

CONSTITUTION OF KENYA REVIEW COMMISSION

CIVIC EDUCATION FOR THE REFERENDUM

SOURCE BOOK

Draft 1
CIVIC EDUCATION FOR THE REFERENDUM SOURCE BOOK

TABLE OF CONTENTS

PREFACE.....	7
ACKNOWLEDGEMENTS.....	8
SECTION I: INTRODUCTION.....	9
PART I: BACKGROUND.....	9
1.0 Introduction	9
1.1 The Mandate of Constitution of Kenya Review Commission (CKRC) in Civic Education for the Referendum.....	9
1.2 The Purpose of the Referendum	9
1.3 The objective of civic education for the referendum.....	9
1.4 The Purpose of the Source Book	9
PART II: DEFINITION OF MAIN CONCEPTS.....	10
2.0 What is Civic Education?.....	10
2.1 What is a Constitution?	10
2.2 What is a Referendum?	10
2.3 What is Civic Education	10
PART III: LANDMARKS IN CONSTITUTION MAKING IN KENYA.....	11
3.0 Independence Constitution	11
3.1 Current Constitution.....	11
3.2 Constitution of Kenya Review Commission Draft Bill (2002).....	11
3.3 The Draft Constitution of Kenya 2004 (Bomas Draft)	11
3.4 The Proposed New Constitution of Kenya.....	11
PART IV: REFERENDUM ON THE NEW PROPOSED CONSTITUTION.....	12
4.0 The Referendum as a Bargain.....	12
4.1 Factors in the Referendum Process.....	12
4.2 Referendum regulations.....	12
PART V: THE WIN-WIN APPROACH TO CIVIC EDUCATION FOR THE REFERENDUM.....	14
5.0 Background	14
5.1 The Win-Win Strategy in Civic Education.	14
5.2 Objectives of the Win-Win Approach in Civic Education.....	15
5.3 Drawbacks in the Win-Win Strategy for Civic Education.....	16
SECTION II- THE PROPOSED NEW CONSTITUTION.....	17
PART I: OBJECTIVES.....	17
1.0 Introduction	17
1.1 Objectives	17
2.0 Approach to content	17
PART II: THE CONSTITUTIVE PROCESS.....	18
1.0 Introduction	18
1.2 Rationale	18
1.3 Objective	18
UNIT I: PREAMBLE.....	19
1.0 Introduction	19
1.1 Objective	19
1.2 Principles underlying the preamble include: -	19
2.0 The current constitution.....	19
3.0 Views of Kenyans.....	19
4.0 The Preamble in other Constitutions	20
5.0 Provisions in the proposed new Constitution	20
CHAPTER ONE: SOVEREIGNTY OF THE PEOPLE AND SUPREMACY OF THE CONSTITUTION.....	21
1.0 Introduction	21
1.1 Objectives.....	21
1.2 Principles underlying the chapter	21
2.0 Provisions in the current constitution	21
3.0 Views of Kenyans.....	22
4.0 Sovereignty of the people and constitutional supremacy in other constitutions	22

5.0 Provisions on Sovereignty and Supremacy of the Constitution in the Proposed new Constitution.....	22
CHAPTER TWO: THE REPUBLIC.....	23
1.0 Introduction	23
1.1 Objectives.....	23
1.2 Principles underlying the chapter	23
2.0 Provisions on the Republic in the current Constitution	23
3.0 Views of Kenyans.....	23
4.0 Provisions on the Republic in other constitutions.....	23
5.0 Provisions on the Republic in the proposed new Constitution.....	24
CHAPTER THREE: NATIONAL VALUES, PRINCIPLES AND GOALS.....	25
1.0 Introduction	25
1.1 Objectives.....	25
1.2 Principles underlying this Chapter	25
2.0 Provisions on national values in the current Constitution	25
3.0 Views of Kenyans.....	25
4.0 Provisions on national values, principles and goals in other constitutions	25
5.0 Provisions on National values in the Proposed new Constitution.....	26
CHAPTER FOUR: CITIZENSHIP.....	27
1.0 Introduction	27
1.1 Objectives.....	27
1.2 Principles underlying the chapter.....	27
2.0 Provisions on citizenship in the current constitution.....	27
3.0 Views of Kenyans.....	27
4.0 Provisions on citizenship on other constitutions	27
5.0 Provisions on citizenship in the proposed new Constitution	27
CHAPTER FIVE: CULTURE.....	28
1.0 Introduction	28
1.1 Objectives.....	28
1.2 Principles underlying the chapter	28
2.0 Provisions on culture in the current constitution.....	28
3.0 Views of Kenyans.....	28
4.0 Provisions on culture in other constitutions	29
5.0 Provisions on culture in the proposed new constitution	29
UNIT II.....	31
CHAPTER SIX: BILL OF RIGHTS.....	31
1.0 Introduction	31
1.1 Objectives	31
1.2 Principles underlying the chapter.....	31
2.0 Provisions on the Bill of Rights in the current Constitution	31
3.0 Views of Kenyans.....	31
4.0 Provisions on the Bill of Rights in other constitutions.....	32
5.0 Provisions on the Bill of Rights in the proposed new Constitution	33
PART III.....	34
MANAGEMENT OF NATIONAL RESOURCES.....	34
1.0 Introduction	34
1.1 Rationale for Grouping.....	34
1.2 Objectives of this thematic area	34
UNIT I.....	35
CHAPTER SEVEN: LAND AND PROPERTY.....	35
1.0 Introduction.	35
1.1 Objectives.....	35
1.2 Principles underlying this chapter	35
2.0 Provisions in the Current constitution	35
3.0 Views of Kenyans.....	35
4.0 Provisions in other Constitutions.	37
5.0 Provisions in the proposed new Constitution	37
UNIT II.....	39
CHAPTER EIGHT: ENVIRONMENT AND NATURAL RESOURCES.....	39
1.0 Introduction	39

1.1	Objectives.....	39
1.2	Principles underlying the Chapter	39
2.0	Provisions in the Current Constitution.....	39
3.0	Views of Kenyans on the Environment and Natural Resources	39
4.0	Provisions on Environment and Natural Resources in other Constitutions:.....	40
5.0	Provisions of Environment and Natural Resources in the Proposed New Constitution.....	41
UNIT III.....		42
CHAPTER FIFTEEN: PUBLIC FINANCE AND REVENUE MANAGEMENT.....		42
1.0	Introduction	42
1.1	Objectives.....	42
1.2	Principles underlying this chapter.	42
2.0	Provisions in the current Constitution.....	42
3.0	Views of Kenyans.....	42
4.0	Provisions in other Constitutions	43
5.0	Provisions in the proposed new Constitution	43
UNIT IV.....		44
CHAPTER SIXTEEN: PUBLIC SERVICE.....		44
1.0	Introduction	44
1.1	Objectives	44
1.2	Principles Underlying this Chapter	44
2.0	Provisions in the Current Constitution.....	44
3.0	Views of Kenyans:.....	44
4.0	Provisions in Other Constitutions	45
5.0	Provisions in the proposed new Constitution	45
UNIT V		46
CHAPTER SEVENTEEN: NATIONAL SECURITY.....		46
1.0	Introduction	46
1.1	Objectives	46
1.2	Principles Underlying the Chapter	46
2.0	Provisions on National Security in the Current Constitution.....	46
3.0	Views of Kenyans.....	46
4.0	Provisions in Other Constitutions	47
5.0	Provisions in the Proposed New Constitution	47
PART IV.....		48
SYSTEMS AND STRUCTURES OF GOVERNMENT.....		48
1.0	Introduction	48
1.2	Rationale for the grouping	48
1.3	Objectives of this thematic area	48
UNIT I.....		49
CHAPTER TEN: REPRESENTATION OF THE PEOPLE.....		49
1.0	Introduction	49
1.1	Objectives of the Chapter	49
1.2	Principles Underlying this chapter	49
1.2	Principles Underlying Political Parties.....	49
2.0	Electoral System and Process in the Current Constitution.....	50
2.1	Provisions on Political Parties in the Current Constitution.....	50
3.0	Views of Kenyans.....	51
4.0	Electoral Systems and Process in other Constitutions.....	54
4.1	Political Parties in the other Constitutions.....	55
5.0	Provisions in the Proposed New Constitution	55
UNIT II.....		56
CHAPTER ELEVEN: THE LEGISLATURE.....		56
1.0	Introduction	56
1.1	Objective.....	56
1.2	Principles Underlying the Chapter	56
2.0	Provisions on the Legislature in the Current Constitution	56
3.0	Views of Kenyans.....	56
4.0	Provisions on the Legislature in other Constitutions.....	57
5.0	Provisions on the Legislature in the proposed new Constitution.....	57
UNIT 3.....		58

CHAPTER TWELVE: THE EXECUTIVE.....	58
1.0 Introduction	58
1.1 Objectives.....	58
1.2 The Principles underlying this chapter	58
2.0 The Executive in the Current Constitution	58
3.0 Views of Kenyans.....	59
4.0 The Executive in other Constitutions.....	59
5.0 Provisions on the Executive in the Proposed New Constitution	60
UNIT IV.....	61
CHAPTER THIRTEEN: THE JUDICIAL	61
1.0 Introduction	61
1.1 Objective.....	61
1.2 Principles Underlying the Chapter	61
2.0 Provisions in the Current Constitution.....	61
3.0 Views of Kenyans.....	62
4.0 Judiciary in other Constitutions.....	62
5.0 Provisions on the Judiciary in the proposed new Constitution.....	63
UNIT V.....	64
CHAPTER FOURTEEN: DEVOLVED GOVERNMENT.....	64
1.0 Introduction	64
1.1 Objective	64
1.2 Principles Underlying this Chapter.....	64
2.0 Devolution in the Current Constitution.....	64
3.0 Views of Kenyans.....	65
(i) On structure: -	65
(ii) Local Authorities: -.....	65
(iii) On other matters, that: -	65
(iv) On decentralization in general, that: -	65
(v) On natural resources: -	65
(vi) On Participation at the local level: -	66
(vii) On Provincial Administration, that: -	66
4.0 Devolution of Powers in Other Constitutions.....	66
Ethiopia.....	67
South Africa.....	67
Ghana.....	67
Nigeria	68
Namibia.....	68
Canada.....	68
Switzerland.....	68
Germany.....	69
India.....	69
5.0 Provisions in The Proposed New Constitution	69
PART V.....	70
THE MANAGEMENT OF CONSTITUTIONALITY AND TRANSITIONAL	
ARRANGEMENTS.....	70
1.0 Introduction	70
1.1 Rationale of the Thematic Group.....	70
1.3 Objective of the thematic area.....	70
UNIT I.....	71
CHAPTER NINE: LEADERSHIP AND INTEGRITY.....	71
1.0 Introduction	71
1.1 Objectives	71
1.2 Principles underlying the Chapter	71
2.0 Provisions on Leadership and Integrity in the current constitution	71
3.0 Views of Kenyans.....	71
4.0 Leadership and Integrity provisions in other Constitutions.....	72
5.0 Provisions on Leadership and Integrity in the Proposed New Constitution.....	72
UNIT II.....	73
CHAPTER EIGHTEEN: CONSTITUTIONAL COMMISSIONS.....	73
1.0. Introduction.....	73

1.1. Objectives	73
1.2 Principles underlying the chapter.....	73
2.0 Provisions in the current Constitution.....	73
3.0 Views of Kenyans.....	73
4.0 Provisions on constitutional commissions in other constitutions.....	76
5.0 Provisions on Constitutional Commissions in the Proposed new Constitution	77
UNIT III.....	78
CHAPTER NINETEEN: AMENDMENT OF THE CONSTITUTION.....	78
1.0 Introduction	78
1.1 Objectives	78
1.2The Principles underlying the chapter.....	78
2.0 Provisions in the Current Constitution.....	78
3.0 Views from Kenyans.....	78
4.0 Provisions on Amending the Constitution in other countries	78
5.0 Provisions on Amending of the Constitution in the proposed new Constitution.....	79
UNIT IV.....	80
CHAPTER TWENTY: GENERAL PROVISIONS.....	80
1.0 Introduction	80
1.1 Objectives of the Chapter.....	80
1.2 Principles underlying the Chapter.....	80
2.0 Provisions in the current constitution.....	80
3.0 General Provisions in other Constitutions.....	80
5.0 General Provisions in the proposed new Constitution.....	81
UNIT	
V.....	82
CHAPTER TWENTY ONE : SAVINGS, TRANSITIONAL AND CONSEQUENTIAL	
PROVISIONS.....	82
1.0 Introduction	82
1.1 Objectives	82
1.2 Principles underlying the chapter.....	82
2.0 Provisions in the Current Constitution.....	82
3.0 Views of Kenyans.....	82
4.0 Provisions in other Constitutions.	82
5.0. Provisions of the proposed new Constitution	83

PREFACE

The Source Book contains two sections. Section I is divided into three parts: Part I- An introductory background to the review; Part II- Definitions on Key Concepts; and Part III- The Win-Win approach in the conduct of civic education.

Section II has four parts dealing with specific contents of the proposed new Constitution that ought to be covered in the conduct of civic education.

Part I- The Constitutive Process consists of the Preamble and chapters on:

- Sovereignty of the People and Supremacy of the Constitution;
- the Republic;
- National Values, Principles and Goals;
- Citizenship;
- the Bill of Rights; and
- Culture.

Part II- Management of National Resources consists of four chapters on:

- Land and Property;
- Environment and Natural Resources;
- National Security;
- Public Finance and Revenue Management; and
- Public Service.

Part III; Systems and Structures of Government covers chapters on:

- Representation of the People;
- the Legislature;
- the Executive;
- the Judiciary and the Legal System; and
- Devolved Government structures.

Part IV; Management of Constitutional and Transitional Arrangements has five chapters on:

- Leadership and Integrity;
- Constitutional Commissions;
- Amendments to the Constitution;
- General Provisions; and
- Transitional and Consequential Arrangements.

Draft 1
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SECTION I: INTRODUCTION

PART I: BACKGROUND

1.0 The Legal Framework

The Constitution of Kenya Review Commission (CKRC) is established by the Constitution of Kenya Review Act (CAP 3A) as the primary organ of the Constitutional review process. Other organs include the Constituency Constitutional Forum, the National Constitutional Conference, the National Assembly and the Referendum. The Commission consists of 29 Commissioners of whom two – the Attorney General and the Secretary are *ex-officio* members.

The Commission is to be independent and its tenure lasts until the review process is concluded. Among its key mandates, the Commission has the responsibility to educate Kenyans on the review process and it is within this mandate that this Source Book has been developed.

1.1 The Mandate of Constitution of Kenya Review Commission (CKRC) in Civic Education for the Referendum

The Constitution of Kenya Review (Amendment) Act 2004 (Cap 3A) sets out the mandate of the CKRC for the referendum. Thus, in addition to Section 17 (a) of the principal Act, which provides that “*the Commission shall conduct and facilitate civic-education in order to stimulate public discussion and awareness of constitutional issues*”, section 28 of the amended Act further mandates the Commission to “*facilitate civic education on the referendum*” and “*monitor and evaluate the conduct of the referendum*”.

1.2 The Purpose of the Referendum

The purpose of the referendum is stated in the Constitution of Kenya Review (Amendment) Act 2004 as part of the sovereign right of Kenyans to decide on their instrument of governance. Section 26 of the Act recognizes “*that the people of Kenya collectively have the sovereign right and power to replace the Constitution with a new Constitution...*” Kenyans will therefore vote to accept or reject the proposed new Constitution.

1.3 The objective of civic education for the referendum

The objective of civic education for the referendum is:

- To provide Kenyans with sufficient information, knowledge and skills on the contents of the proposed new Constitution to enable them participate meaningfully in its ratification by making informed decisions whether to accept or reject it through a referendum.

1.4 The Purpose of the Source Book

The Source Book contains information about the proposed new Constitution and the referendum. The Source Book is designed for use to actualise the contents of the Curriculum on the proposed new Constitution. The end-user of the Source Book is the Educator working under an organisation designated as a Civic Education Provider (CEP) for the referendum. The use of this Source Book by the Educator will help realise the aims of civic education for the referendum in ensuring that Kenyans understand the contents of the proposed new Constitution. Effective provision of civic education should help mobilise Kenyans to vote in the referendum, enable effective participation of Kenyans in the ratification and hence qualify the referendum process as all-inclusive.

Draft 1

This Source Book contains material essential for the conduct of civic education on the referendum. It provides an introductory bird's eye view of the Constitutional Review Process thus equipping the user with the background knowledge necessary in imparting civic education on the referendum. Third, the booklet is a source of expanded explanation of the curriculum contents that would lead to greater understanding and appreciation of the proposed new Constitution.

PART II: DEFINITION OF MAIN CONCEPTS

2.0 What is a Constitution?

For the purposes of civic education for the referendum, the working definition is that a Constitution is a charter, an instrument of governance, the supreme law of the land, an agreement or contract between the governed and governors. It defines and binds relationships; outlines the power distribution; and confers rights and obligations of the citizens and the state.¹

2.1 What is a Referendum?

A referendum is a process through which citizens consciously accept or reject changes from one instrument of governance to another through voting. The voting is a choice between yes or no to accept or reject the proposed instrument. In the Kenyan case, Kenyans will be voting in a referendum to decide on the adoption or otherwise of the proposed new Constitution.

A referendum is not unique to a constitution alone. As an instrument of decision-making, a referendum is a form of direct democracy that allows citizens to express their opinion on critical national issues. A referendum contemplates that direct participation by citizens on virtually all matters of governance would reveal the general *will of all*, and that the referendum is the best means of determining the general *will of all*. Further, that the way of determining the general will is by a simple majority rule.

A referendum may either be demanded by the people themselves or called by the government to legitimise decisions made at any level, but which have short or long term implications for society. A referendum, therefore, maybe called for those issues which require and involve fundamental social change, and which cut across the diversity of socio-political opinion. This is why in modern times, a referendum has been used as a last resort after all other efforts to arrive at a consensus over an issue fail. The Kenyan referendum can be said to have arisen as a desire by Kenyans to have a new constitution and an obligation by Government to fulfil this desire.²

2.2 What is Civic Education?

Civic education for the referendum is provision of information and awareness creation on the proposed new Constitution and the referendum process including the question Kenyans will vote on. The main goal of civic education is to empower citizens to enable them make informed choices and participate in decision-making on issues that affect them.

Civic education for the referendum on the **proposed new Constitution** as envisaged by the CKRC is distinct from advocacy, lobby and interest campaigns. The CKRC Civic Education Curriculum is governed by the need to ensure comprehension of the contents of the **proposed new Constitution**.

¹ See [CKRC, Proposals for Civic Education Policy and Programmes of the Constitution of Kenya Review Commission., 24th August, 2001. See also Adagala, K., PR and Publicity for Civic Education for the Draft Constitution and Referendum, CKRC, October 2004.](#)

² See CKRC pamphlet summary of the *Njoya Case*, which re-states and interprets the Sovereign right of Kenyans to change the Constitution through a referendum.

LANDMARKS IN CONSTITUTION MAKING IN KENYA

3.0 Independence Constitution

The Independence Constitution came into force on 12th December 1963. It was the product of negotiations among various Kenyan political parties and the British Government. Although the Independence Constitution was meant to acknowledge and assert the sovereignty of the people of Kenya and to transform the colonial state from an instrument of dominion to a democratic state for people's welfare, the result was that the Independence Constitution reflected these interests.

3.1 Current Constitution

The Current Constitution is different from the Independence Constitution; despite legal continuity is a product of 38 amendments. The amendments did not represent a progression towards democratisation and a better protection of rights. The salient results of the changes were to encourage authoritarianism. The lack of accountability led to the growth of corruption and abuse of public resources.

3.2 Constitution of Kenya Review Commission Draft Bill (2002)

This came about after the establishment of the Constitution of Kenya Review Commission. The Commission drew-up the Draft Bill after it conducted and facilitated civic education for purposes of creating public awareness on constitutional issues; and collecting the views.

3.3 The Draft Constitution of Kenya 2004 (The Bomas Draft)

These resulted from debate, negotiations and amendments of the Commission Draft Bill 2002 by delegates at the National Constitutional Conference held at the Bomas of Kenya for a total of 139 days from 2003 to 2004.

3.4 The Proposed New Constitution of Kenya

The Attorney General released this draft on 22nd August 2005, via Kenya Gazette Supplement, 2005. The Attorney General using the Draft Constitution 2004, adopted by the National Constitutional Conference on 15th March 2004 and the amendments made by Parliament drafted the Proposed New Constitution.

REFERENDUM ON THE NEW PROPOSED CONSTITUTION

4.0 The Referendum as a Bargain

The views presented by the people during the review process were many and varied. Certainly, all of those views could not be reflected in the proposed new Constitution in the manner and style they were presented in the field. Certainly, the proposed Constitution, as a negotiated document had to reflect those views in a manner that takes care of all Kenyans. The people have to take cognisance of this reality as they prepare to participate in this all-important exercise of referendum.

Lastly, the review process has, all along, been described as one that is people driven and people centred. The referendum is about people making a decision. Civic education will only be an induction in perimeters on what that decision is about - the proposed Constitution. And making decisions means having to choose between available options. This is made the more important to the civic education provider's facilitation considering the fact that a constitution is a vital document in which the interests of all must be taken into account without having one party feeling left out. This puts obligation on the civic education provider to encourage willingness among the people to understand that if individual interests were made rigid without any one party or group willing to give in to some of its demands, it would lead to a situation where the process may stall.

The win-win approach is not premised on the “*we*” verses “*they*” approach. The Civic education Win-Win strategy should hence approach the referendum based on a “*we*” foundation in which every group feels equal. The referendum should not be seen as the occasion for one group to maximize its gains while “ripping off” the other groups. Civic education approach should emphasise that the referendum is not about getting the best deal for *me*; it is about getting the best deal for *us*. The referendum should be such an occasion to pull together to compensate on weaknesses and not use our strength – be it in terms of numbers or otherwise - to exploit those who are a minority. The people ought not go to the voting booths to prove their strength in numbers, but only on focused and reasoned knowledge.

4.1 Factors in a Referendum Process

A referendum process is determined by many factors prior to the holding of the actual vote. These include, among others, a national consensus on the following provisional issues:

- The need for the referendum.
- The process leading to the development and adoption of the document for referendum.
- The document for the referendum.
- The legislative framework for conducting referendum.
- Framing of questions.
- Finances, amounts sources and use.
- Institutions involved in the conduct of the referendum.
- Civic education for referendum.
- Provision of a period for referendum campaigns.
- Eligibility to vote.
- Referendum infrastructure (logistics, personnel, ballot papers, etc.).
- The minimum voter turnout requirement.
- The interpretation of referendum results.
- Dispute resolution mechanisms.

4.2 Referendum regulations

The regulations governing the conduct of the referendum have been prepared by the Electoral Commission of Kenya (ECK) in consultation with the Constitution of Kenya Review

Draft 1

Commission (CKRC) and the Parliamentary Select Committee (PSC) on the Constitution.³ In summary, the regulations address the following issues amongst others:

- The criteria for eligibility to vote in the referendum.
- Voting time during the referendum.
- The threshold for the vote.
- The referendum question.
- Format and language of ballot papers.
- Assisted voters.
- Disputes arising from the referendum.
- Announcement of poll results.
- Observers.
- The personnel recruitment.
- Documentation and archiving.

³ See published regulations by the Electoral Commission of Kenya (ECK).

THE WIN-WIN APPROACH TO CICIV EDUCATION FOR THE REFERENDUM

5.0 Background

The Constitution of Kenya Review Act sets out principles, goals and means of the review process, which focus on a holistic and all-inclusive approach to conflict resolution. The objective and purpose of the constitutional review process as spelt out in section 3 (i), (j) and, (k) of the Act establishes the basis for negotiation among the various parties in the review process. Under the Act the CKRC has to, as part of its mandate, create conditions conducive to a free exchange of ideas and ensure the full participation of people in the referendum on the basis of a win-win outcome.

The win-win strategy is not a new concept in the review process. Throughout the agitation for constitutional change and during the course of the review, the process has reached the referendum stage by achieving a synergy that is based on values, which aim at a win-win outcome. This places an obligation to those conducting civic education to perceive the referendum as a conflict resolution mechanism, and transmit the same to Kenyans. In conducting civic education for the referendum, therefore, it is important that all providers apply the win-win approach to ensure Kenyans comprehend the comparative advantage for all in the contents of the proposed new Constitution.

Win-Win is about interdependence, trust in relationships, keeping commitments and promises; about having the courage to balance and clarify expectations. Win-win just as its opposites the win-lose, lose-lose or lose-win is about the possible outcome of a dispute involving parties. Win-win is not about “*your way*” or “*my way*”; it is a belief in a better ‘*we*’ outcome of a disputed issue.⁴ It arises the ability to compromise the “*I*” gain for the greater “*we*” gains. These qualities should be part of the civic education provider’s predisposition and actual conduct of civic education. In this way, each side of the referendum divide should be able to approach the process as mutually beneficial, participate in the referendum as a negotiation through the vote and accept the result.

To Win-Win⁵ is that land where there is plenty for everybody after a drought; where an individual’s or group’s success is not achieved at the expense or exclusion of the success of others. In the referendum, the win-win strategy in civic education starts on the assumption that a loss for one party will be a loss for all. It is the mutual benefit understanding that civic education seeks from the referendum.

As the people prepare to cast the deciding vote on this document, it is imperative that they cast the vote with the full knowledge that voting in the referendum must never be used as a weapon to prove differences or to settle narrow antagonisms and prejudices. Rather, the vote should be used to reaffirm our commitment as a nation to have each person benefit from the country. Each one’s gain is everyone’s gain, much as each one’s loss will be a loss for all.

5.1 The Win-Win Strategy in Civic Education

The *modus operandi* in the win-win strategy in civic education is to – through information - create as much room as possible for the people to participate in the referendum process. This can only be achieved if views are expressed openly and allowing participation through debate on the pros and cons of the referendum vote.

⁴ Stephen Covey, *The 7 Habits of Highly Effective People: Powerful Lessons in Personal Change*, Simon & Schuster UK Ltd, London, 2004.

⁵ Ibid.

This can be repeated if civic education forums are turned into sessions of whipping-up sectional and ethnic emotions on issues unrelated to the contents of the proposed new constitution. This win-lose situation if let to run its course has the potential of turning referendum phase violent. This win-lose strategy in the referendum has all the potential for a zero-sum game in which the winner takes it all and the loser is embittered forever. This need not be the case because Kenya belongs to all of us. Kenyans need to walk the route of dialogue in the referendum phase knowing the focus is on the greater national gains and not on personal interests alone. It is hence the obligation of the civic education provider to shift debate from the adversarial and combative approach to an all inclusive, cooperative and issue-based sober approach so that Kenyans as a whole benefit at the end of the referendum process.

5.2 Objectives of Win-Win Approach in Civic Education

The underlying principle in the win-win approach to civic education is that each side in the referendum participates on an equal basis and the outcome is thus mutually beneficial and acceptable. The objective aim of the referendum should then be win-win outcome for all.

The Win-Win approach aims at winning through give-and-take for a common good. Kenyans ought to be in competition for achieving concessions on competing concerns and needs, and not to work to win and to decimate the other. The approach by the civic education provider is appreciation and sharing the gains made in the proposed new Constitution. The people will need to know, the gains and not on personal and emotive considerations but in a win-win spirit. The civic education provider will impart knowledge that the referendum is not about protecting territory; rather, the referendum is aimed at:

Unifying adversarial, conflicting, competing, contesting parties or individuals or sectors in the Kenyan society; and Respecting differences in order to build on strengths, to compensate for weaknesses among Kenyans.

Applying the win-win strategy results in diverse opinions and views of Kenyans, which will in turn lead to understanding. The civic education provider, therefore, needs to explain that as Kenyans vote at the referendum, the country makes cumulative gains; that at this point, it is necessary to lower our original expectations and accommodate new collective needs which, though lesser than originally expected, will enable Kenyans to turn a potentially win-lose or lose-lose situation into a win-win outcome.

To vividly illustrate win-win, win-lose and lose-lose situations, the classic example of the *Prisoner's Dilemma*⁶ is useful. In the illustration, two prisoners A & B are faced with a dilemma: they must decide whether to confess to a crime, but neither knows what the other thinks. The best outcome for prisoner A occurs if he confesses, while prisoner B keeps quite. In this case, prisoner A is rewarded by being set free, while prisoner B is convicted. This is a win-lose outcome. However, if both confessed, each trying to take advantage of the other, they both would be convicted. This is a lose-lose outcome. On the other hand, if neither of them confessed, they might not be convicted which is a win-win outcome, although the win is not as big as the one that would have been had for the freed prisoner in the win-lose situation.

Kenyans do not have to be in the kind of dilemma that the two prisoners faced during the referendum. What is needed is that Kenyans be honest, open-minded and willing to concede earlier views and opinions. The point to draw out in *Prisoner's Dilemma* example is that a win-win outcome calls for sacrifice and cooperation. It is the willingness to sacrifice the original demands for lesser ones, but for the greater benefit for the nation that now matters.

⁶ Brad Spangler, *Prisoner's Dilemma*, <http://www.beyondintractability.org/m/win-lose.jsp>

5.3 Drawbacks in the Win-Win Strategy for Civic Education

It would be a dangerous deception to assume that the win-win strategy has no drawbacks or constraints. It is important that the civic education provider is well aware of the drawbacks so that there is proper preparedness to overcome the same. Since the win-win strategy is intended to bring all on board it calls for patience and is time consuming. There is, therefore, the ever-existent threat of this patience running out or of others in the negotiation taking advantage of the trust given by others to deceive and have only their point of view advanced.

Apart from this danger, there is the other danger of viewing compromise in the narrow sense of transferring gains or status to the adversary. A group or community may feel disadvantaged because what they perceive as their losses against others' gains. As a result of this, it may turn out that a group, which is uncertain of the value of the compromise, devalues other gains or rejects them outright. It is important that facilitation of civic education deal with this kind of fatigue and threat that if allowed to go un-addressed, may impact on people's ability to make informed judgment. In such a case, civic education providers should exhibit a sense of patience and accommodation and such sense of purpose bear on the people's sense of judgement.

For effective facilitation, the starting point is to create confidence and trust among the people. The people should be made alive to the fact that engaging in a zero-sum game will only lead to a loss for all. The best option is to create awareness that there is a lot more to achieve in give-and-take rather than where the winner takes it all.

Furthermore, it is also important to recognize that people may interpret an issue or concept differently. Which is why it is important to separate the person from the problem, so that the provider deals with the problem and not the person who might be having a conceptualisation or perception problem. Civic education providers, therefore, ought to stress on the need for Kenyans to deal with each other with respect and to separate the person from issues in the referendum process. It calls upon civic education providers to control emotions and create trust among the people.

In terms of delivery, it will be necessary that focus be on shared interests so as to make the process of comprehending complex or crosscutting issues smoother for the people. In situations where a session is composed of sides that differ on the contents of the propped new constitution, it is will be absolutely necessary to articulate as many of each side's interests as possible, while remaining focused on the mutual needs of Kenyans as personified or otherwise in the proposed new constitution.

SECTION II- THE PROPOSED NEW CONSTITUTION

PART I: OBJECTIVES

1.0 Introduction

This introductory part outlines the objectives and purpose of the Civic Education Curriculum for the Referendum and the referendum processes. This part seeks to inform and prepare the focus of the participants on the aim to be achieved while also informing them about context within which the referendum is being held.

1.1 Objectives

At the end of this unit, participants should be able to understand:

- The rationale, need and objectives for the civic education;
- The definitions of operating concepts; and
- The rationale for the referendum.

2.0 Approach to content

Unlike the other parts of the Source Book where chapters of the proposed new Constitution form the basic content, the content of this introductory part can be found from both Section I of this document and from the Curriculum.

PART II: THE CONSTITUTIVE PROCESS

1.0 Introduction

The constitutive process consists of the Preamble; chapters on Sovereignty of the People and Supremacy of the Constitution; the Republic; National Values, Principles and Goals; Citizenship; the Bill of Rights and Culture which, together, provide for:

- The establishment of fundamental principles of state formation; and affirmation of the sovereignty of the people and supremacy of the Constitution;
- The history of making a nation including the struggle for independence;
- The sovereignty of the people;
- The establishment of principles of national values and goals;
- The acquisition of citizenship, rights, privileges and responsibilities under the Constitution;
- Democracy and good governance;
- Human rights, limitations, guarantees, protection and promotion; and
- Recognition, protection, promotion and development of Culture.

1.2 Rationale for grouping

The chapters have been grouped together into a single thematic area and they provide the basis for the constitutive process. These areas could be said to be the basis on which the constitution is founded. They provide the values, philosophy and guiding principles on which the making and interpretation of the constitution is to be based.

1.3 Objective

The objective of the constitutive process is to state the values, philosophy and the underlying principles on which the making of this constitution is founded. This thematic area of the constitutive process forms what could be said to be the reference point or the foundation for all the subsequent chapters in the constitution.

UNIT I: PREAMBLE**1.0 Introduction**

A preamble in a constitution is the preface or introduction in that constitution. It sets out the collective national vision, ideals, aspiration and shared values. A preamble may also serve to assert the basic philosophy, principle and national goals to which a people are committed. It is premised on the understanding that all members of a state are bound by certain common ideals, or experiences of great significance to them.

A Preamble fulfils several functions. Among them, it may:

- State the source of authority for the Constitution;
- Claim the authority for the people;
- State the ideals, values and aspirations of the people that the Constitution seeks to promote;
- State the history of the Constitution and the constitutional process
- State the reasons why the Constitution is being enacted;
- Define the character of the state constituted, e.g., whether secular, democratic, multi-party, etc;
- Set out the political, social and economic context of the Constitution; and
- Exhort the state's commitment to specific values, particularly where it is designed to overcome divisions.

1.1 Objective

At the end of this unit, participants should be able to:

- Define, understand and appreciate ownership of the Constitution, as spelt out in the preamble.
- Understand the provision on the sovereign power of the people to make the constitution.

1.2 Principles underlying the preamble:

This include

- The content, history and vision of the preamble;
- The aspirations of the people for a government based on the essential values of freedom, democracy⁷, social justice, cultural and religious diversity and the rule of law;⁸ and
- The sovereign power of the people.

2.0 The current constitution

The current constitution does not have a preamble.

3.0 Views of Kenyans

In their submissions many Kenyans urged that the new constitution should have a preamble. Several proposals were given concerning what that preamble should contain. Some of those proposals were that the preamble should:

- Recognize all the people in their ethnic, religious and cultural diversity⁹.
- State the sovereignty of the people as the foundation of the state.
- Have a reference to the Almighty God.
- Should reflect on the history of our nation, including the struggle for independence and our freedom fighters.

⁷ Democracy is a form of government in which the supreme power is vested in the people collectively.

⁸ Rule of law refers to the equal application of the law to all and the strict adherence to the law.

⁹ Cultural diversity refers to the coexistence of different cultural practices and beliefs amongst various communities

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- Contain the values of national unity and social justice.
- State a commitment to the values of democracy, constitutionalism and the rule of law.

4.0 The Preamble in other Constitutions

A number African countries have a preamble in their constitutions. They include Eritrea, Uganda, Ghana and South Africa among others.

In the constitution of Eritrea, the preamble states “We, the people of Eritrea, united in a common struggle for our rights and common destiny”.

The Ghana preamble states “*We the People of Ghana, **IN EXERCISE** of our natural and inalienable right to establish a framework of government which shall secure for ourselves and posterity the blessings of liberty, equality of opportunity and prosperity*”.

The current trend world over is that they all begin with an opening statement, which recognizes the sovereignty of the people, their values and aspiration. This is evident in the opening statement “We the people of...” that is to be found in the aforementioned selected countries.

5.0 Provisions in the proposed new Constitution

The proposed new Constitution has captured the views of the people by: -

- Acknowledging the supremacy of the Almighty God
- Honouring the freedom fighters
- Taking pride in our ethnic, cultural and religious diversity
- Reaffirming the commitment to democracy, social justice, constitutionalism and the rule of law
- Recognizing the sovereignty of the people and their right to determine the form of governance they want.

CHAPTER ONE: SOVEREIGNTY OF THE PEOPLE AND SUPREMACY OF THE CONSTITUTION

1.0 Introduction

This chapter introduces the bases for constituting a nation, such as sovereignty of the people and respect for the supremacy of the constitution. It defines the constitution as being superior to all other laws, and binds the citizenry to defend and respect their constitution.

1.1 Objectives

At the end of this chapter, participants should be able to define, understand and appreciate the provisions related to:

- Principles underlying this chapter;
- The sovereignty of the people; and
- The supremacy of the Constitution.

1.2 Principles underlying this chapter

- All sovereign authority belongs to the people
- Delegation of sovereign authority through representatives
- The constitution binds all state organs and persons
- The legality of the constitution is not subject to challenge before any other law.
- Every person has an obligation to respect and defend the constitution.
- The sources to the laws of Kenya include, laws enacted under this constitution, Acts of Parliament, personal laws, and the rule of law among others

2.0 Provisions in the current constitution

The current constitution provides for the supremacy of the constitution.¹⁰ Section 3 of the current Constitution provides that:

“This Constitution is the Constitution of the Republic of Kenya and shall have the full force of the law throughout Kenya and, subject to Section 47, if any law is inconsistent with this Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

Section 47 provides for alteration of the Constitution by Parliament. It requires the support of at least 65% of Members of Parliament. Parliament has the power to alter any section of the Constitution.

The supremacy of the Constitution demands that courts should hold void any exercise of power which does not comply with the prescribed manner and form or which is not in accordance with the Constitution, from which the power is derived.

Sovereignty of the people¹¹ is provided for at section 1 of the current constitution, which states Kenya, is a sovereign republic.

On the laws of Kenya, the current constitution recognizes personal law to an extent that it is not inconsistent with the constitution.

¹⁰ Supremacy of the Constitution refers to the law that emanates from the people in their sovereignty. Additionally, supremacy of the constitution is premised on the concept that the people express their authority through the constitution and that all state organs must operate within the constitution. The rationale behind this supremacy is that the constitution is a creation of the people. A constitution is regarded as supreme as it is the superior law in the country, to which all other laws must make reference.

¹¹ Sovereignty of the people refers to the right of the people to govern themselves. It implies that the people are not under a foreign authority or power—as was during the colonial period. It is the power of the people—in a delimited boundary—to conduct the affairs of governance freely.

3.0 Views of Kenyans

Supremacy of the constitution

A large number of Kenyans who made submissions to the commission were of the view that the Constitution should remain supreme. They also suggested that the power of Parliament to amend the constitution should be limited. They felt that the current provisions for amending the constitution were too simple and had therefore been used to consolidate power in the executive. In their view, a new constitution should only be amended in the same way it was made.

Sovereignty of the people

On the issue of sovereignty of the people Kenyans were of the view that all power and authority should be derived from the people and the people should be governed through their will. They also told the commission that the state and its security organs should at all times recognize the supremacy of the people and remain subordinate to the people. The reason for this was to acknowledge in the constitution the aspirations of the people.

Laws of Kenya

Although this issue was not specifically put to the people, there was a clear desire for the application of the indigenous, religious and personal laws. The people of Kenya submitted to the commission that:

- Customary laws which differ from one ethnic community to another should be recognised in settling disputes on customs and traditions of the concerned community
- All customary laws should be codified and regarded as by laws adjusted to be relevant to the new constitution
- The customary law should not be used to deny individuals their rights
- The Law Reform Commission should replace outdated colonial laws before the constitution is reviewed.

4.0 Sovereignty of the people and constitutional supremacy in other constitutions

Provisions dealing with the supremacy of the constitution are common in a number of jurisdictions, for example, Uganda, South Africa and Ghana.

The South African constitution states that the constitution is the supreme law of the republic.

A number of written constitutions recognize and acknowledge that sovereignty resides in the people, for example the constitution of the United States of America, France, Ghana and Uganda.

5.0 Provisions on Sovereignty and Supremacy of the Constitution in the Proposed New Constitution

This include:

- The sovereignty of the people (Article 1).
- The supremacy of the constitution (Article 2).
- Laws of Kenya (Article 3).

CHAPTER TWO: THE REPUBLIC

1.0 Introduction

Before the coming of the colonialists, there existed in Kenya interdependent diverse communities, each with its own administrative, legal and political systems with boundaries dividing different communities and families. These boundaries were later to be altered or consolidated by the invading colonial power to establish the Kenya Colony and Protectorate which later became a Republic of Kenya in 1963.¹²

This chapter describes both the key physical features of Kenya and issues of national importance that serve to identify the people of Kenya, their aspirations for republican principles and avenues for exercising their sovereign authority.

1.1 Objectives

At the end of this chapter, participants are expected to understand the provisions:

- Delimiting the international territorial boundaries of Kenya and understand internal boundaries
- Dealing with the physical state of Kenya and its key national features such as days, languages, symbols and the issue of religion.

1.2 Principles underlying this chapter

The principles underlying the chapter are based on the following values:

- Good governance
- Multiparty democracy¹³
- Participatory governance¹⁴
- Transparency and accountability
- Separation and devolution of power
- Respect for human rights and fundamental rights
- The rule of law

2.0 Provisions on the Republic in the current Constitution

The current constitution states that Kenya is a sovereign Republic in Article 1. It makes no mention of Kenya's international boundaries. Similarly, there is very little to say on issues of security and integrity of the State.

3.0 Views of Kenyans

A large number of submissions from the public on the issue of the republic were on:

- The integrity of Kenya's territorial boundaries and maintenance of external and internal security.
- The persistent harassment from elements from neighbouring countries, particularly at border points and along the lake regions.
- The apparent lack of security, both for their life and property.
- The need to have the issue insecurity addressed in the new constitution, clearly and unequivocally.

4.0 Provisions on the Republic in other constitutions

The Constitution of Uganda states that Uganda is a sovereign state and a Republic. Similar provisions exist in the constitutions of South Africa, Ethiopia, Eritrea and Nigeria. Many of these go on to define the character of the state, especially its boundaries, official language(s),

¹² A form of government in which the supreme power is vested in the people and their elected representatives.

¹³ Multiparty democracy refers to the right of the people to form, join or ascribe to a political party of their choice.

¹⁴ Participatory governance refers to the right of the people to participate in the formation and running of their government through fair and free elections.

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secularity, national symbols and political philosophy. The Constitution of Ethiopia, for example, states that:

“This Constitution establishes a Federal and Democratic state structure. Accordingly, the Ethiopian state shall be known as the Federal Democratic Republic of Ethiopia”.

And adds that;

“The territorial jurisdiction of Ethiopia shall comprise the territory of the members of the Federation and its boundaries shall be as determined by international agreements”.

5.0 Provisions on the Republic in the Proposed New Constitution

The proposed new constitution has stated that Kenya consists of the territory recognized under international law. Some of the provisions in the proposed new constitution include

- Declaration of the Republic (Article 4)
- Devolution (Article 6)
- Decentralisation of State Organs (Article 8)
- Languages (Article 9)
- National symbols (Article 11)

CHAPTER THREE: NATIONAL VALUES, PRINCIPLES AND GOALS

1.0 Introduction

This chapter establishes the broad national values, principles and goals that Kenyans aspire to attain in order to remain a unified country where every one plays their part for the better existence of Kenya, adherence to the law and freedom from negative vices such as corruption. The chapter addresses a number of issues, among them:

- Unity of the country
- Transparency and accountability
- Full participation of women, persons with disabilities, marginalized communities and other citizens
- Management of the national resources fairly

1.1 Objectives

At the end of this chapter, participants should be able to understand the:

- Fundamental principles that guide the nation in the implementation of the Constitution; and
- Provisions relating to national values and aspirations that will guide the people of the Kenya.

1.2 Principles underlying this chapter

The principles underlying the chapter include:

- National unity
- Democracy and good governance
- Tolerance and respect of others' views and beliefs
- The obligation of the state to the people
- Shared values and aspirations

2.0 Provisions on national values in the current Constitution

The current Constitution does not have much on national values and principles of state policy. What is available is only a brief statement proclaiming Kenya as a sovereign Republic and a multi-party democracy (section 1A).

3.0 Views of Kenyans

A majority of Kenyans, in their submissions, were of the view that:

- There should exist principles, goals and values in the constitution to guide all citizens, local authorities and Parliament, the Executive, Judiciary and all other state organs and officials in applying or interpreting the constitution.
- The national values, principles and goals should be based on the recognition that power and authority are derived from the people.
- There should be a clear separation of power.
- There should be respect for the rule of law.

4.0 Provisions on national values, principles and goals in other constitutions

Many constitutions have provisions on values and goals upon which the state is founded and according to which it is expected to operate, among them, those of the United States of America, Uganda, South Africa, Fiji and Nigeria. Article 1 of the South African constitution states the values on which the constitution is founded. For instance, the Uganda constitution also has National objectives and directive principles of state policy.

5.0 Provisions on National values in the Proposed new Constitution

The proposed new constitution (at article 13) has one broad section outlines national values, principles and goals that, among other issues, deal with promotion of:

- National unity;
- Recognition of the diversity of the people
- Participation, openness and transparency in public;
- Equality and equity for all;
- Democracy, good governance and the rule of law

CHAPTER FOUR: CITIZENSHIP

1.0 Introduction

The chapter explains the different types and ways of acquiring citizenship, the rights and duties of a citizen and how citizenship can be retained or lost. It also prescribes legislation that guides all these activities.

1.1 Objectives

At the end of this chapter participants should be able to understand and appreciate the provisions on:

- Citizenship;
- The rights, responsibilities and duties of a citizen;
- Acquisition of citizenship and conditions for under which a citizen may be deprived; and
- Conferring citizenship through marriage.

1.2 Principles underlying this chapter

- Every citizen of Kenya is entitled to the to the rights, privileges and benefits of citizenship
- Every citizen is subject to the responsibilities of citizenship
- The right of citizens to a passport and any other document of identification issued by the state to its citizens

2.0 Provisions on citizenship in the current constitution

The current constitution does not allow for dual citizenship¹⁵ (section 97(1)). It also has an apparent aspect of gender discrimination in conferment of citizenship. For instance, it provides that a person born outside Kenya after 11th December 1963 shall become a citizen of Kenya at the date of birth if at that date his father (not mother) is a citizen of Kenya (section 90).

3.0 Views of Kenyans

In summary Kenyans were of the view that: -

- Although the current constitution prohibits discrimination based on gender, there is an apparent aspect this in the conferment of citizenship, specifically for the women. The people wanted to have this aspect of discrimination addressed in the proposed new constitution;
- Dual citizenship should be permitted, especially for communities living along international borders and Kenyans resident overseas.
- Automatic citizenship should be given to a child born of a Kenyan parent
- Any person who marries a Kenyan citizen shall have right to become a Kenyan citizen by virtue of that marriage

4.0 Provisions on citizenship in other constitutions

The Namibian constitution allows for dual citizenship, whereas a large number of African countries do not allow dual citizenship.

5.0 Provisions on citizenship in the Proposed New Constitution

The proposed new constitution provides for the conditions on the following-

- Equality of all citizens regardless of race, ethnic origin, age place of birth, gender or any other difference. (Article 14)
- Dual citizenship, citizenship through ¹⁶naturalization, registration¹⁷ and permanent residence status. (Article 19, 21)
 - Treatment of men and women equally on conferring citizenship (Article 23)
 - Responsibilities of a citizen. (Article 24).

¹⁵ dual citizenship- the right of a person to be a citizen of more than one country at the same time.

¹⁶ Naturalization- the process of conferring citizenship to a person who is not a Kenyan by birth.

¹⁷ Registration is a way of conferring citizenship to a person (upon application) who was not a citizen.

CHAPTER FIVE: CULTURE

1.0 Introduction

This chapter describes the importance of recognizing, observing and promoting, protecting and developing the cultural identities and practices of the diverse Kenyan communities. It emphasizes the need for Kenyans to freely practice their cultural, social and technological heritage without negatively affecting others or the law. This chapter is a unique one in the entire proposed new constitution as this is the first time that we, as a nation, are having a chapter concerning culture in our constitution.

1.1 Objectives

At the end of this chapter, participants should be able to understand and appreciate the provisions on:

- Culture and its promotion; and
- The respective duties and obligations of the state, communities and individuals in the observance and practice of culture.
- The National Communication on Culture
- The importance of Utamaduni Day.

1.2 Principles underlying the chapter

The chapter on culture is founded on the following principles: That;

- Culture is the foundation of the nation on which all spheres of individual and collective lives of a nation are based;
- Culture forms the basis of nurturing our national pride and identity;
- Culture reflects and affirms our uniqueness and distinctiveness as a people
- Cultural diversity, when well enhanced, provides an important aspect of national life and creates a cohesive society; and
- Contributing and sharing in the global culture.

2.0 Provisions on culture in the current constitution

In the current constitution, the provisions, which directly address the issues of culture, are few and scattered in mostly, the chapter on the Bill of rights. These include. .

- The recognition of Swahili as an official language in the National Assembly. (Section 53),
- The right of an accused person to be informed of the charges made against him/her in a language that the accused is able to understand (section 77).
- The right to apply one's personal law in matters that include adoption, marriage, divorce, burial, inheritance of property on death (section 82).
- The requirement to know Swahili before one is naturalized (section 93).
- The holding of Trust Land by the County Council, for the benefit of the persons ordinarily residing on that land under African Customary Law (section 115).
- The payment of full compensation to an owner of land under the African customary law before land is set apart (section 117).
- The extinguishing of the land rights accruing under customary law to a family, tribe, group or individual, once the county council has set apart that particular area of land (section 118).

3.0 Views of Kenyans

The people of Kenya gave their views to the CKRC on various aspects of life as they relate to culture. Some of the issues raised concerned;

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- The diversity of the Kenyan people, in which they expressed the need to respect diversity, so that our differences should provide a source of strength
- The need to turn our shared values into a basis for the development of a national culture
- The need to promote coexistence, peace and stability among all Kenyans
- The need to recognize and respect all of Kenya's linguistic communities
- The right for all Kenyan people and communities to organize, practice and manifest their culture, identity and heritage
- The right for all of the Kenyan communities to maintain, protect and develop the positive culture, including their creative, visual, performing arts, artefacts, ornaments, designs, ceremonies, customs, traditions and rites, among others.
- The need to recognize and honor those who fought against foreign oppression to regain our independence and the need to document and preserve that history
- That records being held by Kenyan government and other governments should be made public;
- The establishment of a mechanism to recognize and honour all freedom fighters, past, present and future;
- The state should recognize, promote and facilitate the work of cultural workers e.g. artists.
- The state should promote and facilitate the media and encourage the development of local content and programming.
- That all Kenyan communities should be respected and treated equally and should not be discriminated upon. Establish a mechanism to establish an accurate number of communities – not the mythical 42.
- Culture and cultural heritage, norms, customs, traditions, beliefs, rituals, rites etc should be respected, recognised, promoted, preserved and protected so long as they are not harmful, oppressive and discriminatory and or forced on an individual.
- All Kenyan people, cultural, linguistic and religious communities have a right to compensation and or restitution for cultural, intellectual, religious, spiritual and other properties taken without their free will and consent or in violation of their laws, traditions. Special efforts should be made to return property appropriated by colonial forces.
- The Constitution should recognise and respect traditional land tenure and use.
- Traditional knowledge on the environment including utilization use and conservation should be recognised, preserved, protected and respected.
- Cultural knowledge and technology should be taught in schools.
- The state to promote cultural and cultural related industries such as textiles, fashion, food, architecture, film, radio and television, theatre, visual arts and design and publishing.

4.0 Provisions on culture in other constitutions

Few countries in Africa have made an attempt to provide for and entrench culture in their constitutions. Among these are Uganda, South Africa, Ethiopia and Swaziland. The Uganda constitution provides for cultural objectives under the schedule while the Swazi constitution provides for the entrenchment of culture in the constitution.

5.0 Provisions on culture in the proposed new constitution

The proposed new constitution has made provisions for culture which, among others:

- Affirms the values and principle of the ¹⁸unwritten constitution of the communities of Kenya; (Article 26)
- Recognizes and protects the fundamental goals and values of culture; (Article 26)
- Establishes a National Commission on Culture (Article 27).
- Establishes Utamaduni Day (Article 28)
- Promotes understanding, tolerance and appreciation of cultural diversity;

¹⁸ Unwritten constitution- refers to the traditional African way of life and practices passed down from generations to generations

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- Enhances the cultural values to develop moral, ethical and spiritual foundations;
- Supports and promotes the development and application of modern and traditional medical practices;
- Encourages the rediscovery and application of traditional farming systems, diet and traditional drinks.

CHAPTER SIX: BILL OF RIGHTS

1.0 Introduction

This Chapter on the Bill of Rights¹⁹ creates clear obligations on the government to protect and promote fundamental rights and also spells out the obligations of the individual in the enjoyment of those rights. It also sets out the general provisions, theory and purpose of the Bill of Rights, Gender equity and equality in relation to; social, economic, cultural and political opportunities/activities, inheritance, access to, and management of property.

1.1 Objectives

At the end of this chapter participants should be able to understand and appreciate the provisions on:

- The guiding principles of the Bill of Rights;
- The fundamental rights and freedoms, and their application;
- Categories of rights; and
- The limitations on Rights

1.2 Principles underlying this chapter

- To provide a framework for social, economic and cultural policies
- To preserve the dignity of individuals and communities
- To promote social justice and the realization of the potential of all human beings
- To state that these rights and freedoms belong to individuals and are not granted by the State
- That these rights may be limited as contemplated in this chapter

2.0 Provisions on the Bill of Rights in the current Constitution

The current Bill of Rights guarantees the following rights:

- The right to life²⁰ and liberty (sections 71,72)
- The right to be protected against slavery; forced labour; torture, and inhuman or degrading treatment (section 73)
- Protection of the right to private property;(section 75)
- The right to be protected against arbitrary search and seizure;(section 76)
- Protection of the right of conscience, expression, assembly, association and movement;(sections 78,79,80)
- The right not to be discriminated against on the basis of gender, race, tribe, place of origin, residence or other local connections, political opinion, colour or creed; (section 82) and
 - The right to a fair trial before an independent tribunal established by law in a criminal case, including the right to be deemed innocent until proven guilty; and right to legal representation (section 77)

3.0 Views of Kenyans

Most submissions touched on human rights directly or indirectly. Complaints and demands were received on:

¹⁹ The Bill of Rights is founded on values of human dignity and equality, which provides the framework for a country's social, cultural and economic policies.

²⁰ The right to life is inalienable, which means it belongs to a person by the mere fact that he is a human being. It is not given by the constitution.

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- The need to remove restrictions on rights;
- Greater accountability of police and an end to police harassment;
- Arbitrariness of officials, particularly chiefs;
- Access to information held by the Government;
- Discrimination by the Government against minorities and prejudice by the public;
- Discriminatory legislation and other measures used to harass the public, especially in North-Eastern and Eastern provinces;
- Inadequate protection of religious freedom, days and modes of worship and even styles of dress;
- Demand for affirmative action to enable disadvantaged groups to catch up with other groups in social and economic development;
- Tribalism or ethnic prejudice;
- Government favour of particular communities and discrimination against others;
- Better protection of property, particularly land;
- Better distribution of land;
- Degradation of the environment and destruction of forests;
- Access to and guarantees of preservation of their cultural sites and shrines;
- Secure land for shelter;
- Guarantees of shelter;
- Lack of transport facilities and poor road conditions, especially in the rural areas;
- Equal (and equitable) rights and access to land;
- Protection of the rights of people with disability;
- Special status and protection of rights of older persons;
- Protection and rehabilitation of street children and orphans;
- Recognition of workers' rights;
- Protection of journalists and of freedom of press in general;
- Free and compulsory primary education and subsidized education thereafter;
- Free or subsidized health facilities;
- Lack of safe and clean water;
- Malnutrition;
- Opportunities for employment or self-enterprise;
- Better access to courts;
- Lack of an institution to which they can take their complaints about arbitrary administration;
- More humane treatment in prisons for inmates;
- Torture at the hands of the police;
- Long periods of remand pending trial;
- Respect for international treaties on human rights;
- More effective machinery for protecting their rights;
- More involvement in decisions which affect their daily lives;
- Protection of children generally;
- Arbitrary arrests and searches;
- Insecurity;
- Failure to recognize certain groups during census;
- Full rights to citizenship, including to obtain identity cards, voting cards and passports;
- Exclusion from public employment of some citizens, e.g., Goans and Nubians.

4.0 Provisions on the Bill of Rights in other constitutions

Provisions for a Bill of Rights is the norm of most written Constitutions. The only difference is that, while the earlier, essentially pre-1966, instruments emphasise civil and political rights, the more recent ones are comprehensive, incorporating, as they do, the values, principles and norms

embodied in international treaties and conventions. A number of countries have provisions for various categories of rights. These rights include civil and political rights, include right to dignity, privacy liberty and ²¹equality. A number of countries have provisions for these categories. Other categories of rights are;

- Economic, social and cultural, which are provided for in the constitutions of Eritrea, Uganda, Ethiopia
- Family rights which include the right to marry are provided for in the constitution of Ethiopia (Article 34)
- Development and environment rights, which include Right to a healthy environment, sustainable development, equitable access to resources and labour are provided for in the constitution of Tanzania (Article 28). Malawi (Article 30), south Africa among others

5.0 Provisions on the Bill of Rights in the proposed new Constitution

The proposed new Constitution has made provisions that: -

- Ensure protection of human rights (Articles 29,30,31)
- Obligates the State and its organs to enforce and implement rights and freedoms (Articles 31,32, 33)
- Establish specialized body – Commission on Human rights and Administrative Justice to promote and enforce rights (Article 32)
- States conditions under which rights may be limited (Article 34)
- Guarantees the right to life (Article 35)
- Protects the rights to choose ones occupation and join association (Articles, 57)
- Guarantee all workers the right to trade union (Article 59)
- Make provision for consumer protection (Article 69)
- Restrict the circumstance in which state of emergency can be used, the time and those who may declare it (Article 75)
- Creation of Gender Commission (Article 76)

²¹ Equality- The concept of equality holds that all people are equal before the law and that all will receive equal protection and treatment. This concept, therefore, outlaws any form of discrimination.

MANAGEMENT OF NATIONAL RESOURCES

1.0 Introduction

This part outlines the identification, utilization, regulation, and management of national resources, which are essential features of any country. The proper distribution, sharing, protection and use of these resources guarantee satisfaction to all.

1.1 Rationale for Grouping

This thematic area clusters chapters that deal with national resources, which include;

- Land and Property;
- Natural Resources;
- National Security;
- Public Finance and Revenue; and
- The Public Service.

There are values and principles put in place to guide the management and utilization of each of these resources. Clear guidelines and principles are embedded into the constitution for the first time to govern the sustainable use of the country's environment and natural resources for the good of all Kenyans. This section stands on the premise that, the country's environment and natural resources belong to all Kenyans.

Similar provisions are in this Part to guide and regulate the conduct of public officers in their day-to-day operations. The Part also provides for a defence and national security system, which derives its authority from established bodies. National security is to safeguard the well-being of Kenyans and their property within Kenya's territorial boundaries.

For the first time, the Constitution recognizes the growing importance of intellectual property as an instrument of innovation and social economic development and seeks to protect it. Patents, copyright, trade marks, trade secrets, utility models, industrial designs and traditional or indigenous knowledge are recognized alongside land as needing special protection against theft and unauthorized use.

1.2 Objectives of this thematic area

At the end of this thematic part, participants should be able to know provisions that cater for

- Protection and management of Kenya's natural resources;
- Promotion of efficient and sustainable utilization, distribution and regulation of natural resources;
- The roles and functions of organs charged with oversight responsibility of these resources; and
- The professional ethics and integrity in the provision of public services.

CHAPTER SEVEN: LAND AND PROPERTY

1.0 Introduction.

This chapter provides for the principles of land policy that recognizes land²² as Kenya's primary resource, which should be held, used and managed in a manner that is equitable, efficient, productive and sustainable. The chapter also explains the different classification of land, regulation of land use and legislation on land.

5.1 Objectives

By the end of this unit, participants should be able to understand the provisions on:

- Acquisition of Land and property, use and transfer;
- The National Land Commission;
- The scope of the power of the state to regulate land use.

1.2 Principles underlying this chapter.

This chapter is founded on the following principles:

- Land is Kenya's primary resource and the basis of livelihood.
- Land ownership, access and use is the crux of cultural, economic and socio-political change.
- Accessibility to land and associated resources shall be equitable and free from any form of discrimination.
- The holding, use and management of land shall be equitable, efficient, productive and sustainable.

2.0 Provisions in the Current constitution

Rights in land, as property are protected by section 75 and may not be expropriated without prompt compensation. Chapter IX of the constitution vests trust land ownership, control and management in county councils, which must hold and use them for the benefit of the communities entitled to them in accordance with customary law.

Although there is no provision in the current Constitution on intellectual property, Kenya is a signatory to a number of international conventions on the issue, including the Biodiversity Convention and conventions establishing the World Intellectual Property Organization (WIPO) and the African Regional Intellectual Property Organization (ARIPO).

3.0 Views of Kenyans

There were extensive views on the land question and, in particular, the constitutional status of Trust Lands. These may be summarized as follows:

- a) all land should belong to the people, not to the Government;
- b) all Government land which has been "grabbed" should be repossessed;
- c) trust land should be vested in local communities directly;
- d) land distribution should be equitable;
- e) land unjustly expropriated by the colonial or current Government should be restored to the rightful owners or, where this is not practicable, reparations should be made; and
- f) restitution should be made for damage arising as a result of land conflicts or clashes, especially in the Rift Valley, Coast, North-Eastern province and parts of Eastern province.

²² "Land" includes –

- (a) the surface of the earth and the sub-surface rock;
- (b) any body of water wholly contained upon or beneath the surface;
- (c) marine waters in the territorial sea and exclusive economic zone;
- (d) natural resources wholly contained upon or beneath the surface; and the air space above the surface.

In specific terms, Kenyans expressed the views that

- i) forest areas being 'de-gazetted', allocated to individuals and deforested for environmental and resource considerations or even of resident communities would effectively destroy the livelihood of the people, (for example, clearing parts of the Mau forest would finally deprive the Ogiek people and ultimately destroy the community itself);
- ii) the effects of unjust deprivation of land during the colonial period are still felt by some communities;
- iii) some communities are deprived of access to important cultural sites;
- iv) There is a good deal of land lying idle while others are crying out for access to land;
- v) some hold land as a symbol of power, rather than for productive use;
- vi) many asked for an upper limit on the amount of land that can be held by an individual; land held above this ceiling to be expropriated and re-distributed to landless people: and
- vi) women should have better rights to land: in terms of control of the land they cultivate, inheritance rights, and matrimonial property rights

On land tenure and land administration

- i) land may be held under customary, private or public tenure systems;
- ii) all such land used and/or occupied by local residents and from which they derive their daily livelihood should be vested in them on the basis of either private or customary tenure, as such, determined by the local land body, which, in making that determination, should take into account all the prevailing circumstances;
- iii) any other such land not used or occupied, or set apart as above, should be reserved as a land bank for future use in the interest of public order, morality, health and development;
- iv) the Constitution should establish principles for a coherent policy on land, which includes:
 - a) respect for individual and community rights under customary law;
 - b) just reconciliation of customary and statutory rights;
 - c) sufficient flexibility to permit tenure changes in the public interest and not detrimental to existing rights holders;
- v) the responsibilities hitherto exercised and rights held by county councils should be vested in the National Land Commission;
- vi) all land hitherto known as trust land, which is not adjudicated and unregistered, should be referred to as land held under customary tenure;
- vii) all such land used and/or occupied by local residents and from which they derive their livelihood should be vested in them on the basis of either private or customary tenure, depending on the prevailing circumstances;
- viii) such land not occupied or not in the immediate use by local residents should be set apart for and vested in the indigenous communities as commonage;
- vii) any other such land not used or occupied, or set apart as above, should be reserved for future use in the public and/or communal interest;
- viii) any trust land for which the lease has expired should immediately revert to the National Land Commission for reallocation by the land board and reclassification as stated above; and
- ix) private property should be protected.

On Intellectual Property Rights

- i) inventors of things e.g., medicines and aircraft, be promoted by the Government;
- ii) the Constitution should provide intellectual property rights for inventions by our citizens;
- iii) a law should protect Maasai intellectual rights;
- iv) patent rights on technology should be waived after 25 years;
- v) the Constitution should take cognizance of social dynamism, advancement of human knowledge and technology;
- vi) the Constitution should protect and promote intellectual property rights and innovation;

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- vii) inventors should be rewarded by the Government;
- viii) patent laws should be strengthened to protect Kenyan inventions; the inventors should also be rewarded and their ideas put into place;
- ix) encourage patenting to protect local investors;
- x) all our discoveries should be patented;
- xi) registration of patents should be reviewed to allow for cheap and easy ways of registering inventions;
- xii) investors should be allowed land in rural areas;
- xiii) the Government should encourage technological developments and assist inventors; and
- xiv) plagiarists of research and innovation should be punished; some taxes should be directed towards research

4.0 Provisions in other Constitutions.

Constitutions generally deal with land issues in one or both of two ways. The first is to include it in the general provisions which protect property rights; hence to make no distinction between land and other forms of property.

The second approach is to separate land (i.e. immovable property) from other forms of property and to classify it as a national asset requiring a special and more elaborate constitutional treatment.

The Constitution of South Africa has elaborate provisions on land. Section 25 (5) provides that the state must take reasonable legislative and other measures within its available resources to foster conditions, which enable citizens to gain access to land on an equitable basis.

Section 25 (7) provides for restitution or equitable redress to the extent provided by an Act of parliament for a person or community dispossessed of property after June 1913 as a result of past racially discriminating laws or practices.

Sections 238 (1) and 239 of the Ugandan constitution provide for a land commission that is required to hold and manage any land vested in or acquired by the government in accordance with the provisions of the constitution.

Section 241(1) (2) states that there shall be District Land Boards, which shall be independent of the Ugandan Land Commission in the performance of their functions and shall not be subject to the direction or control of any person or authority.

5.0 Provisions in the proposed new Constitution

Principles of land policy and the system of holding using and managing land in a manner that is equitable, efficient, productive and sustainable (article 78).

Vesting of land to the people of Kenya collectively as a nation and classification of land as public, community or private.(articles 79, 80, 81 and 82).

Land holding by non-citizens where non-citizens may hold or use land on leasehold tenure only and such lease shall not exceed ninety-nine years (article 83).

Regulation of land use in the interest of defence, public safety, morality and health; planning, development and utilization of property (article 84).

Establishment of the National Land Commission with several functions (article 85).

Obligation (article 86) for Parliament to enact legislation, amongst other things to:

- Revise, consolidate and rationalize existing land laws;

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- Enable the review of all grants or dispositions of public land to establish their propriety or legality; and
- Establish a land fund to enable citizens to gain access to land on an equitable basis; prescribe minimum and maximum land holding acreage in arable areas.

CHAPTER EIGHT: ENVIRONMENT AND NATURAL RESOURCES

1.0 Introduction

This chapter describes the principles, obligations and duties of the State, individuals and communities in the protection, conservation, sustainable utilization and enforcement of legislation on the environment²³ and natural resources.

1.1 Objectives

By the end of this unit, participants should be able to understand provisions that deal with:

- Importance of conserving, protecting and managing the environment and natural resources.
- Dissemination of information about the environment, duties and enforcement of protection.
- Knowledge on the use and development of natural resources and the benefits to communities

1.2 Principles underlying the Chapter

There should be:

- Sustainable exploitation, utilization, management and conservation of the environment and natural resources;
- Equity in sharing of the benefits accruing from exploitation environment and natural resources.
- Planning and utilization of the environment shall take account of disadvantaged areas and their inhabitants;
- Maintenance of a tree cover of at least 10 per cent of the land area of Kenya.

2.0 Provisions in the Current Constitution

The current constitution does not make any reference to environment and natural resources. These are administered under legislation. In the legislation all minerals, water bodies and national forests are defined as the property of the state. For example the Mining Act CAP 306 administers mining of the country's resources. The National Environment Management Authority Act established the National Environment Management Authority to manage and administer the country's Environment. The President is the guardian of all state property.

3.0 Views of Kenyans on the Environment and Natural Resources

Kenyan's views on this chapter were very candid and were summarized as follows:

On Water

- The government should take full responsibility of providing Kenyans with clean piped water.
- The government should protect all water catchments
- Dams should be cleared and reclaimed
- Adequate resources should be provided to rehabilitate depleted water schemes and facilitate fro the harvesting of rain water
- The government should dig boreholes and dams in Arid and semi- Arid areas of Kenya
- Environmentally friendly water projects should be implemented
- Residents should benefit from water resources originating from their regions.

On Minerals

- Mineral exploitation should benefit the communities around those resources.
- Laws pertaining to mineral exploitation should be in line with the local needs.

²³ The surrounding or conditions in which a person, animal or plants live or operate within

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- The Government should put more research into mineral exploration and excavation for the benefit of the people.
- Mineral mining rights should be given to the local communities.
- Communities residing where minerals are discovered should be compensated
- The mining policy should be reviewed to benefit the Public.

On Fisheries

- The people said that the fishing industry has been faced with the problems of:
 - Insecurity: Foreigners fishing in Kenya's waters
 - Restrictions: Kenyans were not free to access all parts of beaches available
 - Poor fishing skills
- Kenyans felt that security should be granted to fishermen and that the fishing industry should be revived.
- Restrictions on fishing should be imposed only on Foreigners
- Small-scale fishing should be legalized
- The Government should provide fishing skills and equipments to fishermen.

On wildlife

- Wildlife be protected from poaching.
- National parks be fenced
- New and rare species of animals should be added to the National parks
- The size of National parks be reduced and the land recovered be distributed to the people.
- Revenue collected from national reserves should be reserved for the locals
- Damage caused by the wildlife should be compensated
- Human deaths caused by wildlife be compensated at Ksh3 million while property should be compensated at Ksh100, 000 and above.

On forests

- The government should undertake massive afforestation to prevent desert encroachment.
- Forest land should not be allocated to individuals or illegally acquired
- Environmental protection issues should be included in the Constitution.
- Stiff penalties should be meted out to individuals and companies involved in Environmental degradation.
- Agro-forest tree nurseries should be established for trees to be planted through out the country.
- Forest land should not be de-gazetted;
- The local community should have a role in the managing and protecting forests and be consulted about all excisions.

4.0 Provisions on Environment and Natural Resources in other Constitutions:

Provisions for managing and controlling natural resources are now common in many Constitutions. These are found in the Bill of rights, the directive principles of state policy or special chapters.

The Constitution of Uganda obligates the state to protect important natural resources such as land, water, wetlands, minerals, oil, fauna and flora for the people of that country. This directive is to be found in that country's National Objectives and Directive Principles part of the constitution.

Similarly the Constitution of Ghana obligates the state to protect the environment and natural resources. It goes further by demanding that any transaction, contract or undertaking involving the grant of a right or concession by on behalf of the people of Ghana to any other person or body of persons for the exploitation of minerals, water or any other natural resources must be ratified by parliament.

5.0 Provisions of Environment and Natural Resources in the Proposed New Constitution

Provisions for the protection and sustainable use of the environment and natural resources are entrenched in the Constitution for the first time. The proposed new Constitution provides for, among others:

- State allocation of adequate resources to reclaim and rehabilitate degraded areas (article 87(h)).
- The obligations on every person and state organs to respect, protect, conserve and safeguard the environment (Article 88, 89).
- The protection, management and promotion of a sustainable use, and development of natural resources (Article 90).
- Establishment of a National Environmental Commission (Article 93).
- Legislation to be enacted to regulate the sustainable exploration, utilisation, management, and equitable sharing of benefits accruing from natural resources (Article 93 (c)).

CHAPTER FIFTEEN: PUBLIC FINANCE AND REVENUE MANAGEMENT

1.0 Introduction

This Chapter sets out the principles and objects of public finance and revenue management at both the national and district levels of Government, explaining the sources of revenue for the government, the method of collecting this revenue and how it shall be appropriated. Details of the offices and officers involved in all these processes and how they shall carry out their duties and functions are provided.

1.1 Objectives

By the end of this unit, participants should be able understand provisions that deal with:

- The principles of public finance management, taxation, borrowing by the national and district Governments; and budgetary processes;
- The institutions and constitutional offices authorized to deal with financial matters; and
- The methods and procedures for the collection, budgeting, appropriation and accounting for public funds.

1.2 Principles underlying this chapter.

This chapter is founded on the following principles:

- Promotion of efficient, effective and economic use and management of public resources;
- Encouragement of the people to participate in the process of policy making, and legislation on public funds;
- Efficient and effective generation of revenue;
- Adherence to the principles of transparency and accountability and observance of the law, including appropriate controls and oversight on borrowing and expenditure
- Regular accounting and auditing of public funds.

2.0 Provisions in the current Constitution

Section 48 of the current Constitution prohibits the National Assembly from proceeding with a Bill or a motion proposing taxation measures, a change on or withdrawal of money from the Consolidated Fund, or composition or remission of a debt due to the Government except on a recommendation by the President signified by a minister.

Part VII of the Constitution makes elaborate provisions for establishing and appropriating the Consolidated Fund, establishing a Contingencies Fund, managing the Government's public debt, and the office of the Controller and Auditor-General.

These provisions are further elaborated in specific Acts of legislation, among which are:

- The Exchequer and Audit Act (Cap.412);
- The Kenya Revenue Authority Act (Cap. 469);
- The Paymaster General Act (Cap.413);
- The Government Contracts Act (Cap.25); and
- The Central Bank Act (Cap.491).

3.0 Views of Kenyans

During the collection of views, people who spoke on public finance and revenue management were concerned mainly about the following issues and wanted them addressed in the new Constitution:

- (i) strengthening the independence and powers of the Auditor-General;
- (ii) better controls over expenditure of State revenue out of the Budget;
- (iii) greater transparency of the process;

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- (iv) greater involvement of the public and Parliament in preparing and approving the budget;
- (v) more transparency over tax waivers;
- (vi) senior officers of the Kenya Revenue Authority to be appointed by Parliament;
- (vii) establishing the Budget Office of Parliament;
- (viii) separating the two functions of Budget control and audit;
- (ix) systemizing the financial provisions; gathering them in one place;
- (x) tightening Parliamentary control of Government borrowing;
- (xi) office of the Governor of the Central Bank to be established by the Constitution and given security of tenure and independence of operations;
- (xii) tightening Parliamentary control of Government borrowing;
- (xiii) the nation's currency should have a national image, not an individual's portrait; and
- (xiv) revenue should be shared between the central Government and lower levels at certain percentages, between 10 and 20% to the central government.

4.0 Provisions in other Constitutions

The Constitution of South Africa has elaborate provisions on Government guarantees. Section 218 (1) states that the national government, a provincial government or a municipality may guarantee a loan only if the guarantee complies with any conditions set out in national legislation.

Section 218 (2) states that the national legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

Section 218 (3) provides that each year, every government must publish a report on the guarantees it has granted.

5.0 Provisions in the proposed new Constitution

The proposed new constitution:

- Sets out the principles and objects of public finance and revenue management (article 218).
- Deals with taxation powers and revenue sharing, both at the national and district Government (Articles 219, 220, 221).
- deals with Government Funds; Consolidated Fund for the national Government and that of the district Government; withdrawals to be made from these Funds; and the Contingency Fund (Articles 222, 223, 224, 225) .
- Addresses how borrowing by both the national and district Governments should be done. It also deals with how Governments at both levels will handle loan²⁴ guarantees (Articles 226, 227, 228, 229).
- Sets out principles of budgeting by the national and district Governments; the annual estimates of a national Government; and that of the district Governments, and how the sharing and appropriation of revenue between both levels of Government will be done (Articles 230, 231, 232, 233); and
- Addresses how procurement of public goods and services should be done and also provisions on how to ensure proper accounting and auditing of all public institutions (Articles 234, 235, 236).

It also establishes key institutions and offices in the management and control of public finances, such as the Central Bank and Auditor General.

²⁴ "Loan" includes any money lent or given to the Government on condition of return or repayment and any other form of borrowing or lending in respect of which money from the Consolidated Fund or any other public fund may be used, or is required to be used, for payment or repayment.

CHAPTER SIXTEEN: PUBLIC SERVICE

1.0 Introduction

This Chapter seeks to enable participants understand the provisions in the proposed new Constitution, which include the fact that the Public Service is intended to be an efficient and professional body that offers its services to the people on the principles of accountability, fairness and transparency. The execution of public service through both levels, and organs of government is also defined.

1.1 Objectives

To enable participants understand the provisions dealing with:

- The guiding principles, values, roles and functions of the Public Service; and
- The composition, tenure and powers of the Public Service and its organs.

1.2 Principles Underlying this Chapter

The principles underlying this chapter include promotion of: -

- Professional ethics²⁵ in the performance of duty.
- Impartiality²⁶, fairness and equity in the provision of services;
- Encouragement of public participation in public policy formulation.
- Accountability²⁷ for administrative acts of omission and commission.
- Transparency²⁸ in the provision of timely, accessible and accurate information.
- Recognition of the country's demographic diversity, including persons with disabilities, minorities and the marginalized groups.

2.0 Provisions in the Current Constitution

The current Constitution recognizes the Public Service Commission alongside other Constitutional Commissions. These are:

- The Parliamentary Service Commission (Part A and B of Section 45)
- The Electoral Commission of Kenya (Section 41)
- The Judicial Service Commission (Section 68 and 69)
- The Public Service Commission. (Section 106)

The above sections provide for the appointment, qualification, appointment, removal from office, terms, conditions, tenure, roles and functions of the said commissions.

3.0 Views of Kenyans:

To strengthen the public service like all Constitutional Commissions, Kenyans gave views that suggested that they wanted them to be:

- Independent;
- Accountable for their activities;
- Financially stable
- Entrenched in the Constitution
- Have their powers and functions clearly set out in legislation.
- Should have power to enforce recommendations.
- Where necessary they should have power to prosecute.
- Should be able to enforce law in different sectors of government.

²⁵ System of moral values; rules of conduct recognized in respect of a particular group of people. With respect to rightness or wrongness of certain actions

²⁶ Not biased (unbiased), fair, just, equitable, unprejudiced

²⁷ Having the property of allowing light through so that goods behind it are clearly visible; open; frank; candid

²⁸ Subject to having to report, explain or justify

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- Chairpersons should have security of tenure.
- Should assist Kenyans to identify, mobilize, and decide on the usage of resources in their respective areas.
- Should offer public information and education programmes in their areas of operation.

4.0 Provisions in Other Constitutions

Most Constitutions in the Commonwealth Countries establish an independent institution for recruiting and disciplining public servants. That is the case in Ghana, Singapore, India and Uganda.

While many Constitutions merely create a single Public Service Commission with responsibility over the entire service, others set up sector specific Commissions. Thus, in Uganda, the Constitution creates, in addition the Public Service Commission: -

- an Education Service Commission;
- a Health Service Commission; and
- a District Service Commission

5.0 Provisions in the proposed new Constitution²⁹

The proposed new Constitution contains articles establishing the Public Service as follows: -

- Values and Principles of the Public Service and how they will be applied (Article 245).
- The Public Service Commission (Articles 246 and 247).
- Provides for responsibilities for the staffing and modes of appointment, dismissal and protection of public officers when on duty (articles 248 and 249).
- Teachers Service Commission (Article 250).
- Health Services Commission (Article 251).
- Salaries and Remuneration Commission (Article 252).
- The Kenya Correctional Services and its Director General (Articles 253 and 254).

²⁹ See also chapter 18 on Constitutional Commissions.

CHAPTER SEVENTEEN: NATIONAL SECURITY

1.0 Introduction

This Chapter defines the various national security organs and their overall responsibility of protecting the territory of Kenya and its people. It explains the establishment, functions, command structure, tenure of the heads of security organs, and the general regulation of the national security organs.

1.1 Objectives

At the end of this Unit, participants should be able to understand and appreciate the provisions on:

- National security; and
- The functions and roles of all national security organs.

1.2 Principles Underlying the Chapter

The principles underlying this chapter state that: -

- National security organs shall comply with the law and demonstrate utmost respect for democracy, human rights and fundamental freedoms;
- Recruitment by the national security organs shall reflect the diversity of the Kenyan people in equitable proportions; and
- National security is subject to the authority of the Constitution and Parliament.

2.0 Provisions on National Security in the Current Constitution

The current constitution does not contain a systematic set of provisions on defence and national security. It merely establishes the guidelines that govern the existing organs of national security in respective Acts of Parliament: -

- The Kenya Police under the Police Act (Cap 84);
- The Administration Police under Cap 85,
- Armed Forces under Cap 199; and
- The National Intelligence Service Act, Cap No. 11 of 1988.

3.0 Views of Kenyans

During collection of views Kenyans wanted to have an accountable and reputable National Security Service along the following lines.

(a) *The Establishment of a disciplined force by the Constitution*

- The forces should be independent.
- They should be under the ministry of defence.
- Others should be under the Ministry of Home Affairs.

(b) *On Whether the President should be commander in chief:*

- The President should not be the commander in chief.
- The chief of general staff should be the chief of the armed forces.
- A Commission be in charge of the armed forces.

(c) *On who should have the authority to invoke emergency powers*

- The supreme defence council should have that authority.
- Parliament should have the authority.
- The war council should have the authority.
- The citizens should have the authority.
- The cabinet should have the authority.

- An independent body should be established and have this authority.

4.0 Provisions in other Constitutions

The Ugandan Constitution is dedicated to Defence and National Security. Section 208(1) states that there shall be armed forces to be known as the Ugandan Peoples' Defence Forces, which:

“shall be non-partisan, national in character, patriotic, professional, disciplined, productive and subordinate to the civilian authority as established under the constitution.”

The Tanzanian Constitution has two articles only in Chapter Nine of its Constitution. Section 147(2) allows:

“The government... in accordance with the law, to raise and maintain in Tanzania Armed Forces of various types for the purpose of the defence and security of the territory and the people of Tanzania.”

5.0 Provisions in the Proposed New Constitution

Principles and objects that guide national security are provided for in Article 255.

Article 256 establishes the national security organs, limitations and conditions for the establishment of any national security or military or paramilitary organization; and the conduct and functions of the said organs.

Establishment of the National Security Council, composition and functions of the National Security Council are set out in Article 257.

The Kenya Defence Forces are established under Article 259, which also provides for the establishment and composition of the Defence Council that shall be responsible for the overall policy, control and supervision of the Kenya Defence Forces.

The Command of Kenya Defence Forces is provided for in Article 260.

The National Intelligence Service responsible for security intelligence and counter intelligence is established under Article 261. The Service shall be headed by the Director General with a term of five years renewable once. His/her appointment and removal from office is by the President.

The National Intelligence Council, its composition and functions are specified in Article 262.

Establishment of the Kenya Police Service, its objects and functions, appointment of the Inspector General are provided for by Articles 263 to 265.

The Police Service Commission and its functions are outlined in Article 266.

Establishment of the Administration Police Service, its functions and appointment of its Commandant General is provided under Article 268.

PART IV

SYSTEMS AND STRUCTURES OF GOVERNMENT

1.0 Introduction

Systems and Structures of Government consists of the chapters on Representation of the People, the Legislature, the Executive, the Judiciary and the Legal System, and Devolved Government which provide for:

- Powers and functions of the three arms of government and a system of checks-and-balances;
- A system of Devolved Government; and structures of distribution of power, roles and resources allocation between the National Government and devolved levels of government; and
- Democratic participation in representation institutions, the conduct of free, fair and regular elections by an Electoral and Boundaries Commission and the regulation of the conduct of political parties.

The chapters address governance and participation including composition and functions of the organs of state including the Executive, the Legislature and the Judiciary and their operations aiming to maximise their mutual checks and balances and secure their independence; the electoral system of Kenya; the jurisdiction of the courts and their accountability, efficiency, discipline;

1.2 Rationale for the grouping

This part groups together chapters on Representation of the people, Legislature, Executive, Judiciary and Legal Systems and Devolved Government. All these chapters provide for:

- Powers and functions of the three arms of government and a system of checks and balances
- A system of devolved government and structures for distribution of power, functions and resource allocations between the Central government and devolved levels of government
- Democratic participation in representative institutions, the conduct of free, fair and regular elections by an independent Electoral and Boundaries Commission and the regulation of the conduct of political parties

1.3 Objectives of this thematic area

The objective of this thematic area is to lay the basis for the establishment of a democratic system of government based on the fundamental principles of separation of powers, accountability, good governance, public participation, effective representation, checks and balances and constitutionalism. Safeguards must also be in place to ensure institutional independence and effectiveness.

It is also to underscore that any election, appointment, removal of any democratic system of government must be based on free and fair elections, an effective and fair electoral, constitutionalism, the rule of law, human rights and gender equity.

Another objective is to explain the rationale and mechanisms through which the people of Kenya are to be involved in the governance and development processes of their country. Through full and effective participation, people assume both the right and the responsibility to be involved in charting their own laws and programmes that aim to sustain and improve their well-being.

The thematic area further seeks to explain the structure and functions, appointment, removal from office and the conduct of the judicial system and its office holders.

UNIT I

CHAPTER TEN: REPRESENTATION OF THE PEOPLE

1.0 Introduction

This Chapter describes the legislation and procedures for the conduct of elections at legislative and executive bodies. It provides for the registration of voters and political parties, qualifications, and functions of the same. The work of delimiting constituencies and overseeing political parties is also prescribed.

1.1 Objectives of this Chapter

At the end of the unit, participants are expected to understand provisions related to the:

- The mechanisms of the electoral system and process;
- The conduct of and participation in free, fair and regular elections;
- The right to representation of all Kenyans, including women, youth, people with disabilities and marginalized groups;
- The establishment and functions of the Electoral and Boundaries Commission; and
- The establishment, functions and discipline of political parties.

1.2 Principles Underlying this chapter

The electoral system shall satisfy the following principles:

- the freedom of citizens to exercise their political rights.
- gender equity in elected bodies.
- representation of persons with disabilities.
- fair representation of the people generally, including the workers and the youth;
- fair elections which are: -
 - free from violence, intimidation, improper influence and corruption;
 - conducted by an independent body; and
 - administered in an impartial, neutral, transparent, accurate, efficient and accountable manner.

1.3 Principles Underlying Political Parties

A political party shall satisfy the following principles:

- have a national character;
- have a democratically elected governing body;
- promote and uphold national unity;
- abide by the democratic principles of good governance and promote and practise democracy through regular, fair and free elections within the party;
- respect the right of all to participate in the political process, including persons with disabilities, workers and other minorities;
- promote and respect human rights and gender equity and equality;
- promote the objects and principles of this Constitution and the rule of law; and
- subscribe to and observe the code of conduct for political parties;

A political party shall not: -

- be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in propaganda based on any of those grounds;
- engage in, or encourage violence or intimidation of its members, supporters, opponents or any other persons;
- establish or maintain a paramilitary force, militia or similar organization ; or
- engage in bribery or other forms of corruption.

2.0 Electoral System and Process in the Current Constitution

The right to vote is dealt with in the chapter on Parliament (s. 32(2)) in the current Constitution. The right is given only to a person who ‘is registered in a constituency as a voter in elections of elected members’(s. 32(2)). To be entitled to registration, a person must be a citizen of at least 18 years of age (s. 43(a)). He or she should also have been ordinarily resident in Kenya for at least one year immediately preceding the registration, or for four years in the preceding eight years. 43(b)) and must have been a resident in, or have other prescribed connection with, the constituency in which registration is sought (s. 43 (c)).

The Constitution provides that “at intervals of not less than 8 years and not more than 10 years, and whenever directed by an Act of Parliament, the Electoral Commission shall review the number, the boundaries and the names of the constituencies and may, by order, alter the number, the boundaries or the names, subject to and in accordance with this section, to the extent that it considers desirable in the light of the review”.

Detailed provisions for the conduct of elections are made in the National Assembly and Presidential Elections Act (Cap 7).

2.1 Provisions on Political Parties in the Current Constitution

In 1992, a section was inserted in the Constitution which declared that the ‘Republic of Kenya shall be a multi-party democratic state’ (section 1A). But the legislative framework for the registration, management and deregistration of parties was not altered. In the same year, the restriction that the President must appoint ministers from his or her party was removed, but some restrictions were introduced in 1997, which could make the Constitution relevant to parties. These are summarised as:

- the Constitution defines a party as one which has been duly registered. There is no special procedure for forming parties; parties are registered under the Societies Act, and it is not necessary to show any degree of popular support for the party;
- candidates for presidential elections must be nominated by a political party.
- candidates for the National Assembly must be nominated by a political party;
- political parties nominate candidates to be nominated to the National Assembly in proportion to their seats in the Assembly;
- an elected or nominated member of the National Assembly loses his or her seat if that member resigns from the party that supported his or her election or nomination while that party is still a parliamentary party;
- If such a member were to join another party when his or her original party has ceased to exist, he or she would lose the parliamentary seat;
- there are no State subsidies to political parties;
- the standing orders of the National Assembly recognize parliamentary parties in the committees and procedures of the Assembly;
- although the President makes appointments to the Electoral Commission, the understanding seems to be that he or she consults with the leaders of political parties before making such appointments; and

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- The National Assembly and Presidential Elections Act provides that a person who is elected or nominated as a member of the National Assembly with the support of a political party (other than the party whose candidate has been elected President at an election) cannot be appointed a minister (under s. 16 of the Constitution) without the concurrence of the party which supported him for election or nomination (s. 17(5)).

3.0 Views of Kenyans

(a) *On representation that:*

- (i) the current majoritarian system, based on simple majority rule, be retained; there was a need to increase representation of such marginalised groups as women, the disabled, ethnic minorities, the youth and other vulnerable groups in Parliament and the local authorities;
- (ii) seats should be reserved for some of these special groups in percentages ranging from 33 to 40, particularly for women in Parliament and local authorities;
- (iii) the electoral system should be computerised;
- (iv) the disabled are discriminated against through the current system at both the parliamentary and local government levels and would, therefore, wish to be given special attention and representation opportunities;
- (v) youth should be adequately represented at all levels of decision-making, including parliamentary and local governments; and
- (vi) the category of nominated members of Parliament be abolished; and elections be held regularly on a fixed date.

(b) *On voting that:*

- (i) the current voting system that links the right to vote to a national identity card and a voter registration card be abolished;
- (ii) that the voter's and identity cards be issued simultaneously but continuously rather than periodically or that one side of the national identity card be a voter's card;
- (iii) women who get married before getting ID's or those who marry after getting IDs but find it difficult to change their names are most disadvantaged, as are divorced women who cannot easily revert to their maiden names;
- (iv) the youth who have just attained majority age are also excluded by their inability to get IDs;
- (v) the infamous screening card among the Somali community is a major impediment to meeting their voting rights and duties;
- (vi) voting rights and residence be de-linked. Many complained that the voting date finds them in places other than where they are registered as voters; this was the case among nomadic communities; and
- (vii) transparent ballot boxes should be used.

(c) *On eligibility for Elections, that:*

- (i) Independent candidates should be allowed to contest elections;
- (ii) only people with proven leadership qualities should contest elections; quality being indicated by age, intellectual, moral and ethical standing and gender;
- (iii) there should be a lower-age and upper-age limit for various positions;
- (iv) for the president the lower-age limit should be raised from 35 years to between 40 and 45 years and the upper-age limit should be between 70 and 75 years;
- (v) minimum academic qualifications for various positions be set;
- (vi) for the president, minimum academic qualifications should be a university degree;
- (vii) for MPs, at least a secondary school certificate or a university degree certificate should suffice;
- (viii) for councillors academic qualifications might vary between at least Standard 8, a primary school certificate or its equivalent or a minimum of a secondary certificate;

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- (ix) women should be exempted from these academic qualifications on the grounds that, for many areas, women have been marginalised in education and may not meet these basic qualifications;
- (x) leaders should be morally and ethically upright; here, proposals on declaration of wealth and its sources and a proof of stable family were made;
- (xi) candidates seeking elective positions should not be required to resign their civil service positions; instead, they should be allowed to take leave and resign only when they win the seat;
- (xii) the language test once the qualifications above have been met should be abolished; and
- (xiii) there should be a leadership code.

(d) *On Election Results, that:*

- (i) the president should win an election by more than 50% of the votes cast;
- (ii) the 25% rule in five provinces be retained in addition;
- (iii) alternatively, a simple majority with at least 25% votes in at least 4 provinces should suffice;
- (iv) there should be a run-off in case none of the candidates wins more than 50% of the total vote in presidential elections;
- (v) a presidential candidate should not run for a parliamentary seat but, on failing to win the presidency, should be allowed to become a member of Parliament if he has secured a certain percentage of the vote;
- (vi) alternatively, a presidential candidate should run for both the presidential and parliamentary seats and the one who wins the presidency should cease to be an MP and a by-election should be called to fill in the vacancy; and
- (vii) the president should always be elected directly by the people.

(e) *On the conduct of Elected Representatives, that:*

- (i) non-performing representatives should be subject to: -
 - recall as a manifestation of the people's sovereignty;
 - increase people's participation in the political process and reduce voter alienation;
 - promote a more vigilant electorate and provide incentives for it to monitor the MP's performance; and
 - emphasise the MP's accountability to the electorate and encourage him or her to perform well.
- (ii) The recall process should be protected from abuse since this would: -
 - destroy representative government by restraining energetic MPs;
 - discourage qualified persons from seeking public office;
 - allow the losing political party a second opportunity to win office; and
 - encourage frivolous harassment of MPs; and permit removal of officers for inadequate reasons.
 - Emphasise the MP's accountability to the electorate and encourage him or her to perform well.

(f) *on whether the Constitution should regulate the formation, management and conduct of political parties, the people were of the view that: -*

- (i) tribalism in political parties was rampant;
- (ii) there are too many political parties;
- (iii) politicians have at times used the armed forces wrongly making them look like terrorists;
- (iv) the current Constitution does not compel political parties to conduct proper internal elections or practice democracy; as such, we have ended up with autocratic parties

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- with self- interest as their main cause .of existence;
- (v) nowadays there are 'briefcase' parties ready for sale;
 - (vi) parties are nowadays formed for personal enhancement;
 - (vii) the Government may suppress the opposition and freedom of association by regulation, formation and management;
 - (viii) political thuggery has taken root;
 - (ix) the Constitution should regulate the formation and management of political parties;
 - (x) the formation of political parties should not be based on ethnic grounds;
 - (xi) political parties should have a national outlook;
 - (xii) political parties should have autonomy on party registration, membership and manifesto;
 - (xiii) the formation and management of political parties should be gender -sensitive in that there should be gender equity in membership;
 - (xiv) before any political party can be registered, it should be scrutinized, especially with regard to its manifesto;
 - (xv) political parties should have a clear manifesto, i.e. what it intends to do for the people when it's in power. The issue, which came out strongly, was promotion of democracy and advocacy for peace and national unity;
 - (xvi) the formation of political parties should be regulated by the Electoral Commission; and
 - (xvii) there should be a code of conduct, adhered to by all party members.
- (g) *on whether the number of political parties should be limited and; if so, how; the people were of the view that:*
- (i) many political parties have created divisions among Kenyans;
 - (ii) so many political parties have encouraged the system of divide and rule;
 - (iii) there is a lot of confrontation and confusion among Kenyans and uncontrolled and unnecessary defections;
 - (iv) multi-party politics has led to increased ethnic chauvinism;
 - (v) most of the political Parties duplicate one another's policies;
 - (vi) many political parties are used as a means for getting into Parliament; and
 - (vii) having many political parties has led to the decline of the economy.
- (h) *On whether there should be a limitation on the number of political parties, the people were of the view that:*
- (i) political parties should be limited to five;.
 - (ii) the country could have more than five political parties; some felt we could have as many as 40 political parties;
 - (iii) alternatively, there should be no limitation on the number of political parties; we could have as many as we can possibly have.
- (i) *On whether the political parties play other roles than political mobilization, the people were of the view that: -*
- (i) most parties easily degenerate into hooliganism when there is a contest;
 - (ii) checks and balances to help root out corrupt and careless practices are not in place;
 - (iii) the administration and the police have abused licensing of political meetings to punish those whom the State does not favour;
 - (iv) political parties often are tools for fighting the Government and international organizations;
 - (v) political parties should be more involved in initiating development programmes, to promote the people's socio-economic status;
 - (vi) should be more involved in mobilizing people on politics;
 - (vii) political parties should be involved in civic education;
 - (viii) political parties should carry out the role of governance;

Draft 1

- (ix) a political party's major role should be promotion of national unity;
 - (x) political parties should be involved in disaster management programmes.
- (j) *On whether public funds should be used to finance political parties and if so on what terms; people were of the view that:*
- (i) Kanu should not own Kenyatta International Conference Centre as it belongs to the nation;
 - (ii) particular individuals, on account of their financial standing, dominate political parties;
 - (iii) most political parties lack finances and, therefore, cannot run their affairs efficiently;
 - (iv) the more money a party has, the higher its chances of winning an election;
 - (v) if not funded, political parties will end up begging from external sources and losing their independence due to influence;
 - (vi) the Government should be responsible for financing political parties;
 - (vii) political parties should fund themselves from membership fees;
 - (viii) political parties should be funded by donors and other well-wishers;
 - (ix) financing of political parties should be based on a party's system of transparency and accountability;
 - (x) the relevance of party manifestoes should be demanded before funding is given;
 - (xi) the parties should also have sufficient members before funding is given;
 - (xii) funding political parties should be based on parliamentary representation, i.e., how many party members are in Parliament;
 - (xiii) political parties should be funded equally regardless of their manifestos or parliamentary representation; and
 - (xiv) political parties should be funded only for the General Election.
- (k) *On general political issues, the people were of the view that: -*
- (i) the exercise of presidential powers during elections can unfairly manipulate the election process;
 - (ii) Government harassment should be banned;
 - (iii) by being a member of a political party, the President is tempted to use public resources to promote his party's activities;
 - (iv) the functions of the ruling party and those of the Government should not be mixed up;
 - (v) there should be co-operation between the State and the opposition political parties;
 - (vi) the head of State should not be affiliated to any political party; and
 - (vii) the ruling party should not use State machinery for its own campaigns and, if it does, all political parties should be allowed to carry out their campaigns through State machinery.

4.0 Electoral Systems and Process in other Constitutions

An increasing number of constitutions now provide for articles dealing either with representation generally or, more often, election of representatives to legislative organs. For example, the Constitution of Uganda provides for the right to vote, the establishment of an independent Electoral Commission, delimitation of constituency boundaries, and system of voting. On the electoral system, the Constitution of Tanzania provides, for example, that there shall be the following categories of Members of Parliament:

- members elected to represent constituencies;
- women members being not less than fifteen *per cent* of the members of Parliament elected by the political parties represented in the National Assembly, ... on the basis of proportional representation among those parties;

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- five members elected by the House of Representatives (i.e., the Zanzibar Parliament) from among its members;
- the Attorney-General, the President and the Vice-President shall not be a Member of Parliament.

4.1 Political Parties in the other Constitutions

It is now recognised worldwide that political parties play a crucial role in democratic governance. As a general rule, however, many constitutions merely provide for authority to legislate for regulating political parties. Thus Article 3(2) of the Constitution of the United Republic of Tanzania merely states that:

All matters pertaining to the registration and administration of political parties in the United Republic shall be governed by... a law enacted by Parliament for that purpose.

On the other hand, the Basic Law of the Federal Republic of Germany is one of the few exceptions to this. According to Article 21,

- (1) The parties shall help form the political will of the people; they may be freely established; their internal organization shall conform to democratic principles;
- (2) Parties which.... seek to impair or do away with the free democratic basic order... shall be unconstitutional;

5.0 Provisions in the Proposed New Constitution

Principles of elections are provided for in Article 102, key of which is that elections shall be by secret ballot, elections must be free and fair and that there shall be continuous registration of voters.

Affirmative action

In order to make sure that marginalized groups in our society take part in Government, the Constitution has reserved five per cent of the seats in the National Assembly or a legislature of a District Government. At least one third of these reserved seats shall be for women (Article 101).

There are other provisions in this Constitution that reserve seats for marginalized groups in our society (Article 101).

Voting at elections shall be simple, using transparent boxes and votes cast shall be counted and results announced at the polling station (Article 105).

Independent candidates shall be allowed under Article 106. The establishment, roles, function, composition and appointment of members of the Electoral and Boundaries Commission is given under Article 109, 100 and 111.

Basic principles for establishing, regulating and discipline of political parties, together with their roles and functions are given from Articles 112, to 113.

CHAPTER ELEVEN: THE LEGISLATURE

1.0 Introduction

The Chapter on the Legislature establishes the law-making organ of government, its role in exercising the sovereignty of the people and how Parliament is constituted. The chapter describes the qualifications and disqualifications of membership, procedures in Parliament, powers and privileges and roles of members and officers and the right of the public to petition Parliament. The overall philosophy of the chapter, therefore, is to ensure democratic, accountable and good governance in the new constitutional order.

1.1 Objective

At the end of the unit, participants should be able to appreciate the provisions related to:

- The establishment of Parliament and its role in law making, overseeing the distribution of national resources and amending the Constitution;
- The composition and membership of Parliament;
- Tenure of Members of Parliament;
- Election, appointment, role and tenure of officers of Parliament;
- Legislation by parliament and procedure of Parliament;

1.2 Principles Underlying the Chapter

- Parliament represents the will of the people and exercises their sovereignty by enacting legislation;
- Equity should be ensured in the sharing and distribution of national resources and opportunities between the two levels of government, for expenditure by departments of government, and among all parts and communities in Kenya; and
- All provisions having the force of law in Kenya can only be made or authorized by Parliament.

2.0 Provisions on the Legislature in the Current Constitution

Section 30 of the current Constitution provides for a Parliament, which is unicameral and composed of the President and the National Assembly. Members of the National Assembly are either elected periodically on the basis of constituencies established by the Electoral Commission of Kenya or nominated by parliamentary parties according to their proportions in the House.

The procedures for electing the officers of Parliament and their roles, functions, tenure and the removal are found in sections 37 and 38 of the Constitution.

The summoning, prorogation and dissolution of Parliament lie in the hands of the President pursuant to sections 58 and 59 of the Constitution. Under section 46, the legislative power of Parliament is exercised by way of Bills it passes and forwards to the President for assent within 21 days.

Parliament has power to make Standing Orders of procedure for the orderly conduct of its business and to establish committees to facilitate its work.

3.0 Views of Kenyans

The people told the Commission that they wanted the Legislature to be more responsive to their needs, to share power with the Executive and to manage its own affairs free of executive interference. The people further told the Commission that:

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- Parliament should vet and approve appointments to various constitutional and public offices such as the Attorney-General, the Auditor-General, Permanent Secretaries, the Chief Justice, Judges, and so on;
- Parliament should be strengthened through the Committee system to enable it to perform its functions efficiently and effectively; for example, establishing an estimate committee to scrutinise Government budget proposals in order to enhance control over State finances; other suggestions were that a stronger Committee system be secured;
- Parliament should have a calendar of its own;
- Members of Parliament should satisfy educational, moral and ethical standards for election to Parliament;
- Members of Parliament should be subject to recall;
- Members of Parliament should work full-time;
- Members of Parliament should have their remuneration packages determined by an independent commission;
- Measures be taken to increase women's participation in Parliament;
- There is need for a second chamber, although views differed on its role and composition; and
- Parliament should have the power to dismiss the Government of the day through a vote of no confidence and to impeach a sitting president.

4.0 Provisions on the Legislature in other Constitutions

All constitutions have provisions for some form of legislature. Unicameral legislatures are common in jurisdictions based on a unitary system of government, including those of Uganda and Tanzania. Bicameral legislatures, on the other hand, are common in jurisdictions based on federal or substantially devolved systems of government. In these jurisdictions, legislative authority is shared between a "lower house" and an "upper house" although the degree of responsibility between them varies. These include Nigeria and India.

5.0 Provisions on the Legislature in the Proposed New Constitution

- Parliament, is established under Article 114
- Roles and duties of Parliament outlined under Article 115.
- The membership, qualifications and disqualifications of members, their election and vacation of office are given in Articles 116 to 120.
- Offices of the Speaker and Deputy Speaker of Parliament established Article 121.
- Office of Leader of Official Opposition established under Article 123.
- Legislative power of Parliament in initiating debating, and passing bills and incidental matters and procedures are contained in Articles 125-136.
- Seat of Parliament established under Article 138.
- Life and conditions for prorogation of parliament respectively contained under Articles 138 and 139
- Parliamentary Service Commission, composition, roles and functions established under Article 140.

CHAPTER TWELVE: THE EXECUTIVE

1.0 Introduction

The provisions of this Chapter respond to the need for checks and balances. The Chapter creates the national executive³⁰. The Executive authority of the Republic shall be vested in the President.

1.1 Objectives

At the end of the unit, participants are expected to understand provisions related to:

- Principles and structures of the Executive;
- The election, powers, functions and removal of the President and the Deputy President; and
- The appointment, powers, functions and removal of the Prime Minister, the Cabinet³¹, the Principal Secretaries, the Attorney General, the Director of Public Prosecutions and the Public Defender.

1.2 The Principles underlying this chapter

Executive authority shall be exercised: -

- for the well-being and benefit of the people and the communities of Kenya, and in a manner compatible with the principle of service to the people; and
- in a manner consistent with the purposes and objects of this Constitution and the laws.
- the executive authority of the Republic shall be vested in the President.

2.0 The Executive in the Current Constitution

Section 23 of the Constitution vests executive authority of the Government in the President, but this authority may be exercised by persons subordinate to him. Sections 4-21 establish the Executive, which consists of the President, Vice- President, Ministers, and Assistant Ministers, who are all members of the National Assembly. The Cabinet, established under Section 17, is the highest decision-making organ of State and advises the President on governance. The President is, however, not bound by Cabinet decisions. The Cabinet is composed of the President, the Vice-President and Ministers.

The Executive as mirrored in the Presidency exercises immense powers. Some of the powers are that the President:

- Is the Commander of the Armed forces;
- Is responsible for creating and abolishing all offices in the public service;
- Is responsible for declaring state of emergency;
- Appoints members of government including the permanent secretaries;
- Chairs the Cabinet;
- Appoints the Attorney-General and the Solicitor-General, whose offices are in the Public service;
- Appoints the Controller and Auditor-General;
- Appoints ambassadors or principal representatives of Kenya to other countries;
- Appoints the Chief Justice and other judges of the High Court and the Court of Appeal;
- Appoints the Police Commissioner and other senior members of the Police force;
- Exercises the prerogative of mercy of the Republic;
- Has power to prorogue and dissolve Parliament;

³⁰ The chief political executive of a government, the head of state

³¹ Members of the Cabinet mean the Prime Minister, a Deputy Prime Minister or a Minister

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- Assents to all Bills made by Parliament, and possesses a limited veto power over legislation;
- Appoints Electoral Commissioners;
- Appoints Public Service Commissioners and other senior civil servants;
- Is immune from legal proceedings while in office;
- Is entitled as Head of State to address Parliament at any time he/she so wishes and, as Head of Government, attends all meetings of the National Assembly and takes part in the proceedings of the House, including to vote in all matters put to the vote.

3.0 Views of Kenyans

- (a) *with respect to the office of the President, that*
- i) the President should not be above the law, a majority asserted; their concerns were that it should be possible to prosecute him/her for offence while in office. In this regard, it was also suggested that the Constitution provide for the President's removal for misconduct;
 - ii) the powers of the President should be curtailed; Kenyans felt the President should not have the exclusive power to appoint senior government officers; it was suggested that for many of the appointments be vetted by Parliament; that the President should not have the power to determine the election dates was a specific concern of many Kenyans;
 - iii) the powers of the President and Prime Minister need to be elaborated in the Constitution;
 - iv) the President should not be a Member of Parliament;
 - v) the President should be elected directly. Here it was suggested that the candidate must garner more than 50% of the total valid votes cast countrywide; in case there is a tie, there should be a run off between the two leading candidates, in which case the one who obtains a simple majority be declared the winner;
 - vi) the President should have 25% support in five provinces was a disputed recommendation. There was considerable support for it, although others felt it should be at least 20% in four provinces, while others suggested that 50 % national support was sufficient;
 - vii) apart from education and age, the President should be a married person with a stable family and impeccable character;
 - viii) the President should possess minimum education qualification to enable him/her to manage the affairs of State. The majority was of the view that the President should possess the minimum of a first degree;
 - ix) the Vice-President should be elected directly by the people as President's running mate;
 - x) both the President and Vice- President should not be Members of Parliament.
- (b) *with respect to the Ministries of Government that*
- i) the number of Government ministries should be reduced to 15 and be approved by Parliament; and
 - ii) ministers should be appropriately qualified to match their ministerial responsibilities. Views went both ways on whether members of Government should also be part of Parliament.

4.0 The Executive in other Constitutions

On the character of the Executive, a number of jurisdictions, such as Australia, Canada, Germany, the Netherlands and the United Kingdom, provide for a ceremonial head of state and a strong head of government (usually designated as Prime Minister). In other jurisdictions, such as the United States and Nigeria, the President and cabinet ministers are not members of the Legislature.

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Hybrid systems, in which the head of state shares significant executive powers with the head of government (as in France), or in which the former, though retaining full executive authority, also appoints a Prime Minister (as in Tanzania and Uganda), are also common.

Issues of power sharing, especially with the Legislature and the Judiciary, and accountability, are usually dealt with by an elaborate system of checks and balances. These include confirmation by the legislature of high-level executive appointments, impeachment of the head of state/government by the Legislature, and judicial review of executive action. These are common features in many English-speaking jurisdictions in Africa such as Ghana, Tanzania and Uganda.

5.0 Provisions on the Executive in the Proposed New Constitution

- Executive authority of the President provided under Article 142
- Principles of the Executive provided under Article 141.
- Authority of the President provided under Article 143.
- State Functions of President provided under Article 144.
- Curtailment of Presidential Powers provided under Article 145.
- Decisions of the President provided under Article 146.
- Presidential elections provided under Article 147.
- Qualifications and disqualifications for elections as President provided under Article 148.
- Procedure at Presidential Election provided under Article 149.
- Question as to validity of presidential election provided under Article 150.
- Assumption of office of President provided under Article 151.
- Term of Office of President provided under Article 152.
- Protection from legal proceedings provided under Article 153.
- Removal of President on grounds of incapacity provided under Article 154.
- Impeachment of president provided under Article 155.
- Vacancy in the office of President provided under Article 156.
- Presidential powers of mercy provided under Article 157.
- Office of Deputy President provided under Article 158.
- Vacancy in the Office of Deputy President provided under Article 159.
- Functions of the Deputy President provided under Article 160.
- Death before assuming office provided under Article 161.
- Remuneration and benefits of President and Deputy President provided under Article 162.
- Appointment and functions of Prime Minister provided under Article 163.
- Procedure for appointment of Prime Minister provided under Article 164.
- Terms of officer of Prime Minister provided under Article 165.
- Resignation of Prime Minister provided under Article 166.
- Vacancy in the Office of Prime Minister and Ministers provided under Article 167.
- The Cabinet provided under Article 168.
- Secretary to the Cabinet provided under Article 169.
- Decisions, responsibility and accountability of the Cabinet provided under Article 170.
- Assignment of functions provided under Article 171.
- Principal Secretary provided under Article 172.
- Appointment and dismissal of Principal Secretaries provided under Article 173.
- Attorney General provided under Article 174.
- Director of Public Prosecutions provided under Article 175.
- Public Defender provided under Article 176.
- Removal from office of Attorney General, Director of Public Prosecutions and Public Defender provided under Article 162.

UNIT IV

CHAPTER THIRTEEN: THE JUDICIARY

1.0 Introduction

The Chapter on the Judiciary enshrines general principles that should the courts of law in the exercise of judicial power and provides for safeguards aimed at enhancing and securing the independence of the judiciary.

1.1 Objective

At the end of the Chapter, participants should be able to understand the provisions on:

- The principles, structure and functions of the Judiciary;
- The role of the Judiciary in the interpretation of the Constitution;
- The structure, jurisdiction and hierarchy of the courts; and
- The qualifications for appointment, tenure and removal from office of judges.

1.2 Principles Underlying the Chapter

- Judicial power is derived from the people and shall be exercised by the courts and other tribunals for the common good of the people.
- Justice shall be done to all, irrespective of their status.
- Justice shall not be delayed and shall be administered without undue regard to technicalities.
- Adequate compensation shall be awarded to victims of wrongs.

2.0 Provisions in the Current Constitution

The current Constitution makes provisions on the judiciary as follows:

(i) *The Superior Courts of Record*

Section 60 establishes the High Court and grants it unlimited civil and criminal jurisdiction on all matters. It provides that the number of judges of that court shall not be less than eleven, subject to Parliament providing for other judges. The details on organization, jurisdiction and procedure are provided in the Judicature Act (Cap 8).

The procedure for appointing the judges is stipulated under section 61 of the Constitution. The President appoints the Chief Justice. On advice from the Judicial Service Commission, he appoints other judges. Removal, in case of infirmity or misbehaviour, is preceded by a tribunal appointed by the President on advice from the Chief Justice to consider the issue and report to him for action.

Section 62 of the Constitution grants Parliament the power to prescribe the judges' retirement age, which the Judicature Act prescribes as 74 years.

Section 64 establishes the Court of Appeal to determine such appeals from the High Court as may be conferred by law. The substantive law on appellate Court procedure, powers and organization are found in the Appellate Jurisdiction Act (Cap 9).

(ii) *Subordinate Courts*

Sub-ordinate courts are established, and are subject to the supervisory powers of the High Court. Pursuant to that provision, Parliament enacted the Magistrates Courts' Act (Cap 10) to lay down the jurisdiction and procedure of these courts.

(iii) *Kadhi's Courts, Chief Kadhi and the Kadhi's*

Kadhis courts are enshrined in section 66 of the Constitution. The Constitution provides for the office of the Chief Kadhi and such number of other Kadhis, not less than three, as may be prescribed by the law. Parliament may prescribe for subordinate courts to be held by Kadhi. The jurisdiction of the Chief Kadhi and the other Kadhis is to hold a court with jurisdiction within Kenya, and extending to determining questions of Muslim law on personal status, marriage, divorce and inheritance in proceedings in which all the parties are Muslims.

(iii) *The Judicial Service Commission*

The Judicial Service Commission (JSC) is established under section 68 of the Constitution. It is composed of the Chief Justice as chairman, the Attorney-General, two judges appointed by the President and the Chair of the Public Service Commission. The JSC appoints the magistracy and staff of the High Court and the Court of Appeal other than the judges.

3.0 Views of Kenyans

The people of Kenya expressed extensive views on the structure of the Courts, the appointment of the Chief Justice and other judges, the organization and structure of Kadhis Courts, and general principles of administration of justice. These views may be summarised as follows:

- The independence of the Judiciary should be entrenched in the Constitution.
- The Constitution should ensure that there is no interference in the Judiciary by the Executive and by politicians.
- Court cases should be determined expeditiously.
- Access to courts should be improved by
 - free legal aid;
 - reducing court fees or paying fees in instalments; and
 - increasing the number of judges and magistrates and decentralizing the court system to the districts;
- There is need to establish a constitutional court, supreme court, and village tribunals.
- The appointment of the Chief Justice and other judges be undertaken by Parliament on recommendation by the Judicial Service Commission.
- The Judiciary should have its own code of ethics.
- Effective complaints procedure against judicial officers be entrenched in the Constitution.
- Corrupt judges should be sacked.
- Kadhis' courts should be established to determine questions of Islamic law relating to personal status, marriage, divorce, inheritance and succession in proceedings in which parties profess the Islamic faith.
- The Constitution should recognise traditional and local courts with jurisdiction over small claims and matters of personal law.

4.0 Judiciary in other Constitutions

The structure and organization of the Judiciary differs from one jurisdiction to another. However, certain principles, such as on the administration of justice and independence of the judiciary, do not vary. Most constitutions establish a hierarchy of courts, usually commencing at the local (village, county or district) level to an apex that is the highest court usually the Supreme Court or Court of Appeal. In many jurisdictions, such as South Africa, India, Nigeria, Ghana, United States of America and Uganda, the apex court is also the final court on constitutional matters. In yet others like South Africa, the apex is the constitutional court.

The Constitution of Nigeria provides for a complete hierarchy below the Federal Court of Appeal of Sharia and customary courts (articles 244, 260 and 266), with original and appellate jurisdictions on personal law. Article 129(1)(d) of the Constitution of Uganda provides, *inter alia*, for the establishment of such subordinate courts as Parliament may, by law, establish, including Kadhi's courts for marriage, divorce, inheritance of property, and guardianship.

5.0 Provisions on the Judiciary in the proposed new Constitution

- The principles and structure of judicial power, the hierarchy and administration of courts, including the independence of the Judiciary, are all covered under Articles 178-180. These structures and procedures should act as guidelines for the Judiciary, which in turn should commit itself to promoting and guaranteeing their implementation.
- Articles 181 and 182 provide for the establishment of the office of the Chief Justice and the Deputy Chief Justice.
- Articles 183 to 195 provide for the establishment, composition, functions and jurisdiction of the various courts in the hierarchy of the court system. The Supreme Court is established as the highest court in the land.
- Article 184 further grants the Supreme Court exclusive original jurisdiction with respect to presidential election petitions and disputes arising from the process of the impeachment of the President.
- Articles 190 to 193 provide for the appointment, qualifications for appointment, tenure of office and grounds for removal from office of judges. Judges should retire from office on attaining the age of seventy years but may retire at any time after attaining the age of sixty years.
- Articles 194 and 195 (2) give power to Parliament to create any other religious courts.
- Article 195 (1), (3) and (4) establish Christian Courts, Kadhis Courts and Hindu Courts and other religious Courts.
- Articles 196 and 197 provide for the establishment, composition and functions of the Judicial Service Commission, an independent body responsible for a wide range of functions related to and incidental to the operations of the Judicial System.

UNIT V

CHAPTER FOURTEN: DEVOLVED GOVERNMENT

1.0 Introduction

This Unit deals with the structure and principles of devolved government, the organisation of the district government, its powers and functions, and the relationship between the national government and the district government. It also explores the philosophical and technical foundations underpinning the proposed devolved system of government and some of the issues that arise when thinking about the design of a devolved system of government.

1.1 Objectives

At the end of this unit participants should be able to understand provisions on:

- The Devolution of power;
- The objects and principles of the proposed devolved government;
- The design and structures of the devolved government;
- The Nature and functions of institutions of the devolved government;
- The Distribution of powers and functions to each government and the principles guiding it; and
- The Fiscal³² aspects of devolution.

1.2 Principles³³ Underlying this Chapter

The proposed devolved system of government is geared towards actualisation of the following objects and principles. It is thus required that all persons and bodies exercising and performing powers and functions in accordance with the chapter on Devolved Government shall take account of the following principles and objects, which are to:

- (a) ensure the democratic and accountable exercise of sovereign power;
- (b) foster national unity by recognising diversity;
- (c) give powers of self-governance to the people and enhance the participation of people in the exercise of the powers of the state;
- (d) recognize the right of local communities to manage their own local affairs, and to form networks and associations to assist in that management and to further their development;
- (e) protect and promote the interests and rights of minorities and marginalized groups;
- (f) promote social and economic development and the provision of proximate, easily-accessed services throughout Kenya;
- (g) ensure equitable sharing of national and local resources throughout Kenya, with special provisions for less developed areas; and
- (h) facilitate the decentralisation of State organs and functions from the capital territory.

2.0 Devolution in the Current Constitution

The current Constitution does not provide for any form of devolution or make any reference to the local government system. The only mention of local government is in the provisions vesting trust lands in the county councils. However, under Chapter 265 of the Laws of Kenya, a local government system is in place.

³² Of the public treasury: relating to public revenues, especially the revenue from taxation

³³ For more information readers are referred to the *Special Working Document on Devolution of Powers* (Published by CKRC).

3.0 Views of Kenyans³⁴

Many people spoke on the issue of devolution of power. Their views may be summarized as follows:

- (i) *On structure:* -
 - a. while others favoured districts as the principal units for devolution, some said that powers should be devolved to provinces,
 - b. many people, especially in the Coast Province and parts of the Rift Valley Province, recommended majimbo; on the other hand many opposed majimbo.
 - c. There was also widespread feeling -
 - of alienation from central government power. Since power is concentrated in the national Government, and to a remarkable extent in the President.
 - of marginalisation and neglect indeed of victimization for their political affiliation;
 - that they should be enabled to determine their own choices, lifestyles, e.g., pastoralism.
- (ii) *Local Authorities:* -
 - a) There was wide support for local government, which people said should be strengthened to support the State in administrative, management and development at the local level.
 - b) All councillors should be elected - none should be nominated.
 - c) Mayors and Chairs of local authorities should be elected directly by the people.
 - d) Councillors should be required to meet a certain minimum level of educational qualification.
 - e) There should be a certain proportion of women in local councils.
 - f) Local elections should not be on a party basis.
 - g) The functions of local authorities should include -
 - provision of social services.
 - maintenance of local infrastructure such as roads, hospitals, schools, and recreation parks.
 - promotion of cultural activities.
 - promotion of participatory democracy within the local community.
- (iii) *On other matters, that:* -
 - a) the local community should control/regulate land.
 - b) districts should not have 'tribal' connotations, e.g., Kuria, Kisii, and Embu.
 - c) local councils should be involved at central level decision making through the establishment of a Senate.
 - d) Local authority budgeting should be done at the grass-roots level.
- (iv) *On decentralization in general, that:* -
 - a) central government powers and functions should be decentralized.
 - b) there should be an end to the colonial and post-colonial history of excluding communities at the grassroots from participation in local governance.
- (v) *On natural resources:* -
 - a) government should be required to apportion benefits from resources between the national Government and communities where such resources are found.
 - b) that devolution (perhaps resulting in a different constituency structure) would give them parliamentary and local representation and greater control of resources and especially land;

³⁴ Sources: Volume One: The Main Report of Constitution of Kenya Review Commission, (2003)
: The Final Report of the Constitution of Kenya Review Commission, (2005). (Page 239-241)

Draft 1

- c) local communities should be involved in resource management. They should also benefit from resources developed locally, and taxes collected from citizens, other residents and companies should be justly distributed between the central government and local authorities and that local authorities should have financial independence and no interference by Parliament.
- (vi) *On Participation at the local level: -*
- a) that traditional forms of organisations should be recognized, including the role of elders.
 - b) that the people should be enabled to determine their own choices, lifestyles, e.g., pastoralism.
 - c) establish a council of elders to handle administrative and development matters in villages.
- (vii) *On Provincial Administration, that: -*
- a) because District Commissioners and district Officers are not usually local people they have little understanding of the local situation and concerns.
 - b) there has been a tendency for the staff recruited to the Provincial Administration in recent years to be from specific ethnic groups and political shades which support the President. The current Provincial Commissioner (PC) of North-Eastern Province is the first from the area and this has made a big difference to the role of the office,
 - c) there are complaints that the behaviour of the Chiefs has failed to take account of the fact that the Chiefs' Act has been amended,
 - d) the use of the Provincial Administration system with its close association with the ruling party is felt to offer an obstacle to fair voting - because it keeps order at polling stations, and essentially conducts elections and the Electoral Commission relies heavily on it,
 - e) although people do look to the Provincial Administration system for help. But women particularly have sometimes complained of lack of attention especially where reports on domestic violence are made.
 - f) people complained of rampant corruption, inadequate personnel, poor equipment, poor management and lack of skills to resolve conflicts, inadequate capacity to manage cross-border activities, poor service delivery, and poor coordination of rural development.
 - g) the District Development Committees as currently set up are not representative of the local community. Most members are civil servants who do not come from the area and who often stay there for only a short while.
 - h) the system has a stifling impact on local government. On many occasions, the Provincial Administration has refused to cooperate with the local authorities, ignoring their views, refusing them licences and central government funds.
 - i) the overall structure of decision-making bodies at the local level is under-funded, bureaucratic and excessively centralized.
 - j) establish a gradual process of abolition of Provincial Administration and transfer its functions to a new local government system.
 - k) if the Provincial Administration is retained, it must be more accountable to the people or replaced with a strengthened elected local authority administration, which is answerable to the people.
 - l) any development, planning, policy formulation and budgetary allocation should involve local committees.

4.0 Devolution of Powers in Other Constitutions

The most extensive systems of devolution are those associated with systems of government whereby several states unite such as Switzerland and the emerging European Union. These are called *confederal systems*. They permit independent political units to come together for strictly

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limited purposes, usually foreign affairs and defence and, more recently, economics. Next are *federal systems*, such as the United States, India, Nigeria, Malaysia and Brazil. Then there are *decentralised systems* operating on the basis of regional or local government structures. The constitutions of the following countries have provisions and structures giving effect to the principles enumerated under each of them:

ETHIOPIA

- (i) The principle of the promotion of the identities of the nationalities and the integration of communities
- (ii) The principle of self-determination for the nationalities including the right to govern themselves and to develop their own culture and language;
- (iii) The principle of entrenchment of the regions;
- (iv) The principle of participatory approach to development;
- (v) The principle of equality of distribution of resources and opportunities and affirmative provisions for less developed regions;
- (vi) The principle of concurrent and exclusive taxation and revenue powers;
- (vii) The principle that all taxation measures shall be preceded by extensive research.

SOUTH AFRICA

- (i) Government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated;
- (ii) Principles of co-operative government and intergovernmental relations- all levels of Government are expected to observe the following;
 - a. Preserve the peace, national unity and the indivisibility of the Republic;
 - b. Secure the well-being of the people of the Republic;
 - c. Provide effective, transparent, accountable and coherent government for the Republic as a whole;
 - d. Be loyal to the Constitution, the Republic and its people;
- (iii) Respect the constitutional status, institutions, powers and functions of government in the other spheres;
- (iv) Not assume any power or function except those conferred on them in terms of the Constitution;
- (v) Exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
- (vi) Co-operate with one another in mutual trust and good faith by
- (vii) Fostering friendly relations;
- (viii) Assisting and supporting one another;
- (ix) Informing one another of, and consulting one another on, matters of common interest;
- (x) Co-coordinating their actions and legislation with one another;
- (xi) Adhering to agreed procedures; and
- (xii) Avoiding legal proceedings against one another.
- (xiii) The Principle of reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

GHANA

- (i) The principle of the sovereign will of the people
- (ii) The principle of entrenched provision to protect the Regions
- (iii) The principle of subservience to the general principles of state policy
- (iv) The principle of co-ordination
- (v) The principle of sound financial base with adequate and reliable resources
- (vi) The principle of efficiency and effective control of affairs

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- (vii) The principle of accountability
- (viii) The principle of popular elections for the councilors
- (ix) The principle of devolution of some National Commissions
- (x) The principle of the guarantee of the traditional rulership

TANZANIA

- (i) The principle of entrenchment
- (ii) The principle of total devolution i.e., devolution of all the organs of government
- (iii) The principle of subservience to the national principles and policies
- (iv) The principle of the need to promote unity and national dignity
- (v) The principle of the need to devolve power to the people, and to consolidate democracy and the participation (involvement) of people in all processes.

NIGERIA

- (i) The principle of entrenchment
- (ii) The principle of absolute devolution
- (iii) The principle of the need to ensure that the exercise of power by the states does not prejudice the existence and investment of the Federal Republic
- (iv) The principle of a democratically elected local government system
- (v) The principle of the cultural, communal and religious diversity and the encouragement of cultural integration (unity in diversity)
- (vi) The Principle of subservience to the fundamental objectives and directives principles of State policy
- (vii) The principle of concurrent and exclusive authority.

NAMIBIA

- (i) The principle of multiculturalism in the determination of boundaries
- (ii) The principle of a delimitation Commission to determine boundaries from time to time
- (iii) The democratic principle in the constitution of the devolved units
- (iv) The Principle of delegation in the exercise of power.

CANADA

- (i) Principle of representation of regional interests in the senate
- (ii) Principle of separation of powers (executive responsibility to regional assemblies)
- (iii) Protection of linguistic minorities
- (iv) Preservation and enhancement of multicultural heritage
- (v) Principle of equalisation of regional disparities
- (vi) Principle of absolute autonomy (each province has its own constitution)

SWITZERLAND

- (i) Principle of co-operative government
- (ii) Principle of peaceful resolution of disputes (between the Cantons)
- (iii) Principle of participation in decision making at the federal level
- (iv) Principle of consultation and disclosure of all government actions that affect the interests of the devolved government.
- (v) Principle of restraint of the federal government in favour of the lower levels of government
- (vi) Principle of financial equalisation and need based allocation of resources.
- (vii) Principle of shared foreign policy relations
- (viii) Principle of autonomy of local government
- (ix) Principle of absolute autonomy (Cantons have their own constitutions)
- (x) Principle of entrenchment

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- (xi) Promotion of cultural and linguistic diversity (Support of plurilingual Cantons)

GERMANY

- (i) Principle of republican, democratic and social government based on the rule of law
- (ii) Principle of self governance of communities
- (iii) Principle of viability of regional units – based on size, capacity, regional, historical and cultural ties, economic expediency, and the requirements of regional policy and planning.
- (iv) Principle of entrenchment.
- (v) Principle of shared foreign policy relations
- (vi) Principle of representation of regional interests in the senate
- (vii) Principle of restraint of federal government (must seek authority from Upper House-Bundesrat)

INDIA

- (i) Principle of equality of opportunity
- (ii) Principle of protection of minorities
- (iii) Devolution of all organs including the judiciary
- (iv) Lowest levels of devolutions. Principle of Devolution to the lowest level of government(village)
- (v) Principle of affirmative action for scheduled minority tribes and castes
- (vi) Principle of self governance by urban areas
- (vii) Restraint of the federal government
- (viii) Peaceful settlement of disputes
- (ix) Principle of co-ordination between states
- (x) Devolution of national Commissions
- (xi) Right to determine official language of the regions
- (xii) Promotion of cultural diversity and traditional rulership
- (xiii) Principle of entrenchment

5.0 Provisions in The Proposed New Constitution

- Article 198 lays down the objects and principles of Devolution.
- Article 199 provides for the district as the principal unit of devolution.
- Articles 200, 201 and 202 provide for the cooperation and linkage between the two levels of government, assignment of specific functions to each and any arrangement thereof and the power of national legislation to arbitrate on conflict of laws between the two levels.
- Article 203 empowers Parliament to pass laws for the identification of urban areas within districts and for their management, including the management of the capital city.
- Article 204 outlines the circumstances and conditions upon which a district government may be suspended.
- Article 206 provides for the establishment and functions of a National Forum for District Governments and other fora, including laws for cooperation amongst districts, and the membership and procedures for the conduct of the business of the Forum.
- Articles 207 to 211 provide for the establishment and organisation of District Government, including elections and respective jurisdictions of authority of both the District Councils and District Assemblies.

General Provisions on Devolved Governments

These are provided for in Articles 212 to 217 and outline terms of office; the reflection and observance of Community and cultural diversity in the exercise of power in districts; mechanisms for transiting existing district councils; and general provisions relating to the conduct of district leaders and enactment of legislation to bring into effect the entire chapter.

PART V

THE MANAGEMENT OF CONSTITUTIONALITY AND TRANSITIONAL ARRANGEMENTS

1.0 Introduction

Management of Constitutionality consists of the four chapters on Leadership and Integrity, Constitutional Commissions, Amendment of the Constitution, General Provisions and Transitional and Consequential Arrangements.

- Leadership and integrity provides for the ethical conduct of public affairs and promotion of meritocracy, integrity and competence in accession to office and objectivity, impartiality, self-less commitment and accountability in public service;
- Constitutional Commissions, seen as the ‘Fourth Arm of government’, are a people-based mechanism under the principle of checks-and balances, and ensure constitutional continuity.
- Amendment of the Constitution as a Chapter provides for the three ways in which the Constitution may be amended; entrenched provisions may only be amended by ratification by the people of the proposed amendment in a referendum; by the Parliament, and by the people through a ‘popular initiative’.
- General Provisions provide for guidelines for the interpretation of the Constitution and definitions of the meanings of words, terms and phrases used in this Constitution.
- Transitional and Consequential Arrangements provide for the transition from the current Constitution to the new Constitution, as set out in the schedules; makes it a mandatory constitutional duty for Parliament to provide for Acts of Parliament for implementation and the High Court as the avenue through which citizens will compel Parliament to act on transition.

1.1 Rationale for the Thematic Group

Management of constitutionality and transitional arrangements provide for structures and principles that would facilitate the internalisation and supervision of constitutionality. It is for this reason, therefore, that the proposed Constitutional Commissions act as the ‘Fourth Arm’ of government. Additionally, the proposed new Constitution also entrenches transitional and consequential arrangements that would ensure a smooth transition from the current constitution to the proposed new Constitution. Provisions in the proposed new Constitution have been provided for Amendment of the Constitution to help in understanding the rationale, organs and procedures involved in the amendment process.

1.3 Objective of the Thematic Area

The objective of this thematic area is to enable Kenyans understand the constitutional mechanisms and institutions put in place to ensure entrenchment and adherence to the new constitutional dispensation.

UNIT I

CHAPTER NINE: LEADERSHIP AND INTEGRITY.

1.0 Introduction

This Chapter, on Leadership and Integrity sets out a constitutional framework that provides for general principles, which shall ensure promotion of ethical conduct of public officers. For purposes of transparency and accountability, the Chapter has also made it mandatory for all state officers to declare their assets and liabilities. It also restricts State officers from engaging in any other remunerative activity.

1.1 Objectives

By the end of this unit, the participants should be able to understand provisions relating to:

- The ethics and responsibilities of leadership;³⁵
- The conduct of state officers in regards to misuse of public assets and receiving of gifts.
- The objects and functions of the Ethics and Integrity Commission.
- The requirement for state officers to declare their wealth and the restriction of not holding any other office for profit.

1.2 Principles underlying the Chapter

The Chapter explains the establishment of a public leadership and integrity⁵⁴ system that is guided by a defined code of conduct whose principles include:

- Transparency and accountability to the public;
- Selfless service to the public;
- Honesty in the execution of public duties;
- Objectivity and impartiality in decision making;
- Maintaining of public confidence in the integrity of the office.

2.0 Provisions on Leadership and Integrity in the current constitution

The current Constitution has no express provisions for Leadership and Integrity. However, there is a Public Officers Code of Ethics Act that provides for the regulation of public officers while in office. State officers are also required to subscribe to an oath of office.

3.0 Views of Kenyans

During the collection of views from Kenyans by the Commission, Kenyans expressed the desire to have an accountable and responsible public service as they raised the following issues: -

- All offices in the public and private sector should be required by law to be accountable for their reputation;
- People who accept bribes should be taken to court and accused for encouraging corruption;
- Public servants should not be involved in business or have relationships that generate conflict of interest;
- Those put in office should not have been convicted of serious felonies in the past;
- All public assets acquired through corruption must be reclaimed by state or sufficient compensation must be sought;

³⁵ Leadership – the ability to positively influence and lead a people with similar interests with the aim of achieving common goals and objectives;

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- All public servants should be individually accountable to their superiors and to the public;
- Appointment process for public servants should be transparent; and
- There should be a code of conduct³⁶ for public servants.

4.0 Leadership and Integrity provisions in other Constitutions

Section 138 of the Trinidad and Tobago Constitution has provided for an Integrity Commission that receives declarations of assets and liabilities from persons holding state offices, supervises and monitors ethical standards of public officers. Section 94 creates the office of Ombudsman with powers to investigate complaints of integrity or corruption of the public service or any department or office of the public service.

Section 284 of the Ghanaian Constitution provides for the conduct of public officers. Section 286 provides that any person holding a public office is required to make a written submission of all his/her property, assets and liabilities failure to which, shall be considered a contravention of the Constitution.

5.0 Provisions on Leadership and Integrity in the Proposed New Constitution

Article 94 deals with the sovereign authority of the people of Kenya to state offices and guiding principles that should comprise of leadership and integrity which include accountability, discipline, objectivity and impartiality and self less service to the public. Article 95 states that before assuming any public office, one has to subscribe the oath or affirmation of office he/she has been elected or appointed to.

Article 96 provides for the conduct of state officers outlining what a state officer can and cannot do and also lays down penalties for those state officers³⁷ who proceed to contravene those provisions. Conditions for and prohibitions on owning assets (wealth) and bank accounts and participation in political parties are given in Articles 97 and 98.

Article 99 provides for the establishment of the Ethics and Integrity Commission whose functions shall include overseeing mechanisms that will ensure probity in public offices.

³⁶ Code of Conduct – a set of rules and regulations established to guide the conduct of public officers.

³⁷ State Officer- means a person holding State Office established by this Constitution, or established and designated as such by legislation.

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UNIT II
CHAPTER EIGHTEEN: CONSTITUTIONAL COMMISSIONS

1.0. Introduction.

This chapter describes the general objects, functions, composition, appointment, funding and independence of constitutional commissions to enable them carry out their roles in managing and supervising constitutionality. The chapter also prescribes the methods and durations of preparing status reports for accounting and monitoring purposes.

1.1. Objectives

At the end of this unit, participants should understand the provisions that relate to;

- The objectives, functions, funding appointment, composition and jurisdiction of constitutional commissions; and
- Tenure and procedure for the removal of holders of constitutional commissions offices.

1.2 Principles underlying the chapter

Constitutional commissions shall;

- be independent and not subject to direction or control by any person or authority.
- be subject only to this Constitution and the law.
- be impartial and perform their functions without fear, favour or prejudice.
- offer their services to the public free of charge.
- where appropriate establish branches in all the districts.

2.0 Provisions in the current Constitution

The current Constitution establishes the following constitutional commissions:

- the Electoral Commission (section 41),
- the Parliamentary Service Commission (section 45B),
- the Judicial Service Commission (section 68), and
- the Public Service Commission (section 106).

Constitutional Commissions under the current Constitution are supported by complementary legislations defining their powers and functions. The President makes appointments, initiates dismissals and their finances are controlled by the government ministries under which they fall.

3.0 Views of Kenyans

The people's views on constitutional commissions centered on their powers and functions, mode of establishment and financing. The views may be summarised as follows:

(a) On commissions generally, that-

- the commissions should have their powers and functions clearly set out in the legislation creating or establishing them.
- they should be independent.
- they should have powers to enforce their recommendations.
- where necessary, they should be given powers to prosecute.
- they should be empowered to enforce the law in the different sectors of government;

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- they should, in conducting their affairs, follow the laid down procedures;
- they should be vigilant in protecting citizen's rights;
- the chairpersons of these Commissions should have security of tenure;
- their role is to bring people together in their respective areas of operation to identify, mobilise and decide on the usage of resources and to share information with the communities to enable them make informed choices;
- they should have public information and education programmes in their respective areas.

(b) **On existing Commissions that -**

- i) the **Public Service Commission** should be required to eliminate
 - corruption, discrimination and nepotism in employment;
 - lack of transparency in the recruitment process;
 - insincere advertising for job vacancies;
 - unfair promotions;
 - retrenchment without a human face.
- ii) the **Electoral Commission** should be staffed by educated Kenyans appointed by Parliament, not the executive, and
- iii) the **Judicial Service Commission** should:
 - have its membership drawn from the legal fraternity, the judiciary, professional bodies, the clergy and interest groups;
 - the appointments to the Commission will be made by the President, after Parliament, in the form of a parliamentary judicial committee, approves;
 - The Commission will deal with disciplinary matters.

(c) ***On the establishment of new Commissions, that the following new Commissions be established:***

- the Commission for Human Rights and Administrative Justice,
- the Gender Commission,
- Disciplined Forces Complaints Commission.
- the Ethics and Integrity Commission,
- the Salaries and Remuneration Commission,

d) In asking for a Commission on **Human Rights and Administrative Justice**, the people submitted that it should:

- act as a watchdog against the existing widespread violation of human rights;
- ensure protection, development and attainment of human rights;
- investigate allegations of human rights violations;
- carry out programmes to educate the public on their rights;
- handle the 1991 - 1997 land clashes;
- deal with past human rights abuses;
- deal with past political assassinations;
- investigate and redress historical injustice among the pastoralists in North-Eastern Province during colonial and past colonial era;
- promote dialogue and peaceful conflict resolution through mediation and arbitration;
- deal with losses and displacement of land;
- deal with poor political representation and exploitation;
- deal with social and economic injustices such as ethnicity, corruption and nepotism committed against Kenyans since colonial times; and
- deal with those who have looted public funds since 1963 and ensure that they make restriction.

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- e) In asking for a **Gender commission** the people submitted that
- the Commission should develop a policy on protection and promotion of women's rights and facilitate the repeal of all laws that have provisions discriminative in terms of gender;
 - most customary laws and practices which clearly discriminate against women in general and the girl child should be eradicated.
- f) In asking for a **Disciplined Forces Complaints Commission** the people submitted that
- policemen who do not follow the process of the law should be sacked;
 - there should be no extra-judicial killings of suspects, as everyone is presumed innocent until proved guilty;
 - corrupt police officers should be brought to book.
 - there should be a special unit in the police forces to investigate corruption;
 - the police and other members of the disciplined force should be politically neutral;
 - the Police Commissioner should be independent and appointed by the President with approval from Parliament;
 - victims of police brutality or those tortured by the police should be compensated;
 - there should be no arbitrary arrests and suspects should be informed of the reason for their arrest;
 - there should be no arbitrary search of premises and affected parties be given the search warrant;
 - action be taken against police officers who engage in crime or aid and abet in the commission of crime.
- g) In asking for an **Ethics and Integrity Commission** the people submitted that;
- an independent Anti-corruption Commission should be formed and entrenched in the Constitution;
 - the defunct Kenya Anti-Corruption Authority should be revived.
 - an Ethics Commission should be established;
 - there should be anti-corruption committees whose members shall be elected and shall have a predetermined security of tenure; the members should be drawn from religions organizations, administrative and professional bodies;
- h) In asking for a **Salaries and Remuneration Commission**, the people submitted that it should;
- determine the salaries of various employees both in the civil service and public sector so as to check corruption and the incidences of strikes;
 - review the benefits, salaries and working conditions of Members of Parliament;
 - review salaries every three years;
 - administer pensions for retired workers;
 - look into the terms of workers in county councils and municipalities.

Many Kenyans see constitutional commissions as mechanisms that would rid the country of corruption, discrimination, unfair treatment in access to employment, police brutality and harassment, human rights abuses and others. Although they may have placed too much faith in these mechanisms, their diagnosis of contemporary Kenyan policy is clearly accurate. Indeed, the Commission received first hand information on many of these ills and in respect of all levels of Government and civil society.

4.0 Provisions on Constitutional Commissions in other Constitutions

Ghana

The following constitutional commissions are established under the Constitution of the Republic of Ghana: -

- (i) Electoral Commission (Art. 43).
- (ii) The Public Service Commission (Art. 194).
- (iii) Commission on Human Rights and Administrative Justice (Art. 216).
- (iv) National Commission for Civic Education (Art. 231).
- (v) Lands Commission (Art. 258).

Terms, conditions of service and removal of the Chairman and Deputy Chairman of a constitutional commission under the Ghanaian constitution is similar to the one set out in the Constitution for the removal of the Justice of the Court Appeal and Justice of the High Court, respectively (e.g. Art. 235 & 236).

The Constitution also safeguards the independence of constitutional commissions by providing that 'the Commission shall not be subject to the direction or control of any person or authority in the performance of its functions (e.g. Art. 234). The Ghanaian constitution also provides that administrative expenses of constitutional commissions shall be a charge to the consolidated fund (e.g. Art. 239).

The Republic of South Africa

Chapter nine of the Republic of South Africa, covers sections 181 to 194 and establishes the following Commissions/Institutions;

- the Public Protector,
- the South African Human Rights Commission,
- the Commission for Gender Equality,
- the Auditor General,
- Broadcasting Authority
- the Electoral Commission, and
- the Public Service Commission.

Section 181 also, in general, sets out principles governing state institutions supporting constitutional democracy, i.e. the institutions are;

- independent,
- subject only to the Constitution and the law,
- they must be impartial, and
- exercise their powers and perform their functions without fear, favour or prejudice.

Other state organs are required through legislation and other measures to ensure the independence, impartiality, dignity and the effectiveness of those institutions. Persons and organs of state are barred from interfering with the functioning of those institutions.

The institutions are only answerable to the National Assembly, and are obligated to report their activities and functions to the Assembly at least once a year.

5.0 Provisions on Constitutional Commissions in the Proposed new Constitution

The Proposed New Constitution provides for:

- Independence and decentralization of Constitutional Commissions (Art. 271),
- Composition and staffing of Constitutional Commissions (Art. 273 & 274),
- The general functions of Constitutional Commissions (Art. 275),
- The grounds and procedure for removal from office of members of Constitutional Commissions (Art. 277), and
- Reporting on findings and accounts of Constitutional Commissions (Art. 279). The Article prescribes the duration within which status reports shall be prepared and presented for auditing, evaluation and monitoring purposes.

The provisions and principles set out in this chapter apply equally to all Constitutional Commissions established in the proposed new Constitution (Art. 270).

CHAPTER NINETEEN: AMENDMENT OF THE CONSTITUTION

1.0 Introduction

UNIT III comprises of Amendment of the Constitution, which deals with procedures to be followed and organs that may propose amendments on parts/sections of the Constitution.

1.1 Objectives

At the end of this unit, participants should be able to understand the provisions that deal with:-

- The rationale and organs in amending the Constitution; and
- The procedures to be used in amending the Constitution.

1.2 The Principles underlying the chapter

The chapter on Amendment of the Constitution is guided by the following principles:

- Constitutional supremacy;
- Sovereignty of the people;
- Rule of law; and
- Constitutionalism.

2.0 Provisions in the Current Constitution

Section 47 provides for alteration of the Constitution by Parliament. It requires the support of at least 65% of Members of Parliament (a special majority). Further, Parliament has the power to alter any section of the Constitution.

Parliament's power to amend the Constitution has been abused and there is need therefore to protect the Constitution against indiscriminate amendments. If the amendment procedure is too simple, it reduces public confidence in the Constitution. The converse, however, is also true. If the amendment procedure is too rigid, it may encourage revolutionary measures to bring about change instead of using the acceptable constitutional means. Thus, a balance must be struck between these two extremes.

3.0 Views from Kenyans

What the people said may be summarised as follows: -

- A constitutional amendment should require 75% of the vote in Parliament;
- The power of Parliament to amend the Constitution should be limited, e.g. where it cannot get 75%, a referendum organised by the Judiciary should be called to decide; this should be done only after a thorough awareness creation;
- The public should be involved in changing certain provisions of the Constitution through referenda, especially when it concerns religions, marriages, divorce and inheritance;
- A distinction should be made between entrenched and non-entrenched provisions of the Constitution, with stringent mechanism being set up for amending the former entrenched provisions which should include supremacy of the Constitution, the Bill of Rights, land, the Judiciary, security, finance, the system of government; and
- On the question of who should conduct the referendum, proposals ranged from: the Electoral Commission, an independent constitutional commission, and the members of Parliament, non-governmental organisations and religious bodies.

4.0 Provisions on Amending the Constitution in other countries

According to the Ethiopian Constitution, Section 94 provides for the Initiation of constitutional amendments and requires that a proposal for amendment to be presented for discussion and decision to the public should garner the support of two-thirds majority in Parliament.

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The Ghana Constitution in Section 290 provides that a bill for the amendment of entrenched provisions shall be subjected to a referendum after its first reading in Parliament. For the bill to be passed, forty percent of eligible voters should have taken part in the Referendum. Moreover, at least sixty-five percent of those who voted should have voted in favour of the bill. Where the bill is approved at the referendum, Parliament shall pass it for onward transmission to the President for assent.

Uganda's Constitution has also made provision for the amendment of its Constitution. Section 258 allows Parliament to make amendments to the Constitution as prescribed in the provisions therein. Section 259 (1) and (2) provides for amendments requiring referendum and stipulates that a bill for an Act of Parliament seeking to amend sections of the Constitution shall not be taken as passed unless:

- (a) it is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and
- (b) it has been referred to a decision of the people and approved by them in a referendum.

5.0 Provisions on amending of the Constitution in the proposed new Constitution

- Article 281 provides that the people and Parliament can initiate an amendment to the Constitution.
- Article 281 further provides that provisions on the: supremacy of the Constitution, territory of Kenya, sovereignty of the people, principles and values of the Republic, Bill of Rights, term of office of the President, independence of the Judiciary and constitutional Commissions, functions of Parliament, values and principles of devolution shall require a simple majority³⁸ of the people in a referendum³⁹ to be approved.
- Article 282 provides that Parliament be required to facilitate public discussions on any Bill that proposes an amendment to the Constitution.
- Article 283 allows for amendment to the Constitution proposed through a referendum; and the requirements, conditions, conduct and thresholds for such a referendum.

³⁸ Simple majority – is majority of members eligible to vote, present and voting.

³⁹ Referendum is a form of democracy where citizens of a country are involved in a vote to determine matters that directly concern them.

CHAPTER TWENTY: GENERAL PROVISIONS

1.0 Introduction

This Chapter lays down general issues concerning the interpretation of the Constitution in order to avoid any conflicts relating to the use of specific terms with reference to the language of this Constitution. The various key terms that have been used in the Constitution are also defined.⁴⁰

1.1 Objectives

At the end of the unit participants should be able to understand the provisions dealing with:

- Guiding principles;
- Interpretation and implementation of provisions of the proposed new constitution; and
- The definitions of terms as used in the proposed new Constitution

1.2 Principles underlying the Chapter

In the interpretation of the new proposed Constitution, the following principles shall be applied:

- Promotion of the values, principles and purposes as set out in the Constitution;
- Advancement of human rights, fundamental freedoms and the rule of law;
- Permission of the development of law; and
- Contribution to good governance.

2.0 Provisions in the current constitution

Chapter 10 of the current Constitution, titled General, provides for the Interpretation of the Constitution. Section 123 (1) begins with definition of terms as used in the Current Constitution. With regards to interpretation of the Constitution, the following interpretations are provided:

- receipt of pension or other similar allowance is not to be regarded as holding an office (S.123 (3))
- A holder of an office includes to the extent of his authority a person authorised to exercised the functions of that office (S. 123 (4))
- exercise of power conferred to somebody or duty imposed shall be exercised or imposed shall be exercised or duty performed from time to time as occasion arises (S.123(5))
- words importing (S.123 (9)):
 - (a) the masculine gender shall also include female,
 - (b) singular include plural and vice-versa.
- An order, regulation or rule or amendment or revocation under the power conferred by the Constitution comes into operation at the beginning of the day (S. 123 (10))
- A law made by 12th December shall unless otherwise be construed as reference to that law as it had effect on 11th December 1963 (S. 123 (12)).
- A law that amends or replaces another law shall include a law that modifies, re-enacts, with or without amendment or modification or makes a different provision in place of that law (S. 123 (13)).

3.0 General Provisions in other Constitutions

Section 257 of the Ugandan Constitution makes provision for the interpretation of its constitution. It provides meaning of terms as used in the Constitution.

In its constitution, Zimbabwe has also made provision for its interpretation. Section 113 provides for definition of terms as used in the context of the Zimbabwean Constitution. Further, the Section provides for the manner in which the Constitution shall be interpreted.

⁴⁰ See Annex ... General Provisions and Definition of Terms

5.0 General Provisions in the proposed new Constitution

Article 285 (1)-(11) gives a guide on principles guiding the interpretation of the proposed Constitution.

- That this chapter makes provisions for the enforcement of this Constitution. Article 284 in this regard provides that all Kenyans shall have a right to go to the High Court to enforce any part/provision of this Constitution. And when they do so, the court has power to declare any law or government action as invalid and to order compensation to any person who has been affected by the said law or government action.
- Article 285 – Construing the Constitution provides that the overriding objective of the interpretation, implementation and application of the Constitution is to promote the welfare of the people of Kenya.
- Article 286 finally provides for the definition of key words and/or expressions that are used in the Constitution. The importance of giving these interpretations is to ensure that the original meaning of the Constitution is clear and it is maintained.

CHAPTER TWENTY-ONE: SAVINGS, TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

1.0 Introduction

The Chapter describes the process, mechanisms and parameters through which the Proposed New Constitution will come into force. It also explains the consequences of implementing transitional provisions in the changeover from the current constitution to the new one.

1.1 Objectives

At the end of this unit, participants should be able to understand the provisions on:

- The rationale and operation of the transitional and consequential provisions.
- The implications of the coming into force of the Proposed New Constitution on existing laws, institutions and structures of governance.

1.2 Principles underlying the chapter

- Parliament shall enact necessary legislation for the implementation of the Proposed New Constitution within the period specified in the Sixth Schedule.
- Where Parliament fails to adhere to the time frame set out in the Fifth Schedule and clauses (2), (3) and (4) of Article 287, the Bill prepared and tabled before Parliament by the Attorney General in consultation with the Commission on Implementation, shall be deemed to have been enacted on the day immediately after the last day of the specified time or extended period.

2.0 Provisions in the Current Constitution

Chapter XI of the current Constitution is titled 'Transitory'. It comprises of sections 124-126. Section 124 provides that the Chapter shall have effect notwithstanding the foregoing provisions of the Constitution. It also provides that the Chapter shall prevail if in conflict with any provision of the Constitution.

Section 125 deals with appeals in respect of certain decisions affecting pensions and benefits, whereas section 126 deals with compulsory retirement to facilitate appointment of local candidates. The issue on pensions and benefits of Public Servants is common to both the current Constitution and the Draft Constitution.

3.0 Views of Kenyans

There exists no express information on the views of the people on Savings, Transitional and Consequential Provisions. The closer the information available as regards transitional measures, deals with the question of succession and transfer of power.

4.0 Provisions in other Constitutions

The circumstances and conditions of different countries are so unique that there is a hesitation to invoke examples of constitutional transitions from other jurisdictions. Certainly, a wholesale importation of those experiences would not be helpful. However, important lessons can be learnt and the experiences adapted to meet local needs. There follows a brief look at the experiences of Malawi and South Africa:

Malawi (Interim Constitution of 1994)

Chapter XXII of the Interim Constitution of 1994 provided for what were referred to as Interim Issues. Section 210 of Malawi's Interim Constitution on the Senate provided that pending the establishment of the Senate and the election and appointment of its members, "*all legislation shall be enacted by the National Assembly as if the new Constitution had not made provision for the Senate and Parliament had consisted exclusively of the National Assembly acting on its own*

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without being subject to the review of the Senate.” It further provided that for the transitional period, the Constitution would be construed as if no functions had been vested in the Senate.

The Judiciary, pending legal actions, judgments and sentences awaiting execution, existing appointments, rights of persons in property and international agreements were all saved by the Interim Constitution.

The most important innovation in this Constitution was found in Chapter XXIII which though headed “Miscellaneous” was really transitional in nature. Section 212 provided for the Interim Constitution to provisionally apply as the Constitution of Malawi for a period of not less and not more than twelve months.

During the period of provisional application, Parliament was allowed to amend or repeal the Constitution in accordance with that section and with the stringent provisions of Section 196 (including the requirement for a referendum if the amendment would affect the substance of the Constitution).

The section also provided for the establishment of the Constitution Committee (of Parliament) to organize for civic education, collect the views of the people, organize a Constitutional Conference and prepare thereafter a Bill for the amendment or repeal and replacement of the Interim Constitution.

It was decided to allow the Interim Constitution to operate provisionally while leaving the door open for amendments or even repeal and replacement after a National Constitutional Conference.

The Section provided that if no amendments were made, the Constitution would be brought definitively in force at the expiry of the period of provisional application.

The Republic of South Africa (Constitution of 1996)

The transitional provisions in the 1996 Constitution were contained in the Sixth Schedule to the Constitution. They occasioned remarkably minimal disruption, saving and continuing existing law, the Executive, the Legislature and the Judiciary. But these transitional provisions need to be understood in their proper perspective, because, unlike the case in Kenya where it is an overhaul of the constitutional order that is impending, in South Africa, this overhaul had already been done by the Interim Constitution of 1993 was then in operation.

Even then, not all the provisions of the new Constitution came into effect immediately. Section 160(1)(B) concerning the chairpersons of the Municipal Councils came into effect on 30th June 1997.

5.0. Provisions of the proposed new Constitution

Chapter twenty-one sets out the Savings, Transitional and Consequential provisions supported by the Sixth Schedule. The Chapter governs the advent of the Proposed New Constitution. The chapter –

- (a) provides for the period within which Parliament shall enact any legislation which it is required to enact to govern particular matters and for the consequences of failure by Parliament to enact such legislation in the required time (Article 287).
- (b) operationalize the savings, transitional and consequential provisions set out in the Sixth Schedule to take effect on the effective date (the date of the commencement of the Proposed New Constitution (Art. 288)
- (c) provide for the Proposed New Constitution to come into force upon promulgation by the President, and for the old Constitution to be repealed (Arts. 289 and 290).

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The supporting Sixth Schedule has a compendium of Savings, Transitional and Consequential Provisions, the effect of which is to: –

- (a) save the rights, duties and obligations of the Government and the Republic.
- (b) save existing laws.
- (c) make provision with respect to National Assembly:
 - the National Assembly;
 - political parties;
 - the Executive; the Judiciary,
 - devolution/districts governments;
 - local authorities; and
 - Provincial Administration.
- (d) provide that a by-election held after the Proposed New Constitution comes into force, shall be held in accordance with the New Constitution,
- (e) save certain constitutional and other public offices,
- (f) provide for the succession of certain institutions, offices and liabilities,
- (g) secure the pensions, gratuities and other benefits of constitutional office holders,
- (h) save pending judicial proceedings,
- (i) remit every sentence of corporal punishment passed before the effective date,
- (j) Establishes the Commission on the Implementation of the Constitution,
- (k) provide for the sequence of the establishment of constitutional commissions,
- (l) Provide for the appointment of judges of Supreme Court,
- (m) provide for the disposal of cases of past human rights abuses,
- (n) Provide for holding of community land by the National Lands Commission until communities are identified and their title is registered,
- (o) provide for civic education on the provisions of the new Constitution,
- (p) provide for an interim procedure for the amendment of the chapter on Public Finance,
- (q) save the validity of currency issued before the effective date, and
- (r) provide for the conversion of title to and interest land from freehold to leasehold.

Articles 287 and 288 headed “consequential legislation” and “transitional” respectively, are the foundation for the Sixth Schedule. Article 308 attempts to find a way to compel Parliament to pass the legislation necessary to give full effect to the new Constitution within the time prescribed in the Sixth Schedule.

Section 288 provides for the transitional provisions set out in the Sixth Schedule to take effect on the effective date but does not make provision for the relationship between those transitional provisions and the rest of the provisions of the new Constitution which also take effect immediately.