



# **Committee of Experts on Constitutional Review**

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**THE REPORT OF THE COMMITTEE OF EXPERTS ON  
CONSTITUTIONAL REVIEW ISSUED ON THE SUBMISSION OF  
THE REVIEWED HARMONIZED DRAFT CONSTITUTION TO  
THE PARLIAMENTARY SELECT COMMITTEE ON  
CONSTITUTIONAL REVIEW, 8TH JANUARY, 2010**

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*List of Acronyms*

CKRC	Constitution of Kenya Review Commission
CoE	Committee of Experts on Constitutional Review
HDC	Harmonized Draft Constitution
FPTP	First Past The Post
IIBRC	Interim Independent Boundaries Review Commission
IIEC	Interim Independent Electoral Commission
MMPR	Mixed Member Proportional Representation
NGOs	Non-governmental Organisations
PNC	Proposed New Constitution
PSC	Parliamentary Select Committee on Constitutional Review

## *Foreword*

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Following the publication and publicisation of the Harmonized Draft Constitution Kenyans were given a statutory period of thirty days within which to debate the Harmonized draft Constitution and to subsequently submit their reactions on the harmonized draft Constitution to the committee of experts on Constitutional review.

It is a mark of our thirst for a new constitution that Kenyans were able within that short period to study the draft and submit their views on the Harmonized draft Constitution. They also engaged in active and robust debate, which culminated in the considerable public's reaction to all the 316 Articles together with the Preamble and the seven Schedules.

This report explains the premises upon which the Committee of experts reviewed the original Harmonized Draft Constitution and the subsequent production of the revised Harmonized Draft Constitution which accompanies this report. The committee of experts was able to revise the original harmonized draft constitution taking into consideration the submissions made by Kenyans during the period of debate. But more importantly, it is also a continuation of the Constitutional Review Process commenced by the Constitution of Kenya Review Commission in 1999.

Kenyans should therefore read both the report and the revised draft within the historical context of the entire Constitutional Review Process, which has taken over twenty years.

**Nzamba Kitonga, S.C**  
*Chairman*

## 1. Introduction

On 17<sup>th</sup> November 2009, the Committee of Experts on Constitutional Review (hereinafter CoE) launched the *Harmonized Draft Constitution* (hereinafter HDC) and its Preliminary Report. Section 32 of the *Constitution of Kenya Review Act (2008)* (hereinafter the *Review Act 2008*), provides that upon the publication of the HDC, the public has thirty (30) days to debate and comment on the HDC and that thereafter the CoE has twenty-one (21) days to review the HDC based on the public's views. After reviewing the HDC the CoE is statutorily required to submit the reviewed draft and report to the Parliamentary Select Committee on Constitutional Review (hereinafter PSC) “for deliberation and consensus building on the contentious issues” (section 32(1)(c)). Pursuant to section 32 of the *Review Act 2008* the CoE has undertaken a review and revision of the HDC. This report provides an overview and summary of the publication and dissemination of the HDC; the methodology of collation, collection and analysis of the public views on the HDC; trends emerging from the views of the public on the HDC that indicate the key areas of review; and consequential changes.

## 2. Publication and Dissemination of the Harmonized Draft and Report

Over Four (4) million hard copies of the *Harmonized Draft Constitution* were published and disseminated in more than 74 locations in Kenya. In addition there were 2,889,352 million visits to the CoE website in order to download the HDC and its report bringing the total number of distributed copies of the HDC to over 6,889,352. This figure is an approximation of the minimum number of copies disseminated as it does not include the copies of the draft further disseminated by individuals and institutions that downloaded the 2,889,352 online copies, as the CoE has no means of tracking that information.

	Means of Dissemination	HDC format disseminated	Number of copies disseminated
(1)	CoE Staff Distribution (outside Nairobi)	Hard copy	1,435,000
(2)	Courier G4S Countrywide outlet Distribution	Hard copy	333,000
(3)	Media (Inserts) Newspapers <ul style="list-style-type: none"> <li>• Nation = 250,000</li> <li>• Standard = 250,000</li> <li>• Nairobi Star = 100,000</li> <li>• Times = 5,000</li> </ul>	Hard copy	605,000
(4)	Partners	Hard copy	1,627,000
(5)	Website	Online/soft copy	2, 889, 352
	<b>Total</b>		<b>6, 889,352</b>

Table 1: Dissemination of the HDC

As illustrated in Annexes 1, 2 and 3 the CoE made efforts to ensure that the draft was disseminated in as many parts of the country as possible including hiring a helicopter to ensure physical delivery to: Mandera, Wajir, Moyale, Marsabit, North Horr, Maralal, Baragoi, Loyangayalani, Lodwar, Lokichogio, Lokitaung, and Lokichar.

Indeed the public demand for the HDC was overwhelming and during the one month of publication, the CoE received 39,439 substantive memoranda and other written materials. Most of the memoranda submitted before 15<sup>th</sup> December 2009 averaged 60 recommendations per memo. However, a large number of memoranda submitted after the 15<sup>th</sup> of December 2009, about 11,122 only had an average of three recommendations per memoranda. Considering the average pieces of recommendations per material submitted, the total number of suggestions or recommendations by the members of the public stood at 1,732,386. Both the public demand for the HDC and its response were indicative of Kenyans' commitment to effectively participate in the review process and to do so from an informed perspective.

During the launch and the distribution period, CoE also aggressively solicited editorial publicity (non-paid for publicity) in the print, electronic media and bulk short message services updating Kenyans on the progress of the distribution, the format of submitting their views. In total, during the month of November, an equivalent of 84 full pages of newspapers were generated on articles related to the HDC across 10 print media titles in Kenya, there were 14,349 radio spots and 3,967 television spots over the same period, which had an advertising equivalent of Kshs. 211 million (According to an independent monitoring report by Synovate Media Monitoring formerly Steadman).

However, there were concerns raised by the public about the short statutory period for dissemination of and public debate on the draft. The CoE sought to address these concerns by not only seeking to disseminate the draft as widely as possible but also participating in dissemination fora; and partnering with other institutions such as civil society networks to ensure dissemination of the draft. Nonetheless the CoE has also sought to reiterate and ensure consistent civic education about the review process and in particular the fact that the HDC was not only going to be subjected to review by the public at large but also subsequently Parliament both through the PSC as well as the National Assembly in general. All these stages of the review process offer the public opportunities to continue to determine the content of and input into the draft.

### **2.1. Methodology used by the CoE in reviewing the HDC**

The methodology adopted by the CoE in reviewing the HDC was as follows:

- The CoE's Research Department, coded, collated and analysed the memoranda. Processing and analysis of the views by the CoE's Research Department began on 18<sup>th</sup> November 2009. Two databases were established, one for the bio-data and background information of persons sending memoranda, while the other is a compendium of the observations and recommendations from the public.
- Individual members of the CoE were assigned the task of reviewing specific chapters of the HDC.

<b>SUBJECT</b>	<b>COE MEMBER</b>
Accompanying Report	Atsango Chesoni
Executive & Legislature, Judiciary & Land	Dr. Chaloka Beyani
Transitional and Consequential Provisions & Public Finance	Otiende Amollo
Devolution	Prof. Christina Murray
Representation	Prof. Fredrick Ssempebwa
Constitutional Commissions, Leadership & Integrity	Njoki Ndungu
Bill of Rights, Technical Issues& Issues in the rest of the draft	Abdirashid Abdullahi
	Nzamba Kitonga Dr. Ekuru Aukot Bobby Mkangi

*Table 2: Members of the CoE responsible for reviewing respective chapters of the HDC*

In analysing the views received from the public the CoE members categorised issues raised by the public as follows:

- Issues where the Committee had extensive debate and consciously elected to decide on one way or another; and
- Issues where the issue was not considered, or requires fresh consideration, in light of:
  - the weight of recommendations;
  - new facts or evidence; and/or
  - consensus reached by any groups.

In reviewing the HDC the CoE also continues to be guided by the provisions in section 4 of the *Review Act (2008)* which, *inter alia*, provides that:

*The object and purpose of the review of the Constitution is to secure provisions therein –*

- (a) *guaranteeing the peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;*
- (b) *establishing a free and democratic system of Government that guarantees good governance, constitutionalism, the rule of law, human rights, gender equity, gender equality and affirmative action....*

As a review organ, the CoE is also bound by the provisions in section 6 that provide certain principles for the review process. In particular sections 6(a) and (c) provide that the:

*....national interest prevails over regional or sectoral interests; [and]...[review organs must] ensure that the review process accommodates the diversity of the people of Kenya including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged.....*

Since section 5 of the *Review Act (2008)* provides that “*the Referendum*” is an organ of review, implicitly all the people of Kenya are bound by the provisions of section 6 and therefore in reviewing the HDC the CoE was statutorily bound to apply the tests contained therein to recommendations made by the public.

## 2.2. Sources of views

Views were received from a diversity of sources including Kenyans living in the Diaspora and international scholars. In respect of the substantive memoranda received the sources were as follows:

	Number Received
Political Parties	22
State Agencies	799
Religious Organizations	7737
NGOs	3321
Face book	1653
Individual memos	25907
<b>Total</b>	<b>39,439</b>

*Table 3: Breakdown of sources of memoranda*

## 3. Summary/Overview of Public Views on draft

There were several distinct trends in the views received from the public:

- Views that spoke to the overall format of the document.
- Views that raised concerns about specific technical aspects of the draft.
- Views that addressed mainly editorial content.

In views on the overall format of the document the public expressed concerns about two specific issues in particular:

- the length of the document; and
- the level of detail contained in the HDC including the fact they perceived aspects of the draft as having delved into areas of policy and legislation.

Whilst the CoE would have preferred to keep to the principle of brevity and tautness, there are several challenges to this that arise out of the statutory methodology and evolution of the HDC. Firstly the CoE as noted in the *Preliminary Report* is bound by statutory methodology vis- a-vis issues that it is statutorily bound to incorporate into the HDC. Sections 29 and 30 of the *Review Act (2008)* require that the CoE take into consideration the views of the people of Kenya as presented to the Constitution of Kenya Review Commission (hereinafter CKRC) as well as the two CKRC drafts (the *CKRC Draft* of September 2001 and the draft



that came out of the National Constitutional Conference (NCC or *Bomas Draft*) of 2004) and the referendum draft (*Proposed New Constitution* (PNC) of 2005). The history of the HDC is therefore that it emanates from three source documents which the CoE had a very limited discretion in deviating from; and to the extent that the bulk of the original three drafts were agreed and very long documents the HDC is inherently predisposed towards being long.

Similarly on the issues of detail, policy and legislative content again the history of the HDC is that given the time at which the earlier drafts (*CKRC; Bomas & PNC*) developed, there was public suspicion of the State and political leadership; consequentially there was a tendency towards protecting several principles of governance and rights by constitutionalising them. Furthermore the originating drafts of the HDC are highly negotiated documents that are the outcome of an extremely inclusive, consultative and participatory constitution-making process. Given the extent of citizen participation, many people expected to see themselves reflected in the earlier drafts. Thus again, whilst the CoE has sought to limit the extent of detail in the HDC, to constitutional principles, the fact that much of that detail now constitutes agreed principles does limit the CoE's discretion in the editing of these clauses. Nonetheless, the revised HDC has edited out several clauses and harmonised four chapters into two.

The public offered views on all the 316 articles of the HDC including the Preamble as well as the Seven Schedules; however most of the views focused on ten chapters:

<b>Chapter</b>	<b>Percentage % of Memoranda with comments on the chapter</b>
<b>Executive</b>	<b>95</b>
<b>Devolution</b>	<b>68</b>
<b>Legislature</b>	<b>67</b>
<b>Judiciary</b>	<b>63</b>
<b>Bill of Rights</b>	<b>60</b>
<b>Representation</b>	<b>55</b>
<b>Land</b>	<b>51</b>
<b>Transitional Clauses</b>	<b>51</b>
<b>Public Finance</b>	<b>48</b>
<b>Public Service</b>	<b>46</b>

*Table 4: Percent of public submissions responding to the key issues*

As can be noted, from the table above, the public offered the most views in relation to the chapters that had been identified as being in contention by the CoE in particular: Systems of Government i.e. the Executive and Legislature; Devolution; and Transitional Clauses. In addition the chapter on Representation of the People also received a lot views that requested a reconsideration of the provisions that had been made in the HDC. Although there were chapters that may not have received as much comment as others, the memoranda that were received did require some technical adjustment, consequentially some of the more key

changes in chapters that were not contentious such as that on Public Finance are highlighted below. Finally where further technical expertise was required in order to enable the Committee to effectively respond to the needs of members of the public, such expertise was sought – again an example is in the process of the revision of the Public Finance chapter.

In respect of views raised that were largely editorial, the CoE’s response was to assign the task of editing to its in-house drafting team who right from the 18th of November, 2009, began to revise the draft with a view to correcting grammatical and drafting errors. In addition the CoE enlisted the services of additional draftspersons during the review period to ensure that the reviewed draft could be completed in time.

## **4. Public views on Contentious Issues**

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Most of the memoranda received expressed perspectives on the chapters that the CoE had originally identified as contentious namely the chapters pertaining to the proposed system of government: the Executive and Legislature; as well as those on Devolution; and Transitional Clauses. Even the commentary related to the Judiciary chapter was largely in respect of the provisions contained in the transitional clauses. This section of the report highlights the nature of the commentary on the chapters that had originally been identified as being in contention and outlines any changes that may have been made as a consequence of the review of those chapters in light of the responses from the public.

### **4.1. System of Government: the Executive**

More than 95% of the submissions received by the Committee related specifically to the nature of the Executive organ of Government contained in the *Harmonized Draft Constitution*. Analysis of these submissions by the Committee shows that the people of Kenya remain as deeply divided on the nature of the executive as they were when the Committee held public hearings on contentious issues across the country. Public views are divided between those who prefer a Presidential, or a Parliamentary, or a Hybrid Executive system of Government. They express widespread concern that the structure of the executive in the Draft is ambiguous, and would be unworkable because it could lead to frequent tensions between the President and the Prime Minister, especially when they come from different parties.

The substance of the views expressed by the public show:

- preference for a President and Prime Minister;
- that there be proper delineation of powers between the State President and the Prime Minister;
- that there be a clear distinction between offices of State and offices of Government; and
- that whatever form is adopted, the chief executive should be elected by members of the public, whether it is a President, Prime Minister, or both.

In considering these views, the Committee stands by its original assessment made after holding public hearings that a Presidential or a Parliamentary system would polarise the

country. Public preference for a President and a Prime Minister points to, and reinforces a collective executive system of government that accommodates these offices while maintaining a clear distinction between offices of State and offices of government as laid out in the *Harmonized Draft Constitution*.

#### **4.2.Changes in the Chapter on the Executive**

The notion of a collective executive has been further clarified by indicating that executive authority under the constitution derives from the people and shall be exercised by their elected representatives in accordance with the Constitution. The executive is defined more clearly, with the authority of the State President in decision making delineated, and the holding of regular consultations between the State President and the Prime Minister elaborated. While the Prime Minister runs government, the State President has a supervisory role that is evident in the stated requirement that the Prime Minister reports to the President.

#### **4.3.System of Government: the Legislature**

About 67% of the submissions made by the Public to the Committee addressed the framework of the Legislature in the *Harmonized Draft Constitution*. Analysis of these submissions by the Committee shows that there is overwhelming support for a bicameral legislative body comprising of the National Assembly and the Senate.

The substance of the views expressed by the public express:

- Concern regarding the potentially large number of members of the Legislature and the need to reduce these;
- A desire for some provision for Mixed Member Proportional Representation (MMPR) in electing members of the Legislature;
- A desire for a statement of the educational qualifications of members of parliament;
- A need for further clarity in the respective roles of the Senate and the National Assembly; and
- A need for elaborating modalities on the recall clause.

In considering these views, the Committee took the view that whilst appreciating the desire for a lean parliament the exact number of Members of Parliament cannot be limited by the constitution as it will require the completion of the review of constituency boundaries. This is currently being undertaken by the Interim Independent Boundaries Review Commission (IIBRC). An act of parliament can provide for the setting of educational qualifications for Senators and Members of the National Assembly as these may change over time and can therefore cannot be stipulated in the constitution. The detailed elaboration of the modalities or procedure relating to the recall of Members of Parliament would also require legislation.

#### **4.4.Changes in the Chapter on the Legislature**

(i) *Size and nature of the Legislature as well as method of election to office for parliamentarians*  
There is a significant reduction in the number of Senators as the number of counties under the revised *Harmonized Draft Constitution* has been reduced from Seventy-four (74) to Forty-seven (47) in response to public views. (See also the section below on Devolution for more

on this). Both the First Past the Post (FPTP) and MMP systems are drawn from to ensure the representation of women and marginalized groups, persons with disabilities, and youth is achieved, in such a way as to also take account of the proportion of votes secured by political parties in the direct elections of Senators and Members of the National Assembly. Given that the exact number of parliamentary seats is not fixed the flexibility of using both these approaches will ensure that the minimum constitutional requirements for diversity in representation are also satisfied whilst taking into account the diverse needs of all actors in the political and electoral processes.<sup>1</sup>

(ii) *Delineation and clarification of the roles of the National Assembly and Senate*

The Legislative authority of Parliament is clearly outlined, and within that the roles of the National Assembly and the Senate have been separated out and clarified. The National Assembly will continue to play its legislative role while the Senate will mainly provide an institution for the principal representation of the interests of devolved government, act as a house of review over matters specified in the Constitution, and discharge any specific functions assigned to it.

#### **4.5.Devolution**

The views received confirm the people's support for the system of devolution. The views contain diverse comments and suggestions that have guided improvements on the system. The areas which have been most intensely discussed are outlined below.

(i) *The levels of governments*

Whereas the three level system provided by the HDC is widely supported, a strong sentiment in favour of a two level system is discernable from the suggestions and comments. The main reasons for the preference are:

- the three level system of the HDC will be costly; and
- the 74 counties in the First Schedule of the HDC are small units which will lack resources to govern effectively or to provide checks on the exercise of power at the national level.

(ii) *Boundaries of the devolved units*

The comments are mainly expressions of concern that:

- The selection of 74 counties and eight regions is random. The devolved units are not rationalized in terms of population, geographical features and command of resources; and
- Some of the proposed counties are based on district units whose establishment has been successfully challenged as being unlawful.

(iii) *The necessity of the government at the regional level*

Again the main thrust of the comments was a concern that the regional level of government has no clear role and may become irrelevant because regional governments as proposed:

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<sup>1</sup> See further below the section on Representation of the people

- have no clear source of funds, and therefore, will not be effective in coordinating the functions of county governments or providing capacity building and technical assistance;
- have structures that do not allow for effective supervision and monitoring of county activities since they consist of delegates (and their appointees) of the counties that are supposed to be supervised and monitored; and
- have been assigned the functions of planning, formulation of policies, setting regional standards and delivery of regional services with no indication as to what exactly the region is to handle or deliver.

#### **4.6.Changes to the Devolution Chapter**

The CoE has therefore made the following changes to the Devolution chapter based on the views expressed by the public:<sup>2</sup>

##### *(i) Levels of devolved government*

In accordance with the majority's preferences, the levels of government are reduced to two: national and county. This responds to concerns about the role of regional government and the cost of administration. For the units of county governments, the Districts enacted in 1992 by *The District and Provinces Act* have been provisionally adopted as proposed counties. The regional units had been conceived to be large units better posed to apply checks and balances to the exercise of power at the national level. Without the regional level, there is therefore need for units that can be effective for this purpose, while at the same time, they have capacity to, and, are able to provide services close to the people. This, plus the fact that they are the lawfully recognized administrative units, explains why the CoE adopted the districts delineated in 1992.

The revised HDC provides for a review of boundaries by a specialized committee or commission. The object of including the units of devolution in the reviewed Draft is to provide a starting point for a new dispensation under which the boundaries of the devolved units can then be altered in accordance with the procedure provided for by the new constitution. It is to be noted that whereas electoral boundaries change frequently, those for devolved units do not do so. However given that the new constitutional dispensation would be in the initial phase of devolution there may be some fluidity in respect of the boundaries of the devolved units hence the need for the provision for review.

As is noted below, the provisions in the chapter on Public Finance have also been clarified to ensure that the relationships between the levels of government address in principle matters regarding taxation so as to ensure that the taxation does not inhibit trade and business.

##### *(ii) The Senate*

Many submissions questioned the ability of the Senate as originally proposed in the HDC, to carry out both of its roles, as a review organ of Parliament, and, as a representative of the interests of devolved governments. The fact that members were to be indirectly elected was

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<sup>2</sup> This only highlights key changes to the Devolution chapter.

perceived as a weakness. It was argued that persons of the right calibre were unlikely to emerge from this method of election, and, Senators without popular support would carry less weight than members of the proposed National Assembly.

In response to the above concerns the relevant provisions in the Chapter have been revised to provide for the direct election of senators.<sup>3</sup> Given that senators are now proposed to be directly elected the Committee has provided for them to have a nexus to the county assembly of the respective counties that they represent, by providing for them to have rights of audience in their respective county assemblies without a right to vote therein. On the other hand to also ensure a reciprocal accountability relationship, Senators are required to furnish annual reports in their respective county assemblies. In addition the roles of the Senate in relation to the National Assembly have been streamlined as was earlier noted in the section on the Legislature.

*(iii) The National government's role in the supervision of devolved governments*

Memoranda from many expert groups indicated concern that the HDC did not provide mechanisms by which the performance of devolved governments could be monitored and supervised. This, it was suggested, may be necessary to supplement capacity, or to intervene where a government fails to deliver an essential service or simply because of the need to oversee the utilization of the funds transferred from the National government. It was argued that the suspension measures under Article 235 of the HDC would be invoked in the extreme cases of decay of administration when there was little room for remedies.

The Committee appreciates the above concern. Whereas it may be useful to empower the National government to take measures to ensure the success of devolution, care must be taken not to open wide the opportunities for interference in the affairs of the counties. It is in this context that an additional provision is added requiring the National government to ensure that county governments are given adequate support and to intervene for purposes of maintaining the integrity of the system of devolution and the provision of essential services.

*(iv) Provincial Administration*

Under the transitional arrangements of the HDC, the system of Provincial Administration stands dissolved upon the implementation of the devolved system. Some memoranda expressed some sentiment in favour of continuing with the Provincial Administration at the level of chiefs, the District Officers, and, the District Commissioners as they are “*accessible to the people.*”

The Committee's view is that the representatives under the devolved system will be even more accessible to the people who elected them. The role played by the chiefs can continue to be played by them under the county governments, as was and still is provided for in the Transitional Clauses. Section 4 of the *Review Act (2008)* provides that the new constitution should “*secure provisions therein ... promoting the peoples' participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power.*” The system of

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<sup>3</sup> See the earlier provision on the Legislature to see how else the CoE has responded to these concerns about the electoral process for senators vis a vis the role that they will be playing.

Provincial Administration in its current form, is incompatible with, and may impede the implementation of the system of devolution. It is true, however, that the National government needs to maintain structures for purpose of monitoring the implementation of its functions, including security of the nation. The Provincial Administration will be phased out in a period of five years from the implementation of the constitution. During that period the necessary structures can be established.

#### **4.7. Transitional and Consequential Provisions (Bringing the New Constitution into Effect)**

The provisions on transition contained in the HDC attracted less commentary than the other chapters that had been found to be contentious. Other than the provisions relating to the transition of the Judiciary, and Devolution the commentary in relation to most of the provisions in the chapter on Transitional and Consequential Provisions and Schedules 6 and 7 of the HDC pertained to further need for clarification and modification.

(i) *Concerns raised in respect of transitional provisions relating to Devolution:*

The public concerns raised vis a vis transitional provisions relating to Devolution were in respect of:

- Ensuring that functions are not devolved all at once in a big-bang model but rather in a phased approach by requiring a process to ensure that the new units of devolved government develop capacity to fulfil their functions;
- Allowing the asymmetrical devolution of power (i.e. to units according to their specific capacity);
- Providing checks so that the National government cannot undermine devolved government either by refusing to transfer functions or by transferring functions that the new units cannot fulfil; and
- The proposed phasing out of the provincial administration (which has been addressed in the section on Devolution above).

(ii) *Views on Boundaries and Electoral Processes*

A number of submissions raised questions about the boundaries of devolved governments this has been dealt with in the section on Devolution above. In essence article 230 of the HDC provides for the review of boundaries of devolved units. In respect of the electoral process, the reviewed HDC has further clarified the provisions on the Interim Independent Electoral Commission (IIEC) and IIBRC in its transitional clauses so that it is clear that it is intended that these commissions continue and fulfil their mandate vis-a-vis the conduct of elections and the review of constituency boundaries.

(iii) *Views on the transitional provisions on the Judiciary*

Views about the transitional provisions with respect to the Judiciary manifest three trends:

- Firstly there are views expressed that mistakenly claim that the Judiciary is to resign in its entirety upon the promulgation of a new constitution. The HDC actually offers sitting judges who opt to do so the choice of resigning with benefits upon the promulgation of a new constitution. Those who choose to stay on will be vetted in a phased approach on the basis of clearly identified principles. Judges who are cleared by the Judges Review Commission (JRC) would automatically continue to serve under the new constitution. The provisions for a phased approach are to ensure that the provision of judicial services would not be disrupted.
- Secondly there are views expressed that the transitional provisions pertaining to the Judiciary are unfair and suggesting that the same judges who currently serve should upon the promulgation of a new constitution be sworn into office under the new constitution and continue to serve without being subjected to any transitional process.
- Finally on the other hand there were views expressed to the contrary that instead all the judges currently in office should be sent home to ensure “*a clean slate.*”

The Judiciary is the third arm of the State. Unlike the other two arms of State the constitutional office holders in the Judiciary (i.e., judges) are not elected and enjoy security of tenure. Whilst the provisions viz-a-vis elections will ensure that the constitutional office holders who belong to the other arms of the State can be transited effectively through the electoral process which will actually “*vet*” their compliance with the new constitution – no such mechanism exists for judges and other appointive constitutional office holders.

The transitional provisions with respect to other appointive office holders such as the Attorney General are that the officeholder will cease to hold office within a year of the coming into effect of the new constitution. The provisions provide that incumbent constitutional officeholders are eligible for reappointment on application if they qualify and are successful. There is therefore need for an appropriate transition mechanism for judges. The *Final Report of the Constitution of Kenya Review Commission*<sup>4</sup>, 10<sup>th</sup> February, 2005 states that “*serious allegations were made against the Judiciary, including inefficiency, incompetence and corruption.*” Furthermore the need for Judicial Reform was identified as one of the long term issues causing conflict in Agenda Four of the Kenya National Dialogue and Reconciliation (KNDR) in February 2008. The Judiciary itself has acknowledged this need for reform and established a Task force on Judicial Reform, the report of which was published in August 2009 and informed the CoE’s proposals.

Judicial reform, like all the other forms of institutional reform that have a constitutional dimension – entails structural reform as well as mechanisms that enable and require individual officeholders to comply with the provisions for office within the new constitutional order. Given the public’s expressed concerns about the judicial system there is need that these concerns be addressed in a way that restores public confidence in the administration of justice. Not providing for a transitional mechanism for the Judiciary would

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<sup>4</sup> Page 210



further erode the public's confidence in the justice system. Yet the means of restoring public confidence must also not undermine the Judiciary as an institution. The Committee considered the suggestion of the “*clean slate*” approach but were of the opinion that like the “*radical surgery*” it runs the risk of undermining the Judiciary and also condemns wholesale all members of the Judiciary. The CoE still holds the view that the vetting procedure allows those members of the Judiciary who want to continue serving to be eligible for reappointment whilst those who prefer not to can choose the option of resigning with their appropriate benefits. The transitional provisions in the reviewed HDC provide that the processes for vetting comply with international principles including the provision of a Judges Review Commission (JRC) with the membership of judges from other Commonwealth jurisdictions in order to ensure objectivity. The process would also entail addressing concerns in respect of the welfare of judicial officers who choose to resign, this would be in keeping with submissions made by members of the Judiciary. The public expressed the desire to also have magistrates vetted and this has been provided for.

#### **4.8.Changes to the Chapter on Transitional and Consequential Provisions**

(i) *Revisions vis a vis concerns about the Devolution transitional provisions*

The system of devolved government cannot come into effect until –

- The necessary laws are passed transferring functions and providing for other matters; and
- Elections to county assemblies are held.

These new provisions provide a role for the Commission on the Implementation of the Constitution in monitoring the process of implementing the new devolved system.

(ii) *General revisions pertaining to Schedule 6*

Schedule 6 of the HDC relates to legislation required to enable the new constitution. This Schedule has been revised to:

- Remove from the list of legislation that is not required by the Constitution but which the Constitution gives Parliament discretion to enact.
- Ensure that all the legislation necessary for the following matters is enacted before the 2012 elections:
  - Elections
  - Leadership and the management of political parties
  - The system of devolved government to come into effect.
- Ensure that the timetable for law-making is reasonable so that it is likely that the government and Parliament can comply with it. The legislative load over the 5 year period established in the table remains very heavy, especially taking into account that there is an election in this period.

## **5. Summary of Changes to Non-Contentious Chapters**

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As has been noted earlier there were also views on non-contentious chapters that recommended either changes of a technical nature, modifications and or clarifications of clauses; this was particularly so in respect of the chapters on Representation of the People; the Judiciary and Public Finance. Key aspects of these changes, modifications and or clarifications are briefly highlighted below.

### **5.1. Changes to the chapter on Representation of the People**

The Committee received several memoranda, particularly from governance institutions expressing concern that the HDC provided for only one system of election: First Past the Post (FPTP). This system it was felt exacerbates disparities due to the fact that it is a winner take all system and can sometimes lead to winning candidates who in actuality only enjoy a minority of the total vote in the constituency. There were recommendations to make provision for a Proportional Representation (PR) or at the very least Mixed Member Proportional Representation (MMPR) system, which allows political parties to benefit from the total votes cast for their candidate whether or not their candidates win in the particular constituency that they are in. There was also need to ensure that the affirmative action principles agreed and provided for in the HDC and earlier drafts have an enabling mechanism that allows them to meet minimums. There are provisions in the HDC for direct election of parliamentarians to both the National Assembly and Senate on single member, FPTP constituencies that also ensure regional diversity in representation in the Parliament. In addition there are also MMPR provisions that would apply to the county assemblies to ensure representation of all members of society in all legislatures at both levels of government. MMPR would work through provisions for party lists that would entitle political parties to a certain number of seats on a proportional basis relative to their votes won, that would also ensure opportunities for representation of women and marginalised groups commensurate with the HDC provisions.

### **5.2. Changes to the chapter on the Judiciary**

The Committee received memoranda on the Judiciary chapter that raised concerns about the need to clarify the role of the constitutional court *vis-a-vis* other courts. Some members of the public were of the view that a constitutional court is unnecessary and that the Committee had “gone out of its mandate” by creating one in the HDC. There were also concerns expressed by the Judiciary that their financial independence had not been adequately addressed. They also were concerned about the fact that the provisions in the HDC required that they be vetted by Parliament, this they felt would politicise the appointment process. The CoE has responded to these concerns by:

- Clarifying the role of the Constitutional Court. The CoE’s constitutive Act, the *Review Act (2008)*, does require in section 4 that the provisions of the new constitution secure and ensure constitutionalism and the rule of law. Kenya has hitherto not had a strong culture of constitutionalism. This may have led to the views expressed by the people to

the CKRC and contained in their report at page 209 where in speaking to the issue of the structure of the courts they are said to have expressed “*a need to establish a constitutional court*”. The report of the CKRC is the statutory HDC primary source document as per section 29 of the *Review Act (2008)*. The HDC provides for a new and strengthened Bill of Rights as well as several new institutions such as the devolved governments. Whilst some memoranda argued that a Division of the High Court, as is the current arrangement, could play the role of a constitutional court, the CoE holds that this is not adequate. Divisions of the courts are not provided for through the constitution and so can be abolished over time. The Division is also temporary and does not have judges who sit in it permanently. Nor is experience in constitutional law required for a judge to serve on the Division. There is therefore need for a permanent judicial mechanism that will enhance constitutional jurisprudence that promotes constitutionalism. The Committee was of the view however that there was need to further clarify the role of the Constitutional Court to ensure that there would not be conflicts between it and the other courts.

- In respect of the issue of an independent vote for the Judiciary, the reviewed chapter on Public Finance contains clauses making provision for a vote for independent institutions such as Parliament, the Judiciary and other such relevant institutions.
- The revised HDC also does not provide for judges to be vetted by Parliament (although there is an exception for the Chief Justice who as the head of the Judiciary must receive “*parliamentary approval*”).
- The revised HDC has made provision for a slightly more expanded Judicial Service Commission.

### **5.3.Changes to the chapter on Public Finance**

There were some memoranda regarding the chapter on Public Finance that required changes consistent with technical advice that the CoE had received vis- a-vis the chapter. The chapter on Public Finance has been reorganised and, in places, redrafted in response to submissions received by the Committee and to ensure that the three key principles of public finance that it encompasses are clearly articulated and sustained through the chapter.

The principles of public finance on which the chapter is based are:

- Accountability, including openness and transparency;
- The equity principle or principle of equitable distribution encompassing:
  - fair taxation (revenue raising);
  - fair and responsible expenditure; and
  - prudent borrowing.
- Value for money/efficiency and the responsibility principle.

In establishing a framework for the management of public finance in the country that implements these principles, the chapter does two main things:

- it establishes the key institutions and processes for sound financial management at all levels of government; and

- it provides a framework for the equitable distribution of revenue amongst the different levels of government and amongst devolved governments

As the principles on which the chapter is based assert, sound financial management includes openness and accountability with proper opportunities for public participation in all processes, equity and responsible management of state assets. In the HDC these principles are realized in the following way:

*(i) Accountability*

The main tool for securing financial accountability is through Parliament and, for the devolved governments, through their assemblies – budgets must be approved by Parliament or the assembly of a devolved government. The provisions in the HDC that require legislative processes to be open ensure that the public will have proper access to information about and opportunities to participate in these processes.

*(ii) Equity*

The equitable distribution of revenue amongst all governments is key to Kenya's system of public finance under the HDC. HDC seeks to ensure equity in other ways too including –

- fair taxation: all taxes must be authorized by law and any exemptions must be recorded and made public
- fair expenditure: government procurement must be properly controlled with processes that are fair, equitable, transparent and competitive. These processes must include provisions that give previously excluded groups access to government contracts.
- prudent borrowing: Parliament may control borrowing, devolved governments may borrow only on terms agreed by the national Parliament (so that borrowing by devolved governments does not destabilize the economy) and Parliament must control any loan guarantees.

*(iii) The responsible use of public assets*

Two strong and independent offices are included in the HD to monitor the use of public assets: the Controller of Budget who checks withdrawals from government funds and the Auditor-General who audits and reports on public spending.

## 6. Annexes

*Annex 1: Schedule for Dissemination of Harmonized Draft Constitution of Kenya - December 2009*

DAY	DAY ONE	DAY TWO	DAY THREE	DAY FOUR
TEAM/ DATE	WEDNESDAY 2 <sup>ND</sup> DECEMBER	THURSDAY 3 <sup>RD</sup> DECEMBER	FRIDAY 4 <sup>TH</sup> DECEMBER	SATURDAY 5 <sup>TH</sup> DECEMBER
TEAM ONE	SOY MATUNDA MOI'S BRIDGE	KITALE ENDEBESS	KAPENGURIA CHEPARERIA	KACHIBORA KAPCHEROP
TEAM TWO	ELDAMA RAVINE BURNT FOREST	ELDORET KESSESS	KAPSABET NANDI HILLS	KAPSOWAR ITEN
TEAM THREE	MAI MAHIU NAROK	BOMET KEROKA	KISII SARE	MIGORI KURIA
TEAM FOUR		GILGIL NAKURU MOGOTIO	MARIGAT LORUK	KABARTNET KABARTONJO
TEAM FIVE	MATUU MWINGI GARISSA	MATINYANI KITUI	MUTOMO KIBWEZI	MAKINDU SULTAN HAMUD
TEAM SIX	MOLO MAKUTANO (TOTAL)	KERICHO AWASI KISUMU	SIAYA BUSIA MALABA	BUNGOMA WEBUYE KAKAMEGA
TEAM SEVEN	MWEA KERUGOYA KUTUS	EMBU RUNYENJES CHOGORIA	NKUBU CHUKA MERU	ISIOLO
TEAM EIGHT	KIAMBU SAGANA KARATINA	NYERI NARO MORU NANYUKI	RUMURUTI NYAHURURU	OL JORO OROK OLKALAU OLEOLENDO
TEAM NINE	MTITO ANDEI MANYANI VOI	MIRITINI MAZERAS	MOMBASA UKUNDA MSAMBWENI	KIKAMBALA KILIFI MALINDI
TEAM TEN		ATHI RIVER MAKUTANO KYUMVI	MACHAKOS MAKUENI-WOTE	E-MALI SALAMA

*Annex 2: Schedule for Dissemination of Harmonized Draft Constitution of Kenya in Nairobi*

TEAM ONE	TEAM TWO	TEAM THREE	TEAM FOUR
KAREN	KIAMBU	EMBAKASI	GITARU
NGONG	RUIRU	MLOLONGO	KIJABE
KISERIAN	GITHURAI	ATHI RIVER	MAGINA
ONGATA RONGAI	KASARANI	KITENGELA	KINANGOP FLYOVER

*Annex 3: Distribution in and around Nairobi*

<b>VENUE</b>
Waiyaki Way: Nairobi University, Kangemi, Uthiru, Kabete, Tigoni. Zambezi, Muguga, Gitaru and Limuru
Juja Road: Pangani, Mathare, Mathare North, Huruma Round About and Dandora
Mombasa Road: KIMC, Embakasi, Mukuru, Syokimau, Mlolongo and Kitengela
Thika Road: Mathare North, Roysambu, Githurai, Juja, Mangu, Githunguri, K.U. and J.K.U.A.T
Kangundo – Tala Road: Umoja, Komarock, Kayole, Ruai, Tala and Kangundo
Jogoo Road: Shauri Moyo, Maringo, Kaloleni, Jericho, Buru Buru, Donholm and Eastleigh
Nairobi West, Kenyatta Market, Kibera, CUEA, KCCT, Nazarene
Kasarani – Njiru Road, Limuru Road to Banana
Central Business District Nairobi and Community