commission comprises the Chief Justice, Attorney-General; two Judges selected by President, and the chairman of the Public Service Commission.	Judicial Service Commission to comprise the Chief Justice, one Supreme Court judge, one Court of Appeal judge, one High Court judge and one magistrate all elected by Judges/magistrates, the Attorney-General, two advocates, one a woman and one a man elected by the profession; one person nominated by the Public Service Commission, and one woman and one man, to represent the public, not lawyers, appointed by the President with approval of the National Assembly.
Judges can be removed only for inability or for misbehaviour	Judges can be removed only for inability, breach of a code of conduct, bankruptcy, incompetence or for gross misbehaviour
Process for removal of judges involves a tribunal appointed by the President from among judges and lawyers (in case of Chief Justice it is a slightly different tribunal)	Process for removal of judges involves a tribunal chosen by the Judicial Service Commission including judges and lawyers and two people experienced in public affairs (in case of Chief Justice tribunal is slightly different, and is chaired by the Speaker of the National Assembly)
	Code of Conduct to be prepared by Parliament
Retirement age is fixed by Act of Parliament (and has been varied to suit government)	Retirement age is 70 (can retire at 65)
	Judges cannot be prosecuted or sued for what they do in good faith

Comments

The proposals made in the Proposed Constitution are better in a number of ways than the current Constitution. There must be some fear that the Supreme Court will not be

really a new and vibrant court, bringing in new blood to revive the largely discredited judiciary. The responsibility will be that of the new Judicial Service Commission – and at least that will have to be set up as a matter of urgency, in fact within 60 days after the new Constitution comes into force. Let us hope they will choose new judges with unblemished records, rather than only judges promoted from the existing ranks – running the risk that the vetting mechanism will then be established and bring even this new court under its scrutiny. One of the methods intended to make a really fresh start possible was to require the current Chief Justice to retire. Some might think that it is a pity that this need not happen until after the new Judicial Service Commission comes into existence, chaired by the Chief Justice (the existing Chief Justice can stay on for up to 6 months).

Again the links between the elite and the judiciary may result in the process for the scrutiny of the existing judiciary, under the law that Parliament must make, as we have seen, being rather weak.

It is very difficult to devise methods of disciplining judges, while not exposing them to the risk of being victimised not for real incompetence but for deciding cases, even bravely, against the government and the powerful. We are not sure that the Proposed Constitution has the balance quite right. Judges can be removed for “breach of the Code of Conduct” that is to be prepared. But a Code like that will cover minor and well as major matters. Only serious offences against it should lead to removal.

Magistrates deal with most of the cases, and they can also be important. But the Proposed Constitution hardly deals with magistrates, and certainly gives them no protection against possible victimisation.

Kadhi courts

Much ink has been spilled and controversy stirred over the kadhi courts. Some churches have unnecessarily antagonised Muslims. It is important to realise that:

- the situation under the Proposed Constitution will be really the same as under the current Constitution
- the kadhi court deal only with matters such as marriage and divorce among Muslims; they cannot introduce *shari’a* law in other areas, such as criminal law
- the kadhi courts deal only with Muslims – and then only those who accept their jurisdiction
- there is no need to feel resentful that Kadhis will be paid from public funds; if Muslims use the Kadhi court they will not at the same time be using the other courts for the same issue.
- One report suggested Muslims were worried because the Proposed Constitution seems to allow non-Muslims to be Chief Kadhi. They need not worry: the Chief Kadhi and “other Kadhis” (in other words the Chief Kadhi is a kadhi) must be Muslims.

Do you think that courts under the the Proposed Constitution will be more effective and independent than under the current constitution? You might like to note any particular points on the lines below:

Are there points that worry you in connection with the courts under the Proposed Constitution? You might like to note any particular points on the lines below:

Overall: do you think that the Proposed Constitution is better or worse in relation to the courts than the current constitution? (you can note your conclusion by ticking one of the boxes):

Much better	Better	Much the same	Worse	Much worse

County government

There has long been a strong feeling that far too much power is concentrated in Nairobi, and decisions that affect people have been made far away from them. Local governments have been weak – and very much under the control of the national government. Power has been highly centralised. For many people their main contact with government has been with Provincial and District Commissioners, Chiefs and Assistant Chiefs (Provincial Administration), ultimately responsible to the office of the President.

Kenya became independent with a system of “regional government”. There were to be 8 regions with elected Assemblies and Regional Executives. Each was to have the power to make laws including on some aspects of education, health and agriculture. There were to be regional contingents of the police. And the regions were to be able to tax incomes of residents, impose land rates, and raise certain taxes. The regional governments would not have been very strong– but the system was essentially abolished before it had started to work.

The question of “devolving” power to lower levels of government has another importance: what is reserved to the local levels of government is not within the power of the national government. This would have the effect of reducing the power of the national government and its head the President. How far the Proposed Constitution proposals would have this effect depends on how much power the devolved governments are given – which we discuss briefly here. The future of local government, as it is now known, and of the Provincial Administration, is briefly discussed under “Local Government” and “Decentralisation”.

The vision

A very clear vision of the governance of the country emerges from the Proposed Constitution chapter on devolution, and that on finance: devolution is intended to involve the people more in government, and to ensure the effective delivery of services. Relationships between the various levels of government are intended to be based on cooperation and not competition. The law that is to be prepared (within three years) to phase in the new system must provide for the national government to help counties to develop the necessary capacity, and to support the counties. Disputes are to be resolved through mediation not confrontation. The system is to be flexible: counties could agree that the national government should do certain things for them, or the national government could agree that the counties, or those of them with the capacity, should take over certain national government functions; laws can be made to give new powers to the counties; the system is to be phased in so that functions are transferred gradually to counties as they are able to handle them, and they need not all get the same powers at the same time. And although the national government can make laws about anything, including topics on which counties may make laws, the national government’s laws will take precedence only if there is good reason for having national rather than county laws.

The Proposed Constitution

Under the Proposed Constitution there would be 47 counties (at first – Article 188 provides for changes in the future), each with its own system of elected government. The number of counties – 47 – was chosen to reflect the existing districts that legally exist. The courts have held that the various other districts that have been created by Presidents Moi and Kibaki have not been validly created.

Counties would have a government system like a small version of the national government – with a directly elected county assembly (Art. 177), with one member for each ward, special seats for women, persons with disability and youth (see “Elections” for some more detail), and each having a chief executive, called a Governor (Art. 179). The Governor would be directly elected by the voters of the county, and the Governor would appoint an executive committee (like a cabinet) from among people who are not members of the county assembly. Like the national President, a county Governor could serve only two terms of 5 years and could be removed from office for serious misconduct, or incapacity. How that might be done is to be decided by a national law.

Those counties would have the responsibility for certain matters (see box) including making the necessary laws (Art. 185). But the national government could also make law on any topic – even on the topics assigned to the counties (Art. 186). But the national government is supposed to make laws on those topics only if there is a good reason for national rather than local laws (Art. 191). This might be because of a need for national standards, for example. The powers allocated to counties are to be transferred over a period of three years.

What could counties do?	
<i>Administer (and make necessary laws about):</i> Agriculture, including farming, livestock sale yards; abattoirs; disease control; fisheries. County health services, including local facilities and pharmacies; ambulance services; promotion of primary health care; licensing and control of food outlets; veterinary services; cemeteries etc., refuse removal and disposal. Control of air and noise pollution, public nuisances and outdoor advertising. Various cultural and entertainment activities. County roads and transport. Animal control and welfare. Local markets, tourism, cooperatives, etc. County planning and development, including statistics; land survey and mapping; boundaries, housing.	Education at pre-primary level, village polytechnics and childcare. Implementation of national government policies on natural resources and environmental conservation. County public works and services, including water and sanitation services. Police and fire services and disaster management. Control of drugs and pornography. <i>Levy:</i> Property rates; Entertainment taxes; and Any other tax that it is authorised to impose by an Act of Parliament.

The resources the counties have are as important as their powers. Government revenue is to be shared equitably between the national and the county governments and particularly there is a guarantee that 15% of the revenue collected by the national government will be allocated to county governments (Art. 203). Counties could impose property rates and entertainment taxes (and any other tax assigned to counties by a national law) (Art. 209). A Commission on Revenue Allocation will propose the equitable sharing of revenue between the national and the county levels, and between the counties (Arts. 215-6).

For 20 years there is to be an “Equalisation Fund” to be used by the national government to provide – itself or through counties – basic services for marginalised areas (Art. 204).

At the national level, the Senate has the main function representing the interests of the counties in the national Parliament (Art. 96) (see also “Parliament”). It has a member from each county, plus some other members to increase inclusiveness.

The Proposed Constitution envisages that in certain circumstances the national government may be able to intervene in the affairs of a county. This may be because of incompetence, especially financial mismanagement, in which case the intervention of the national government must be limited to what is needed, and be directed towards assisting the county government to operate properly (Art. 190). The other possibility is that the national President may suspend a county government for up to 90 days, only because of war or internal conflict or after a commission of inquiry has found allegations of misconduct by the county government to be justified (Art. 192). In each case of national government intervention the Senate may bring the intervention to an end.

How is this different from the existing constitution?

The current constitution says absolutely nothing about any government except the national government. All the law on local government is contained in Acts of Parliament especially the Local Government Act. That Act will have to be replaced, so far as the new counties are concerned. The minister would not have powers to nominate county assembly members as he now can councillors “to represent the Government” as the Act says, nor be able to appoint the chair of county assemblies, give instructions to county governments, or take over their functions. The counties will have guaranteed resources. And the counties will be able to make laws, rather than making only regulations (by-laws) under laws made by Parliament.

Comment

After noting the vision that comes out so clearly, it is a bit disappointing to look at the actual powers given to counties. There is already national law on all, or virtually all, of the items listed under the powers of counties (not perhaps on dog licensing). It will not be easy for the counties to take the plunge to make new law on a topic on which there is already national law, without knowing whether their law will be held to be within their powers, or something that the courts may decide that the national government should continue to do. So counties may end up merely administering national laws, leaving little possibility for locally suitable laws.

Most of the powers listed in the box above are already often exercised by local government. In fact, many of them can be exercised by local authorities at a level below the counties – although they do so because of powers conferred on them by Acts of Parliament, or by decisions of Ministers.

New laws will have to work out the relationship between the current powers of the Provincial Administration (see “Decentralisation”) and local government (see “Local government”) and the new system of county government.

Establishing the new system will be a very complex business. And quite sophisticated systems of county government will be set up, possibly with very limited functions. The structure could support much greater powers, and with a preparedness to think positively about the role of the new counties, progress could genuinely be made towards the vision that the Proposed Constitution lays out but does not fulfil.

In fact the Proposed Constitution provides for a gradual shift of powers to counties, and that counties could gradually take over powers as they develop the capacity, over a period of three years (Schedule 6 para. 15). This process could be used not only to take over the functions on which the counties are to make law, but also the functions currently exercised by the Provincial Administration (as that is reorganised over a period of 5 years). Over a longer time frame more and more powers could be

transferred to counties, especially under Article 187. That Article says power must be transferred only if it can be more effectively used by the government to which it is being transferred. And it also stresses that resources must be made available as well. This Article can make possible a real shift in power to governments closer to the people.

Decentralisation

There are three main ways to bring government services closer to the people. One is for the national government to set up branches of its own ministries throughout the country. The second is to give the responsibility of providing the services to a system of local governments though the law is made by the national government; the local government may have the power to decide where to put facilities like schools and may make detailed regulations. The last way is to set up a system of governments at a local with law making powers as well as the powers to carry out the laws

At present the main mechanism for decentralisation of the things that have to be done under national law is the Provincial Administration, with its Provincial Commissioners, through various levels to the chiefs and assistant chiefs. For example, chiefs now have the duty “to maintain order” in the area for which they are appointed; they have functions in connection with disease control, can issue orders “prohibiting or restricting the ...manufacture, transfer, sale and possession of noxious drugs or poisons”, “preventing the spread of disease”, they deal with registration of births and deaths and so on.

The Provincial Administration is a very “top-down” system – a method of control originally set up by the colonial power, which now has its apex in the Office of the President. It has become an object of suspicion in some ways – being accused of being not just an arm of the government but an arm of the party in power. And there is no democratic control over the provincial administration, at least not from the people in the area concerned. They do not choose their PCs, DCs, DOs and chiefs; there is no accountability of these officials to the people. Many people have wanted the system abolished.

At the same time, people have complained that they need more services close to them. President have courted popularity by creating more districts – so more district headquarters, more jobs and less distance to go to get to government offices.

The Proposed Constitution goes some way towards the third approach mentioned earlier, with the county governments (see “County Government”) – and it has been often described as “devolution”. But questions remain: how will national government services get delivered to the people, and how will county government services get delivered to people more locally (because the 47 counties will still be quite large and county headquarters far from the people)?

Decentralisation of national government services under the Proposed Constitution

Some people have been worried that the county government system would represent a retreat from the process of creating more offices at the local levels. Yet the Proposed Constitution says that one object of devolution is to make it easier for government services to be decentralised away from Nairobi (Art. 174(h)).

Provincial Administration is also to be restructured to fit with the county government system (Schedule 6 para. 17). As we make clear in the “County government” section, the law making powers of the counties will not be great. Unless these are increased, restructuring Provincial Administration is likely to mean giving powers to the county governments to carry out national law. In fact, implementing national legislation is among the functions of county governments (Art. 183). So many of the functions of Provincial Administration could be given to the counties, and the counties themselves could set up lower level offices to bring those services closer to the people. The same offices could be used to carry out functions under county law – and the Proposed Constitution does direct that counties must decentralise their own functions and services (Art. 176(2)).

The reorganisation of Provincial Administration will need to be planned carefully with the implementation of the whole system of county government, and reorganising local government.

And finally, the Constituency Development Fund is also a form of decentralisation. In some eyes, perhaps in some places, it has served to bring some sort of development where national and local government programmes have failed. This is at the expense of coherent planning, and clearly has involved a good deal of corruption and wastage in some places. If under the Proposed Constitution a function is given to the counties (such as street lighting or markets), and there was no national law on the topic, or the national government was unable to show that national law was necessary, arguably the CDF could not be used for this purpose any more – as the CDF is a national institution and the functions would be a county function only.

Local government

At present there are many local government bodies serving areas smaller than the proposed 47 counties. The Proposed Constitution says very little about local government except that national laws must provide for the government of towns and cities (Art. 184). And the transitional provisions say that the existing local government bodies will continue unless and until a law changes the situation (Schedule 6 para. 18).

Local government (even outside towns and cities) is not made a responsibility of the counties. Yet counties have a function that may relate to local government – namely to coordinate community and location participation in “governance at the local level”, and help those communities develop the capacity for participation. This is unclear – but if by “local level” the drafters meant “county level” they could have said so, so we assume they meant a more local level.

The relationship between the new counties and the towns and cities is unclear. Is a town within a county boundary in any sense below the county? Now districts are not local authority areas, and within a district there may be several local authorities, one or two of which will be municipal or town councils and probably one a county council (mainly the rural area). Every part of a district is within some local authority area, but no part is within more than one local authority area. Presumably it is not intended that rural areas should not have any system of local government?

This issue will require careful thought. It is likely to be relevant especially to finances: if both a county and a town within it can raise property taxes, either the

people will find they are paying a lot of taxes, or the county government and the town will be receiving limited incomes.

Do you think that the system of county government under the Proposed Constitution will be more better than the current system of a central government and weak local governments? You might like to note any particular points on the lines below:

Are there points that worry you in connection with county government, local government and the future of the Provincial Administration under the Proposed Constitution? You might like to note any particular points on the lines below:

Overall: do you think that the Proposed Constitution is better or worse in relation to these issues than the current constitution? (you can note your conclusion by ticking one of the boxes):

Much better	Better	Much the same	Worse	Much worse
☐	☐	☐	☐	☐

Part III Moving from the old to the new

Bringing in the new order: Transition

Some provisions in a new constitution can have legal effect immediately. Most of the human rights provisions of the Proposed Constitution would come into force straight away, provisions about the electoral system not until the next elections. Some provisions require no further action; when a constitution specifies how a particular institution will be formed, if it is not formed in that way it will probably be unconstitutional and its acts of no legal effect.

There is a rational fear that new provisions of a constitution that may not be welcome to the ruling classes may never be brought properly into effect. It is not easy to ensure that new rules will indeed be made operational. The Proposed Constitution does have several techniques to try and ensure that its provisions are brought into effect.

There is a timetable (Schedule 5) stating when necessary Acts of Parliament must be passed. The list seems very long, but in fact many Acts already exist and may just be retained or may need some minor amendment(s).

But just to say a law must be passed may have little effect. The Proposed Constitution has a rather creative solution to this problem: if Parliament does not enact a law that is required, anyone may apply to the High Court for an order directing that legislation be enacted, within a time limit. If the legislation is not enacted within the time limit, the Chief Justice must advise the President to dissolve Parliament – and the President must do it. MPs would have to face an election (Art. 261).

The transitional provisions also create a Committee on the Implementation of the Constitution, which is to work closely with a Parliamentary Committee on the Implementation of the Constitution. Its tasks would include helping to prepare the necessary laws (Schedule 6 para. 5).

There are various other important transitional provisions, some mentioned earlier in this booklet, including on the complex business of introducing the county government system, changing the Provincial Administration and adjusting local government. And there are provisions about a law on vetting of the judiciary, as well as a provision requiring the current Chief Justice to resign within 6 months and the current Attorney General to do so within one year.

Summary Evaluation Sheet

As you read through this booklet we invited you to pause at the end of each section to reflect on whether you thought the Proposed Constitution was an improvement on the current constitution – and why. We assume that voters will generally try to make an overall assessment of the Proposed Constitution, and compare it with the current one, before casting their vote – which really is a vote between the two constitutions. As you weight up the two constitutions – in terms of what they mean for you and in terms of what they mean for the country, you might find it helpful to bring together your responses to the individual sections. You might find it worthwhile to copy into the table below your overall evaluations of each aspect. In the left hand column is an indication of the aspect of the constitution; you can tick the relevant column

“Much better”, “Better”, “Much the same”, “Worse” or “Much worse” reflecting your evaluation as you read through the booklet.

Do you think that the Proposed Constitution is better or worse than the current constitution in relation to -	Much better	Better	Much the same	Worse	Much worse
Principles and values?					
Citizenship?					
Issues of ethnicity, minorities and national integration?					
Human rights?					
Gender fairness?					
The position of persons with disability?					
Democracy?					
Participation?					
Elections?					
Honesty and competence in public life?					
Land?					
The Presidency?					
Parliament?					
The courts?					
County government, decentralisation and local government?					