

**WORKING DOCUMENT
FOR THE NATIONAL
CONSTITUTIONAL
CONFERENCE**

**DOCUMENT I: SUMMARY OF
KEY RECOMMENDATIONS OF
THE COMMISSION**

**(EXTRACTED FROM VOLUME I OF THE COMMISSION'S
REPORT – THE MAIN REPORT)**

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FOREWORD

SUMMARY OF KEY RECOMMENDATIONS

The summary, which follows, is of the recommendations, which the Commission has reformulated and incorporated into the design of the Draft Constitution. These are as follows:-

On Constitutional supremacy, the new Constitution should -

1. have some entrenched provisions, which Parliament would have no power to amend without first seeking the views of the people at a referendum.
2. address the issue of the relationship among the various organs of state and must deal with checks and balances.
3. have a supremacy clause that should state that the Constitution is binding on all the people and all the organs of the state and at all levels.
4. except as provided in (1) above, only be amended by at least 75% of members of Parliament.

On Constitutional interpretation, the new Constitution should -

5. contain an interpretation clause worded in a manner that assists the interpreters to appreciate the fundamental values of the Constitution without taking away the judicial creativity that permits the Constitution to be a living document.
6. have a provision that sets out the principles governing interpretation which should include the promotion of values that underlie an open and democratic society based on human rights, equality and freedom.
7. establish a Supreme Court as the final arbiter on the interpretation of the Constitution.

On sovereignty of the people, the new Constitution should -

8. acknowledge the sovereignty of the people.
9. acknowledge that government derives its power from the people.

On nationality and citizenship, the new Constitution should -

10. treat women and men equally as regards conferment of citizenship whether married to a Kenyan citizen or a foreigner.
11. state that all citizens have a right to a national identity card and a passport.
12. provide for dual citizenship, naturalisation, registration and permanent residence status.
13. create and entrench an independent body to take responsibility for citizenship issues so as to prevent interference with citizenship rights.
14. provide for citizenship by adoption and legitimation;
15. provide that children under a certain age found within Kenya, and whose parents cannot be found, should be accorded citizenship.

16. firmly entrench the equality of all citizens regardless of race, ethnic origin, age, place of birth, gender or any other difference

On territoriality and defence, the new Constitution should -

17. define Kenya's international boundaries, and proclaim Kenya's sovereignty over its territory.
18. create security and defence forces that are politically neutral, disciplined, patriotic and totally under civilian control.
19. specify the circumstances under which a declaration of war may be made or the defence forces of the Republic committed to operations outside the borders of the state.

On State values, goals and ideology the new Constitution should -

20. have a preamble which *inter alia* acknowledges the significance God to the Kenyan people; recognises the struggle for independence and the role of freedom fighters; recognises the sovereignty of the people in the establishment of the Constitution and setting the means of governance for themselves and the posterity; affirms the religious, cultural and ethnic diversity of Kenyans; re-affirms the indivisibility of Kenya as a nation; seeks to heal post-independence wounds caused by political conflict; re-affirms commitment to social justice; and re-affirms commitment to democracy, Constitutionalism and the rule of law.
21. also contain directive principles of state policy requiring all persons and organs of state to respect the rule of law, protect democratic principles, protect fundamental rights and freedoms, exercise power justly and manage the country's resources sustainably.
22. entrench the republican principles of good governance, democracy and the rule of law
23. proclaim that Kenya is a sovereign Republic that derives all its powers from, and shares in the common interest of her people.
24. proclaim that the Republican shall be a multiparty democratic state committed to promoting the full participation of the people in the management of public affairs either directly or indirectly.
25. proclaim that all power derives from and is exercised on behalf of the people.
26. clearly state and outline the country's basic national ideological principles and values, which direct the new social, political, cultural, economic and environmental dispensation.

On the character of the legal system, the new Constitution should –

27. state clearly the sources of the laws of Kenya .
28. acknowledge the viability and integrity of African customary law, Islamic law and Hindu law.
29. declare the customary international law and treaties binding on Kenya are part of domestic law.

On the Bill of Rights, the new Constitution should -

30. in addition to civil and political rights entrench social, cultural, economic and development (or solidarity) rights.
31. state that the Bill of Rights has 'horizontal effect i.e. applies not just to people in the government but between the people.
32. restrict circumstances in which the state of emergency can be declared and the time and those who may declare it.
33. ensure accessibility to courts and fair administration of justice.
34. establish institutions other than courts for the supervision the Bill of Rights.
35. provide specifically for the rights and needs of women and of children.
36. make provision recognizing the rights of persons with disabilities.
37. make provision to recognise the right of the elderly.
38. recognise the rights of refugees.
39. require government to take affirmative action in respect of groups marginalized on the basis of gender, numbers, disability, age or any other reason created by history, tradition or custom.
40. provide that programmes of affirmative action be justified by full data, use appropriate means and goals be transparently operated and limited by time, and be adequately monitored.
41. abolish the death penalty.
42. give general protection to privacy of the home, person, correspondence and other form of communication.
43. give general protection to the media, including protection from government interference.
44. recognise the value of local languages and the right of people to use them, and the duty of the government to communicate in them, and to provide for their development where desirable and appropriate.
45. guarantee access to government information, subject to reasonable exceptions for national security and to the information held by others that is necessary in order to enforce rights.
46. protect the right to just administrative action.
47. protect the rights of people in detention or custody.
48. guarantee the rights of consumers to appropriate quality of goods from whatever source, fair advertising and consultation.

On cultural, religious and linguistic diversity, the new Constitution should -

49. ensure that freedom of worship is not used to infringe onto other people's freedom of religion.
50. state that no religious test will be required as a qualification to any office or public trust under Kenyan Government.
51. declare that Kenya is a secular state and that the government will not do anything to help, encourage or promote any particular religion;

52. put in place mechanisms that will ensure the removal of socio-cultural and religious obstacles that hinder or impede national integration and unity.
53. provide that no person shall be compelled to participate in any activity or ritual or take any oath, bear any arms or work or study on any day, if doing of such acts violates the person's freedom of religion and conscience.
54. provide for a clear language policy and effective implementation mechanism;
55. recognise Kiswahili as the national language and accord its requisite status during national functions.
56. recognise both Kiswahili and English as the official languages at the national level and provide that all national documents would be made available in the two languages.
57. in the context of devolution of power, recognise Kiswahili, English, sign language and the preferred language(s) of particular areas as official language at the District level.
58. provide for the enactment of legislation to establish institutions for the promotion of English, Kiswahili, sign language and braille.
59. place obligation on the government to set aside budgetary allocation for promotion of national languages, sign language and braille.
60. safeguard linguistic and cultural rights of all people.

On political parties, the new Constitution should -

61. protect the right of all Kenyans to form political parties.
62. provide that political parties, which intend to contest elections be required to register with the Electoral Commission.
63. provide that the Electoral Commission be the registrar and supervisor of political parties.
64. prohibit the founding of political parties purely on religious, linguistic, racial, ethnic, sex, corporatist or regional basis.
65. prohibit political parties from engaging in activities that compromise public order or public peace.
66. provide that political parties once registered, shall be obliged to subscribe to a legally binding Code of Conduct.
67. define the circumstances under which political parties may be de-registered or re-instated.
68. define the conditions under which and for what activities political parties may receive public or more funding.
69. provide that everyone is free to join a political party ; no one can be compelled to join a party; and that only citizens can become members of a party.
70. prohibit the delegation of state functions to, or the use of state resources by, political parties.
71. require that election to offices and committees of political parties be conducted by or supervised by the Electoral Commission.
72. provide for the regulation of expenditure by political parties during elections.

73. require political parties to establish internal machinery for ensuring discipline that are consistent with the principles of democracy, justice and the rule of law.
74. prohibit political parties from disciplining Members of Parliament on the basis of contributions made in Parliament including voting in a manner that may be contrary to the position of the sponsoring party.
75. provide that the President and other senior government officials may not hold any official positions in their respective political parties.
76. provide that political parties must publish their manifestoes before participation in elections.
77. provide that Parliament shall enact a law on political parties.

On the state in the Global system -

78. require Parliament to enact legislation to facilitate informed and strategic integration of Kenya's economy into the global and regional economy.
79. provide that Kenya shall adopt the dualist treaty-making process that includes specific role of the Parliament as part of its "in-put" to or supervision of the treaty-making powers of the Executive.

On participation and governance, the new Constitution should -

80. affirm the importance of the people and their institutions in promoting democracy and republican principles, values and practice.
81. provide that the people of Kenya have the right to participate in the affairs of government either directly or through freely elected representatives.
82. provide that it is the duty of public authorities to promote individual and community participation in the activities of society and to influence decision-making affecting them.
83. establish appropriate mechanisms to ensure the accountability of the government at all levels and to afford people the opportunity to participate effectively in the governance of the state.
84. establish mechanisms to facilitate decision—making by the people on Constitutional issues whether through referenda or otherwise.
85. require state institutions to conduct public enquiry before important decisions affecting the public welfare are made or implemented.
86. reserve the people the right to individually or jointly to petition or address complaints to public institutions and authorities including Parliament and to insist that these be acted on.
87. provide that Parliament enact a law defining the role of traditional leadership, customary law and the customs of communities.
88. create mechanisms that would enable and empower people to monitor the performance of elected representatives and to recall them if their performance is not up to expectation.

On the electoral system, the new Constitution should -

89. adopt the Mixed Member Proportional system for the elections of representatives to the National Assembly involving:-
 - the retention of the current 210 constituencies through single member constituencies,
 - and the introduction of 90 proportional representation seats based on party lists distributed equally between men and women and also taking into account Kenya's diversity.
90. require that at least one-third of all candidates presented for elections by political parties, and one-third of elective and appointive positions in public institutions be reserved for women.

On the electoral process, the new Constitution should -

91. state that it is both a fundamental right and duty of every citizen to vote or otherwise participate fully in the electoral process.
92. require the state to protect the right of every citizen to exercise his/her right duty to vote.
93. provide that voting materials, polling stations and polling personnel be accessible to voters with disability, nomadic communities and other minorities.
94. entrench the principle that elections shall be by secret ballot.
95. guarantee the rights of the disciplined forces, persons in custody, bankrupts and those in hospital, to vote
96. provide that registration of voters be a continuous process, not confined to particular periods.
97. provide that in a Presidential election a registered voter may vote anywhere in the Republic irrespective of the station where he/she is registered.
98. provide that Parliamentary elections be held on a specific or predictable day every five years.
99. empower electors to recall their representatives at council and Parliamentary levels for specified acts of commission or omission during their tenure of office and in accordance with clearly defined procedures.
100. require election candidates to possess minimum academic and other qualifications and to provide such other information as may be specified by electoral law at the time of nomination.
101. allow independent candidates to stand for Presidential and Parliamentary elections
102. specify the circumstances under which a candidate for election may be disqualified from offering himself/herself for election.
103. provide that except for the public servants debarred by the Constitution, civil servants be allowed to take leave of absence in order to seek elective offices.
104. provide for the enactment of a code of conduct governing elections and the conduct of election candidates and specifying penalties to be exacted for violation thereof.

- 105. require state media to give balanced coverage to all persons and parties participating in elections.
- 106. recognise and facilitate the right of civil society and other organisations both domestic and institutional to participate in election observation and monitoring, even with financial subsidies.

On management of elections, the new Constitution should -

- 107. establish an independent and impartial Electoral Commission, comprised—of Commissioners of integrity appointed by the President with the approval of Parliament and funded directly from the Consolidated Fund.
- 108. provide that Commissioners serve for a maximum of two five year terms but who otherwise have security of tenure.
- 109. give the Electoral Commission the power to deal with certain electoral disputes or offences immediately.
- 110. provide for a the establishment of a special Electoral Boundaries Commission within two years of coming to review constituency boundaries and where necessary create new constituencies on the basis of criteria specified in electoral laws.
- 111. provide that the delimitations of constituency boundaries be done every ten years.

On the legislature, the new Constitution should -

- 112. provide for a bicameral legislature consisting of an Upper House called the National Council and a Lower House called the National Assembly both collectively referred to as Parliament.
- 113. provide that the National Council shall consist of 100 members of which 70 members shall be elected from the districts (including Nairobi) and 30 women elected from the provinces (4 from each province and 2 from Nairobi).
- 114. provide that the National Assembly be composed as indicated in recommendation number 89 above.
- 115. provide that the term of Parliament shall last five years from election to election.
- 116. provide, in detail, the functions of Parliament.
- 117. provide that the political party with a majority of members or a coalition of such parties would form the government.
- 118. provide that Parliament has unlimited powers over its own procedure and full control of its own calendar.
- 119. require that members of Parliament work full time.
- 120. stipulate clearly that Parliament has the power to dismiss the government through a vote of no confidence.
- 121. require that members of Parliament establish constituency offices.
- 122. stipulate that the office of Leader of the Minority party be established and recognised in Parliament.
- 123. enhance the capacity of Parliament to supervise the operations of the executive branch.

On the executive, the new Constitution should -

124. provide for an executive branch consisting of a President and a cabinet headed by a Prime Minister.
125. stipulate that a Presidential candidate be nominated by a political party or be an independent candidate aged between 35 and 70 years, a graduate from a recognised university, and of high integrity and moral probity.
126. stipulate that the President be elected directly by the people on the basis of universal suffrage.
127. provide that a Presidential candidate, who obtains 20% of votes cast in at least 5 provinces and an overall 50% of the total valid votes cast countrywide be declared elected and that where there is no outright winner, a run off shall be held between the two candidates with the highest number of votes, and the candidate with a simple majority in the run off be declared winner.
128. exclusively define the powers of the President and the circumstances under which he/she may be removed from office and procedure for impeachment.
129. provide that every Presidential candidate must nominate a person qualified to be President as his/her running mate who upon election shall become Vice President .
130. stipulate that in the event of death, impeachment, or resignation of the President, the Vice-President shall assume the office for the remainder of the term of the President.
131. provide that if the office of the Vice-President becomes vacant, the President shall appoint a Vice-President from among elected members of Parliament.
132. provide that in the event of death of both the President and the Vice President, the Speaker shall act as President
133. provide for the appointment of a Prime Minister responsible to Parliament and head of the Cabinet in the Government of Kenya.
134. provide that the Prime Minister be appointed from the party or coalition of parties with the largest number of members in Parliament and be the head of the Cabinet.
135. provide that the term of office of the Prime Minister continues for the life of Parliament unless he/she resigns, dies or is dismissed by Parliament on a vote of no confidence.
136. provide for the appointment of two Deputy Prime Ministers to assist the Prime Minister in the performance of his/her functions.
137. limit the size of the cabinet to not more than fifteen ministers and that ministers be appointed from outside Parliament but approved by it.
138. provide for the appointment of a person qualified to be a High Court judge as Attorney-General as the chief legal advisor for the Government.
139. provide for a separate and independent office of Director of Public Prosecutions.

On the judiciary, the new Constitution should -

140. establish the office of Chief Justice the holder of which shall be the head and member of the Judiciary and President of the Supreme Court.
141. establish an independent Judicial Service Commission and define its membership and functions.
142. establish a new court structure consisting of -
 - Supreme Court
 - Court of Appeal
 - The High Court
 - Kadhi's Courts
 - Subordinate Courts
 - Specialized Tribunals
143. provide that the Supreme Court be the Constitutional Court and the ultimate court of appeal in all matters.
144. provide for the establishment of tribunals composed of village elders to adjudicate on land, and personal law matters at the local level.
145. clearly define the qualifications necessary for appointing a judicial officer at any level.
146. fix the retirement age for all judges, Kadhi's and magistrates at 65 years.
147. accord the Chief Kadhi the status of a High Court Judge
148. provide that upon coming into force all judges of the High Court, Court of Appeal and the Chief Kadhi comply with the terms and conditions set in its transitional provisions.

On the public service, the new Constitution should -

149. establish an independent Public Service Commission and define its membership, functions and powers and mode of appointment.
150. provide that all appointments to the public service be made by, and discipline of public servants be executed exclusively by the Public Service Commission.
151. provide that all public servants shall retire at the age of 65 years.

On devolution of powers, the new Constitution should -

152. provide for a four tier devolution structure based on the province, district, location and village.
153. provide that Nairobi be state capital territory and be governed in accordance with special legislation.
154. provide that other municipalities be governed in accordance with legislation establishing units of devolution.
155. entrench the structure of devolution
156. provide that upon coming into effect the provincial administration will stand abolished.

On the management of natural resources, the new Constitution should -

- 157. vest all natural resources including minerals, water, land, forests, fisheries and wetlands in within the jurisdiction of Kenya in the people of Kenya except where ownership is expressly vested in other persons or people by this Constitution.
- 158. provide that the state under the supervision of Parliament be under a public duty and trust to manage the country's resources on behalf of the people.
- 159. provide that structures should exist through which communities can participate in the administration of natural resources

On the environment, the new Constitution should -

- 160. create environmental rights and duties as well as standards for the conservation and sustainable utilization of the natural resources.
- 161. contain provisions giving every person in Kenya a duty to have the environment protected for the benefit of present and future generations.
- 162. establish a National Environmental Management Commission to take custody of environmental resources.

On the land question, the new Constitution should -

- 163. declare that all land belongs not to the state but to the people of Kenya in their individual and collective capacity.
- 164. prohibit non-Kenyans from holding land other than in terms of leases
- 165. provide that land be held as either public, community and individual property, and that all three categories be clearly defined.
- 166. reserve in the state, the power of compulsory acquisition and authority to regulate the use of land.
- 167. establish a National Land Commission to *inter alia*, hold title to and administer public land
- 168. require Parliament to establish mechanism for the investigation and recovery of all public land irregularly disposed of, and the investigation and regulation of land expropriated during colonialism or through other causes.
- 169. require government to design and publish a national land policy
- 170. provide for security of land rights for all land owners irrespective of tenure
- 171. require the government at all levels to establish an efficient, transparent and cost — effective land administration system.
- 172. recognise customary land law as the regime governing the delimitation of right in community property and the transmission of those rights as part of the personal law of indigenous Kenyans.
- 173. recognise the right to matrimonial property and equitable access to such property by spouses during and after marriages.

On intellectual property rights, the new Constitution should -

- 174. protect indigenous knowledge and skills and promote their development and nurture.
- 175. require Parliament to enact legislation to promote cultural, industrial and scientific innovations and to enable inventors or authors to appropriate benefits derived from such innovations.

On public finance and revenue management, the new Constitution should -

- 176. establish an inter-disciplinary Economic and Financial Affairs Council comprised of such members and exercising such powers or performing such functions as may be defined in legislation.
- 177. provide for a Parliamentary Budgetary Committee that to work closely the Treasury in the development of the Annual Financial Bill.
- 178. provide for a Parliamentary Budget Office in the form of a Secretariat that would render technical assistance to the Budget Committee on matters relating to financial control and audit.
- 179. establish a Central Bank of Kenya as an independent institution which shall be the supreme monetary authority of the Republic, headed by a Governor and Deputy Governor exercising such powers as may be specified in legislation.
- 180. prohibit the raising or levying of taxes without the authority of Parliament.
- 181. prohibit the incurring of the public debt of the Government of Kenya without the prior approval of Parliament.
- 182. provide for the creation of two separate Constitutional offices of Auditor-General, and Controller of the Budget and define their functions.

On human resource management, the new Constitution should -

- 183. require Parliament to enact legislation establishing an efficient, effective, accountable and motivated public service.
- 184. guarantee to every Kenyan free and compulsory basic (i.e. primary) education.

On social infrastructure, the new Constitution should -

- 185. include, in the Bill of Rights, the basic right to health, shelter and efficient physical infrastructure.

On science and technology, the new Constitution should -

- 186. require the state to design and implement a science and technology policy to improve the effectiveness of the national system of innovation and research.

On constitutional commissions and offices, the new Constitution should -

187. create and define the powers and functions of special Constitutional Commissions and offices to supervise Constitutionality.
188. provide that the appointment of holders of Constitutional Commissions and offices be made with the approval of Parliament.
189. establish a Salaries and Remunerations commission to determine the remuneration and benefits of holders of Constitutional offices.

On ethics and leadership, the new Constitution should -

190. establish a leadership code to regulate the conduct of all public offices including those holding Constitutional offices.
191. establish an Ethics and Integrity Commission to administer the leadership code.

On succession and transfer of power, the new Constitution should -

192. provide detailed provisions relating to the management transitional issues consequential upon its commencement.
193. provide that any person who has ever held the office of President for more than two terms under the old Constitution be banned from holding office under it.