

REPORT OF THE CONSTITUTION OF KENYA REVIEW COMMISSION

VOLUME FIVE TECHNICAL APPENDICES PART FIVE

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10TH APRIL, 2003**

PART FIVE:

EEXPERT REVIEW OF THE DRAFT BILL SEMINAR

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FOREWORD

The Constitution of Kenya Review Commission is pleased to publish this volume of the Commission's report, comprising the technical appendices to the Commission's main report. The contents of this volume are a reproduction of the proceedings of technical seminars held by the Commission. It is presented in five parts as follows:

Part One

Interpretation of the Constitution of Kenya Review Commission's Mandate Seminar
Independence Constitution Seminar

Part Two

Culture, Ethics and Ideology Seminar
Gender Question Seminar
National Convention for Persons with Disabilities
Human Rights Seminar

Part Three

Devolution Seminar
Electoral Systems and Political Parties Seminar
Legislative Reforms Seminar
Judiciary Seminar

Part Four

Economic Sensitisation Seminar
Land Seminar
Constitutional Reform to Fight Corruption Seminar

Part Five

Expert Review of the Draft Bill Seminar

This volume is one of a number, which the Commission has published. It has produced a main report on its work and its recommendations for a new Constitution, a short version of it, a series of reports for each of Kenya's 210 constituencies, and a volume on the Commission's method of work. The authority to prepare and publish these documents is derived from Sections 26 (2) and (7) and 27 (1) of the Constitution of Kenya Review Act (Cap. 3A).

This particular volume has been prepared by the Commission working through the Research, Drafting and Technical Support Committee. The Chair of the Commission, Prof. Y. P. Ghai, and the Chair of the Research, Drafting and Technical Support Committee of the Commission, Prof. H. W. O. Okoth-Ogendo, co-ordinated the work of these seminars. Backstopping assistance by way of research and logistical support was provided by the Technical Staff of the Research, Drafting and Technical Support Department of the Commission.

We wish to acknowledge and thank the local and international experts and professional groups and institutions, who offered their views, opinions and comments freely and sincerely during the

Commission's seminars. We also want to thank the individuals and organisations who gave their material and moral support during the exercise. We as Commissioners are pleased to release this volume to the public for perusal and discussion.

1. Prof. Yash Pal Ghai, Chairman
2. Prof. Ahmed Idha Salim, 1st Vice-Chair
3. Mrs. Abida Ali-Aroni, Vice-Chair
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25. Dr. K. Mosonik arap Korir
26. Mr. Domiziano Ratanya
27. Dr. Andronico O. Adede
28. Hon. Amos Wako, Attorney-General – *ex officio*
29. PLO-Lumumba, Secretary – *ex officio*

**EXPERT REVIEW OF THE DRAFT BILL SEMINAR: 26TH –
27TH OCTOBER 2003 AT THE BOMAS OF KENYA, NAIROBI**

List of Presentations and Presenters

1. “A Critical review of the Draft Bill of the Constitution of Kenya” by Prof. Joseph Nyasani
2. “Draft Bill of the Constitution of Kenya Review Commission: A Commentary” by Prof. Macharia Munene
3. “Audit & Review of the Draft Bill to alter the Constitution” by Dr. Patricia Kameri-Mbote
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15. “Police Departments Proposal for Amendments to C.K.R.C. Draft Constitution - Chapter 14 Part II On the Kenya Police Service” by King’ori Mwangi for Commissioner of Police
16. “Department of Defence Comments” By Brig. T. K. Githiora
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A CRITICAL REVIEW OF THE DRAFT BILL OF THE CONSTITUTION OF KENYA

Prof. Joseph M. Nyasani

1. Introduction

I was assigned a difficult but pleasant task of critically analysing and reviewing three chapters specifically, namely, chapters one, two and three of the Draft Bill and specifically to identify any inconsistencies and paralogistic instances or clear failure of logic. Subsidiary perhaps, I was also asked to conduct what you called an intellectual audit of the Draft Bill with a view to assessing its correctness and to making recommendations as to its implementation. I am honoured and privileged to do just that and I will start with the principal assignment of the chapters that fall within my terms of reference.

2. Preamble

If I start with the Preamble, I would put it this way:

We, the sovereign people of Kenya-
Aware of our ethnic, cultural and religious diversity and determined to live in harmony, peace and unity as one indivisible sovereign nation:

Committed to nurturing, protecting and promoting the well-being of the individual, the family and the community within our nation:

Actuated by the resolve to live as a united people with a common destiny in the attainment of social and political objectives for our nation:

Recognising the aspirations of our women and men for a government *founded on the inalienable principles* of freedom,

democracy, social justice and the rule of law:

Exercising our sovereign and inalienable right to determine the form of governance *for our country:*

Convinced that the form of governance under this constitution duly executed fully and freely through popular participation is suited for our nation:

Do hereby adopt, enact and give (bequeath) to ourselves and to our future generations this Constitution.

3. Chapter One

3.1 *Sovereignty of the People*

Under Article I (4) where it is specified that the right to exercise sovereignty shall not be delegated to any individual, group or class, seems to strike me that it may be contradicting Articles 1 (2) and (3) unless the drafters had a different interpretation of it. If that is not the case, I would be persuaded to begin Article 1 (4) as follows:

Except as specified under Articles I (2) and (3), the right to exercise sovereignty shall not be delegated to any individual, group or class.

(I would go further to break up this Article into two on reasons of logical compatibility and sequencing because the two scenarios are substantively distinct and envisage or, rather, point to two separate conducts in two different directions. I would therefore come up with an additional Article 5 to read as follows):

No person shall have the right to arrogate to himself or herself or exercise any state authority which does not emanate from the

Constitution.

3.2 *Supremacy of the Constitution:*

Under Article 2 (1), I would rather predicate the founding of Kenya upon *principles* of the supremacy of the Constitution to read as follows:

Kenya is founded on the *principles* of the supremacy of the Constitution

Under the same Article (2) for specificity reasons, I would put it this way:

The Constitution is the supreme law *of the land* and binds all authorities and persons throughout the Republic of Kenya.

Under Article I (4) again for stylistic and specificity reasons I would put it this way:

A law which is inconsistent *or at variance* with the constitution is *null and void* to the extent of the inconsistency.

Under (5), I would formulate it thus:

The Constitution shall be interpreted in a manner-

- a. that promotes the values *and principles of good and just governance*. (The reason being that you could have a good governance that is not Just. Hence 'just' should be introduced to reinforce the 'good')
- b. that advance *the cause of human rights and fundamental freedoms and the rule of law*;
- c. that permits the creative *and positive* development of the provisions of the constitution and of the common law of Kenya;
- d. that avoids *the use of technical, ambiguous or obscure language* which may defeat the purpose of the Constitution

Under (6), again for stylistic reasons, I would reformulate it as follows:

The courts, a person or an authority interpreting the Constitution may refer to *such* matters or materials *as may be deemed necessary* to assist in the *accurate* interpretation of the Constitution.

3.3 *Enforcement of the Constitution*

(I must say I had a problem in deciding whether or not the paragraphs falling under this heading actually belong there. In my reading of them, I get the sense that they would rather fit under the Defence of the Constitution sub-title immediately following. However, I will leave that to much more expert interpretation. That notwithstanding, I thought Article 3 (1) might be rephrased as follows):

A person may bring an action in the courts on the ground that an enactment or anything contained *therein*, or done *there under* is inconsistent with, or is in contravention of the Constitution, *to seek the court's* declaration to that effect.

3.4 *Defence of the Constitution*

Under Article 4(1) I was persuaded to put it this way:

Any attempt to establish a system of government contrary to the Constitution *in force* is unlawful

(My reasoning for this is that the body politic is a dynamic process and a constitution can be suspended or altered for whatever reasons and it must be the constitution in force that is relevant here).

Under (2), I would formulate it thus:

An act that is *contrary and prejudicial* to the sovereignty *and interests* of Kenya is unlawful.

3.5 *The Laws of Kenya*

Under Article 5 (1) (c) I would phrase it this way to avoid prejudicial interpretation:

Positive customary and personal law of the peoples of Kenya

(The reason why I do this is because African customary law cannot very well be contrasted with Islamic and Hindu personal law because it is not necessarily based on religious faith or on any other peculiar *Weltanschauung*. In any case, to single out Islamic and Hindu law here, may be redundant and possibly a cryptic case of obtrusive inquietude since the Constitution should have addressed this in a separate article providing for the protection and defence of all religious faiths. As it now stands, it may be misinterpreted as giving advantage to the Islamic and Hindu faiths).

Article 5 (1) (g) might read as:

Customary international law, international agreements and *protocols to which Kenya is a party (signatory)*.

Under this same Article (2), what is entered here may be logically encroaching. In my view, it does not quite belong here, Maybe, it could be relegated to the section on the powers of Parliament vis-a-vis this Constitution.

4. Chapter Two

Article 6 (2) might read as follows:

The Republic of Kenya is founded on republican principles of good *and sound* governance through multiparty democracy, participatory governance and transparency and accountability, separation of powers, respect for human rights, fundamental freedoms and rule of law.

(The reason for the additional *sound*, is because you could have a good governance

that is not sound in its institutional governance).

4.1 *Territory*

Under Article 7 (3), I would not be too sure if the sovereignty of any nation over its territory can be subject to some international obligations other than the discharge of some obligation which would not prejudice its sovereignty. Maybe, I have missed your interpretation here. In any case, I would phrase this article as follows:

The sovereignty of the Republic of Kenya is *not negotiable and any accommodations to it may be effected only under international obligations subscribed to* freely and in accordance with the Constitution by the Republic of Kenya.

4.2 *National Days*

On Katiba Day, I am not too sure if I understand the wisdom of the drafters in dedicating a national holiday to the Constitution. It is possible that on the basis of some comparative information, they may have had the advantage of mooted this Katiba Day holiday. My own experience of Germany does not seem to concur with this because after the cataclysmic devastation and the state of hopelessness resulting from World War II, Germany embarked on drafting the so-called *Grundgesetz* (Basic Law). However, at no time did the drafters consider dedicating a national day to this memorable occasion. In any case, it should not be assumed that the country is emerging from a constitutional vacuum or anarchy or that this will be the final and conclusive constitution for the Kenya of tomorrow. Consequently, in my candid opinion, a public holiday should not be dedicated to

this day anymore than it could be dedicated to some historic milestone of the nation. Maybe, it could be renamed as a Memorial Day for all the great trying events that the nation has had to go through. I have a feeling that this proposed holiday may attract a negative interpretation and even warrant some adverse criticism especially if it is perceived to subscribe to the egos of the drafters. Anyway, that is a point that you might want to debate and rationalise on.

5. Chapter Three

5.1 National Goals, Values and Principles

Under Article 14 (2), I would add 'patriotism' to read as follows:

The Republic shall promote national unity and develop the commitment of its citizens to the spirit of nationhood *and patriotism*.

Under (3), the word 'positive' should be included to read:

The Republic shall recognise the diversity of its people and promote *positive* cultures of its communities.

Under (6) some glaring vices which constitute the root-cause of our political problems ought to be added to read as follows;

The Republic shall take effective measures to eradicate all forms of corruption, *nepotism, cronyism and political patronage*.

Under (8), it might read as follows:

Political parties shall *adopt and* observe a democratic culture and humane principles in their internal organization and procedures, respect the rights of others to participate in the political process, and avoid *acts* of violence and

bribery.

Under (9), it might read thus:

The Republic shall promote the role of civil society in governance and *recognize and* facilitate its role in ensuring the accountability of government.

Under (12), it might read thus:

The State shall *be committed to the principle* that *at least* one third of the members of all elective and appointive bodies shall be women.

Under (13) the closing word 'well being' should be one word: *well-being*.

Under (14), it might read thus:

The Republic shall be committed to social justice and, through appropriate policies and measures, to providing for all Kenyans the basic needs of food, shelter, clean water, sanitation, education, health, a clean environment, and security so that they live a life of dignity, *self-respect* and comfort and can *exert* their *full* potential.

Under (15) the phrase 'recognize and enhance the role of science and technology' is obtrusively interruptive here and should be relegated to an appropriate place or converted into a sub-article of its own considering the importance of science and technology. Consequently this sub-article should read as follows:

The Republic shall promote equitable development and *avoid as much as possible* disparities in development between regions of the country and sectors of society, and manage national resources fairly and efficiently for the welfare of the people.

The Republic shall actively promote the teaching of the discipline of science and technology ensuing from it as part of its national resolve to attain an industrial

status within the shortest period possible.

Under (16), it might read thus:

The Republic shall recognize its responsibilities to future generations of *Kenya*, by pursuing *such policies as will (or may) promote* sustainable management of the environment.

Under (17), it might be phrased as follows:

The Republic shall be a good citizen of Africa and the world and *shall* commit itself *towards working* for international peace and *security*, equitable *global* development and the promotion of human rights and fundamental freedoms.

Under (18), it looks like a case of redundancy here for the President to report to Parliament and the nation. I would therefore phrase it as follows:

At least once every year, the President shall report to the nation all the measures taken and the progress achieved in the realization of the national goals, values and principles set out in this Chapter.

(In my view, this chapter on values might have been enhanced by explicitly stating which values and national goals are critical to the nation and dedicating a sub-paragraph to them to underscore their criticality. As it stands now, they seem to be sandwiched in paragraphs as *obiter dicta*).

5.2 *Duties of a Citizen*

Under 15(1), it might read thus:

In order to fulfil the national goals, values, and principles, all citizens have the duty *as far as circumstances may permit to*,

- (a) acquaint themselves with the provisions of the Constitution and propagate its ideals and objectives;

- (b) exercise their democratic rights in taking part in voting and by being involved in all other forms of political participation.
- (c) Engage in work, including the *setting up of home* for the support and welfare of themselves and their families, for the common good and to contribute to national development.

Under 15(2), I confess, I did not comprehend the sense of the sub-article. However, I surmised that it might have been intended to read as follows:

The duties set out in this chapter equally apply to non-citizens wherever appropriate.

(Maybe, this chapter might have included something more explicit on public morality, law and order, security of citizens even if as a reiteration of what has been interspersed in the sub-paragraphs *passim* especially considering the current circumstances in the land).

6. Overall Assessment and Recommendations

This Draft Bill is very well crafted, outstandingly crystal clear and accessible to the common understanding. Clearly, the method used was to depart significantly from the traditional use of abstruse legal jargon and ambiguous and obscure technical language often associated with the formulation of legal concepts and phraseologies. In a sense, it was meant to be everyman's constitution and I believe it has achieved this goal abundantly and robustly.

The issues treated are extremely pertinent to the Kenyan socio-political environment, very wide-ranging and extremely close to the hearts of all Kenyans at this time of social and political evolution. Indeed,

reading through the constitution one gets a distinct impression of a comprehensive inventory of social foibles for which specific remedial measures are being proposed. Moreover one gets the feeling of a cogent compendium of issues hitherto either neglected or simply ignored by the fathers of the outgoing constitution.

This Draft Bill, effectively creates an extraordinary sensitivity and awareness to those social aspects that touch on gender equality, women empowerment, the predicament of the disabled and disadvantaged groups as well as issues of cultural and ethnic diversities that have not been fully addressed in the past or simply taken for granted. This is the perspective that really renders this Draft Constitution particularly germane and stimulating.

Being aware that there may be issues which may cause some controversy at the National Constitutional Conference especially issues related to the measures and modalities of redressing social imbalances among disadvantaged groups, the Draft Bill has created a tremendous opportunity and a

reasonable framework for further discussions and possible emendations thereto. This in itself makes the Draft a very exciting document.

The document clearly sets out the three arms of State: the Legislature, the Executive and the Judiciary in a clear and rational order. Moreover, the constitution and composition of government is so well documented and well-thought out as a distinct innovation by the public and the Commissioners. This new structure may breathe new hopes to the potential polarization of the political system with its inherent dangers of ethnic rivalries. If this Draft Bill is adopted with minimum interference and emendations, Kenya may very well boast of having crafted a document that could be emulated and possibly replicated in the rest of the African social and political *continuum*. I would therefore, go all out to advocate and actively support the implementation of this document without the least reservation.

DRAFT BILL OF THE CONSTITUTION OF KENYA REVIEW COMMISSION: A COMMENTARY

**Macharia Munene,
Professor of History, USIU**

1. Introductory Remarks

The "Draft Bill of the Constitution of Kenya Review Commission" and "The People's Choice: The report of the Constitution of Kenya Review Commission, Short Version" are remarkable documents as being a reflection of the aspirations of Kenyans on how they would like to live and govern themselves. What the commission has done is to try and find common threads that might constitute basic agreements on the part of Kenyans as to what is universally fair and therefore applicable to all Kenyans equally. This applicability should be without favour or discrimination, whether individually or collectively. That being the case, does the Draft Bill meet those expectations? Is it so detailed that it is rigid rather than flexible? And if so, is it likely to be a living document or a temporary one?

The task this morning is to evaluate as best as possible, bearing the above questions in mind, three aspects of the Draft Bill. First, is to concentrate on the "Preamble" and the first three chapters that relate to declarations. These are declarations on "sovereignty and supremacy of the constitution" to be found in Articles 1 to 5 of the Draft Constitution; the declaration on the "Republic" to be found in Articles 6 to 13; and the declaration on "National Goals, Values and Principles" to be found in Articles 14 and 15. Second, is an assessment of the overall correctness of the document as

to logic, intellectual clarity, and potential problems. Third, is to suggest implementation mechanisms that may be considered in order to bring the document into overall acceptance. All the three aspects will be combined in this presentation.

2. Preamble

The "preamble" captures the aspirations of Kenyans to live as one. It highlights key concepts that should be enduring in Kenya. These are:

- (i) The indivisibility of Kenya as a sovereign nation;
- (ii) The exercise of sovereignty as an inalienable right to decide the form of governance;
- (iii) The full participation of Kenyans in constitution making;
- (iv) Kenyans giving themselves this Constitution;
- (v) An appeal to God.

The Implication of the "Preamble" These key concepts have a number of implications and one small problem.

First, the term "sovereign nation" means the people because it is the people sharing common characteristics, culture, traditions, and norms that constitute a nation. In the Kenyan context, all people within its geographical confines are therefore assumed to be one, a nation, and are therefore sovereign as a nation. In this respect, the

idea of the indivisibility of the sovereign nation allows no room for *Majimboism*, secessionism, or any other political formula that is meant to divide or separate Kenyans along any political line. The sovereignty is in the "nation" or the people collectively but not individually or in terms of special groupings.

Second, the right to determine the form of government is presumed to be God-given or natural and is therefore not dependent on any person(s), institutions, organizations, legislatures, or any earthly force. This right is also presumed to be perpetual rather than a one-time event. The implication is that the people of Kenya or the nation can, at any time, decide to change the form of governance that they have as an inalienable right.

Third, is a kind of justification for accepting the Constitutional Draft Bill. All types of Kenyan people had an input in the draft constitution because they participated in different ways and their ideas, opinions, and memoranda were taken into account. Having fully participated in constitution making, the people of Kenya are expected to agree to the outcome. They are then to adopt, enact, and give to themselves this constitution.

3. The Problem of Implementing this Constitution

It is in the method of adopting, enacting, and giving to self that a problem arises. At present, the parliament is a key determinant on whether or not this new constitution comes into force, which essentially contradicts the claim that the people of Kenya adopt, enact, and give themselves this constitution.

If indeed it is the people of Kenya who are

going to adopt, enact, and give themselves this new constitution, presumably through the agreement to be reached at the national conference, then the position of the parliament as an institution is irrelevant. The point of parliament, as an institution, being irrelevant applies whether parliament is dissolved or not. Members of parliament were to attend the national conference as individuals that represent diverse and significant numbers of all types of Kenyans and were not to represent parliament. Their value as Kenyans does not disappear with the dissolution of parliament. It is not the parliament that is adopting, enacting, and giving the constitution to the

Kenyans; it is the people of Kenya and members of parliament are just a fraction of that people. In this case, the expectation that parliament should be in session in order to adopt and enact this constitution contradicts key points in the preamble. The expectation makes the parliament the giver of the constitution and, as the giver, it can decline to give.

A different method of adopting, enacting, and giving the constitution to self may be needed as an alternative. Making a declaration that the agreements to be reached at the constitutional conference are binding and go into force within a specified time would be one way. The national conference, in the name of the people of Kenya, can require the immediate implementation of provisions of the new constitution as per the suggested schedule.

Except for the hitch regarding the method of adopting, enacting, and giving self the new constitution, the "preamble" to the Draft Constitution represents the aspirations of Kenyans. Its appeal to God emphasizes the fact that Kenyans are basically religious

people despite the diversity of their religious faiths and professions. It captures the essence of Kenyanness.

4. Chapter One: Sovereignty of the People and Supremacy of the Constitution

Two competing ideas are emphasized in this chapter. These are the sovereignty of the people of Kenya and the supremacy of the constitution.

4.1 *The idea of sovereignty*

Article 1.1 bestows all sovereignty to the people of Kenya that "may be exercised only in accordance with the constitution." This is a repeat of a key point in the "preamble" but the clause proceeds to impose limitations on that sovereignty in the name of the "constitution." This limitation is problematic.

If the sovereignty of the people can be exercised only in accordance with the constitution, then they are not sovereign for sovereignty implies ultimate authority to do and decide what is in the interest of those holding sovereignty.

The constitution is a creation of a sovereign people, and not the other way round. In this case, the sovereignty of a people comes first and supercedes the constitution which is simply an agreement on how to live, govern self, and relate to other sovereign peoples. The constitution, or agreement, does not supercede those who made the agreement. The modification or qualification in Article 1.1 is actually unnecessary and simply serves to dilute the declaration of sovereignty and makes that declaration doubtful.

Article 1.2 that deals with the exercise of sovereignty either directly or indirectly

through representatives does not affect sovereignty itself and is therefore appropriate.

Article 1.3 deals with the anticipated four branches of government that are supposed to take sovereignty from the people. In the first place, this clause is misplaced and would be more appropriate in Chapter Two, which declares Kenya to be a "Republic." Second, it purports to take sovereignty from the people of Kenya and give it to some human creations called "executive," "legislature," "judiciary," and "Commissions." This would be a negation of the preamble. It would be tantamount to turning these creations into "masters" as opposed to being instruments of service to the people of Kenya.

In itself, however, the clause is a novelty in that it suggests governmental powers being shared among four branches. The novelty is in making "commissions" a separate branch of government. With this novelty, the clause clearly states that these four branches would be separate but it is not clear whether they would be equal to each other and whether they are meant to balance each other and yet work together in serving the Kenyan people. Article 1.4 has two types of problems. First, it contradicts Article 1.3 by stating, "the right to exercise sovereignty shall not be delegated to any individual, group, or class." Article 1.3 "allocated" sovereign authority to four creations in the name of executive, legislature, judiciary, and commissions.

Second, its impact is, like in Article 1.1, diluted by modification and qualification of a categorical statement. The second part of the clause is superfluous and takes away the punch by implying that a person can arrogate to himself "state authority" as long as it can be claimed to "emanate from the constitution." The statement, "and no person

shall arrogate to himself or herself, or exercise any state authority which does not emanate from the constitution" unnecessarily qualifies the first part, "the right to exercise sovereignty shall not be delegated to any individual, group or class." The entire Article 1 on the declaration of the sovereignty of the people needs to be tightened in order to be pithy and to stand on its own. Its impact should not be diluted by modifications, qualifications, conditions of applications, or exceptions to its application. In this regard, sovereignty of the people is either sovereign or it is not. It cannot be conditional. It is perpetual. Declaration of Sovereignty should be a chapter on its own, standing out and undiluted.

4.2 The Declaration on the Supremacy of the Constitution

The declaration on the supremacy of the constitution is in Article 2 and should be a chapter on its own. Article 2.1 reads like a weak preamble, an attempt to justify what is to follow. At present, the Statement "Kenya is founded on the supremacy of the constitution and the rule of law" is of doubtful validity given the past record in Kenya of how law was enforced and how the current constitutional document was trifled with. It was that record that necessitated the clamour for a new constitutional dispensation and resulted in the Draft Bill.

Article 2.2 would be more appropriate as an opening declaration of the supremacy of the new constitution and should read, "This constitution is the supreme law of Kenya and binds all authorities and persons throughout Kenya." The term "Republic" should be left out at this point because it has

not so far been defined and there has been no declaration to the effect that Kenya is a "Republic."

Article 2.3 and 2.4 re-enforce Article 2.2 and they are apt to the declaration of supremacy.

Article 2.5 and 2.6 are on the interpretation of the supremacy declaration. They appear to be misplaced and take attention away from the thrust of the declaration of supremacy. They put restrictions, qualifications, and conditions on the supremacy of the constitution, which then means that the constitution in itself is not supreme. These two clauses are best placed as part of Article 3 on the "Enforcement of the Constitution."

Article 3 is on the "Enforcement of the Constitution" and it has no problems that are evident. Incorporating clauses 2.5 and 2.6 of Article 2, however, can strengthen article 3.

Article 4 is on the defence of the constitution. This article is vague, confusing, and does not say anything on how to defend the constitution. Article 4.2 mentions the unlawfulness of an "act that is prejudicial to the sovereignty of Kenya" and this raises questions as to whether it is the geographical and political entity called Kenya that is sovereign or it is the people of Kenya. Does Kenya in this context refer to the people of Kenya or to the "state" that is called Kenya? If it is the latter, then this clause negates the "preamble" and Article 1, which made it clear that it is the people who are sovereign. An additional concern is whether the anticipated "prejudicial" act emanates from within or from outside Kenya.

A suggested rephrasing of Article 4 would

be:

"All Kenyans are obligated to defend this constitution from internal and external threats."

Article 5 is on the laws of Kenya. It is essentially appropriate but a few adjustments are in order and a few questions do arise. First, Article 5.1 has a conceptual problem. The people of Kenya have not yet adopted, enacted, and given to themselves this constitution. When they do, different categories of laws will emanate from that constitution. The constitution, therefore, cannot simply be one of several categories of the laws of Kenya. To make it one of seven categories, as Article 5.1 does, is to undermine the declaration on the supremacy of the constitution.

A suggested rephrasing of this Article 5.1 would be:

"This constitution is the primary law of Kenya and shall include, but not limited to:

Acts of Parliament

African Customary Law

Islamic and Hindu Personal Law

Common Law rules of procedure, practice, and equity as applied to Kenya."

Items "f and "g" of Article 5.1 create special problems for they imply that the people of Kenya are subject to external jurisdiction and are therefore not sovereign. If the argument is that East African Community Laws and International Laws are domesticated by being approved or confirmed by the parliament, they then do not need to be mentioned as separate categories because they fall within the purview of Acts of Parliament. These two categories of laws that emanate from outside Kenya fit more in an Article dealing with

the conduct of foreign policy and international relations than in this article or in a chapter on the supremacy of the constitution.

Article 5.2 needs some clarification. Which constitutional document is the existing system of laws not in conformity with? The current one that Kenya has been operating under for roughly forty years or the proposed one that has yet to be adopted, enacted, and given? Is this clause a call for a thorough review, and possible overhaul of the existing system of laws within two years?

5. Chapter Two: The Republic

This chapter sets out the structure and the political system that should govern Kenya. It declares Kenya to be a Republic. The implication is that Kenya will, therefore, adopt a political system that is associated with the principles of republicanism. A few philosophical problems arise in the wording of some of the clauses.

Article 6.1 asserts that Kenya is a "sovereign republic," meaning that sovereignty is in the geographical political entity called Kenya that is of a republican nature, and not in any other type whether that other type is a monarchy, a dominion, or a democracy. If sovereignty is in the "republic," does it not contradict the "preamble" and Article 1, which are categorical that sovereignty is with the people of Kenya? If the people, in their sovereignty, create a "republican" form of government, do they then automatically lose their sovereignty to a form of governance? The people of Kenya are likely to adopt, enact, and give themselves this constitution that shall declare that the form of government that they want to follow will

be a republican one but that should not imply that sovereignty will subsequently be taken by the adopted form of governance. They will continue retaining sovereignty irrespective of the form of government they choose to have.

It should be sufficient simply to state that "Kenya is a Republic" and its official name is "Republic of Kenya."

Article 6.2 tries to enumerate republican principles but fails to mention the key concept in the notion of republicanism. This is the representative nature of a republican form of governance. This means selecting a few people who represent different interests to be involved in the governance of a place so as to ensure that those interests are advanced and protected through the governing machinery or system, or are not jeopardized or threatened. The method of selecting those few representatives can have democratic colouring in the form of periodical elections. One may raise the question of whether "multiparty democracy" is a republican virtue given the number of multi-parties existing in monarchies and dominions. This clause needs to be reworked.

Article 7 tries to define the territory of Kenya. It declares that Kenya is divided into provinces and districts although it is not clear why the terms provinces and districts are used, and whether the divisions are new or the existing ones. Article 7.3 claims that the "sovereignty of the Republic of Kenya over its territory is subject only to any international obligations that the Republic of Kenya freely accepts in accordance with the Constitution" which in turn makes sovereignty of the people of Kenya conditional and subject to others. If indeed Kenya freely accepts international

obligations in accordance with the constitution, which the Kenyans give themselves, then the issue of sovereignty being "subject" does not arise. This clause has the problem of trying to condition or qualify sovereignty and this is inappropriate. It should, in addition, be in the Article dealing with foreign policy or international relations.

Article 7.4 calls on Kenyans to defend the Republic against threats to political independence, territorial integrity or constitutional order "by unconstitutional means." Are there constitutional means of threatening the republic and constitutional order? This phrase, "by unconstitutional means" is unnecessary and tends to dilute the call to defend the republic.

After the article on the territory, the proposed structure of the government should follow as a separate article. In this article, the anticipated level of government, national and local would be mentioned without going into detail. A second clause could refer to the suggested four branches that would be separate to each other. Such declarations in such an article should not be qualified, modified, or conditioned.

Article 8 on the capital of Kenya would then logically fall into its proper place in the chapter. Article 8.3 claiming that it "is the policy of the state to decentralize the headquarters of national government....to the provinces equitably" is misplaced and has little to do with the declaration that Nairobi is the capital of Kenya. And what does the word "state" refer to in this scenario? It is more appropriate in Chapter Ten that deals with the "Devolution of Powers" than in a chapter of declaration of the republic. Even then, it is doubtful whether the Draft

Constitution should be dictating "policy" to the "state." The choice of words is wanting in this respect.

Article 9 deals with languages and declares English and Kiswahili to be official languages but only Kiswahili is a national language. The implication is that Kiswahili is the language of the people of Kenya who constitute a nation but that English is tolerated because of necessity.

Article 9.3 calls for the "state" to respect, protect, and promote the languages of the people of Kenya. While "respect" and "protect" may be within the ability of "state," it is doubtful whether the "state" can "promote" all the diverse languages in Kenya. A provision on "not hindering the promotion" of the diverse languages would be in order.

Articles 10, 11, and 12 have no problems that come to mind.

Article 13 is on National Holidays. It suggests three National Holidays. These are to be Madaraka Day (June 1), Jamhuri Day (December 12), and an undated one to be termed Katiba Day. The implication is that Kenyatta Day and Moi Day will be abolished since they are not specified in the Draft Bill. The question that arises is what was the rationale for abolishing Kenyatta Day? Moi Day was created in 1989 after Vice-President Josphat Karanja pushed it through parliament as a reward to President Moi for the good work that he had done. It was essentially an extension of the "Ten Great Years" celebrations of Moi's "Nyayo" rule. In subsequent years, the wisdom of this Moi Day was subject to questioning and even Moi himself doubted its value and started toning down celebrations associated with it.

The circumstances that gave rise to Kenyatta

Day, however, are completely different and had nothing to do with Kenyatta as president. Kenyatta Day is commemorative of the struggle for independence from colonialism, in which a lot of blood was shed, and whose official starting date for violent confrontation was October 20, the day the State of Emergency was declared. The celebration of Kenyatta Day started in 1958 and 1959 when Kenyatta and his colleagues were in jail, counting their days, and not in any position to demand anything from anyone. It was the people of Kenya who, in those colonial days, demanded that there be a Kenyatta Day. In this context the name Kenyatta is simply symbolic of the struggle, it is not personal. A suggestion to abolish Kenyatta Day, then, would be tantamount to an attempt to abolish history; and that would be folly.

6. Chapter Three: National Goals, Values and Principles

This chapter aims at setting out what are supposed to be national "goals, values and principles" and the duties of a citizen, or a non-citizen in Kenya, in upholding those goals, values and principles. The second part of this chapter, Article 15 is on the "Duties of a Citizen." These are clearly stated and raise no concern as to language, logic or style of presentation. The first part of the chapter, Article 14, however, has some problems. The Article, in presenting 18 clauses that supposedly relate to goals, values, and principles, elicits the following comments.

First, this Article 14 would have been clearer than it is if the three categories of goals, values and principles were separated in such a way that the statements relating to each category would be distinctly separated

from the others. Goals are targets to be attained. Values, in part, are those ethical socio-cultural attributes and beliefs that are considered important or vital to the definition and identity of a given people.

And principles are essentially operating guidelines. In this way, each category would stand on its own as statements relating to "goals", would be separated from those related to "values", and those related to "principles."

Second, the style of presenting those statements is problematic in that it is giving orders to some organ created by the constitution, mainly the "Republic." Mention is also made of "political parties" in Article 14.8 and "President" in Article 14.18 with specific instructions on what they are supposed to do. In Article 14.10, however, deviates from giving orders, as is the case in the rest of the Article, by claiming that the "Republic is fully committed to. ..." By requiring the "Republic" or any other organ to do things, the chapter does not state what the "national goals", values, or principles are. And in giving those orders, the attempt to stick a lot of things in the chapter has resulted in inadvertent repetitions that could have been avoided. In addition, Articles 14.8 and 14.18 are better suited in the chapters dealing with "political parties" and the "presidency" than in the chapter on goals, values, and principles.

While the objective of outlining what should be Kenya's "national" goals, values, and principles is commendable, the whole chapter needs to be recast so as to be forceful and clear as to what are the goals, what are the values, and what are the principles. In the process, repetitions and overlaps would be reduced if not completely eliminated. And in so doing, assertions of

goals, values, and principles should not be confused with instructions to be given to organs that the people of Kenya are likely to create after they adopt, enact, and give this constitution to themselves.

7. Comments on Other Parts of the Draft Bill

The following selected comments apply to other chapters in the Draft Bill. Some of the problems observed in Articles 1 to 15 are also evident in the rest of the document. These include clarity of language, repetitions, style of presentation, logical placing of clauses in their appropriate chapters, and what amounts to terminological fuzziness. Terminological fuzziness is found in the way such terms as republic, state, government, and parliament are used interchangeably in the Draft Bill and thus tend to confuse the exact meaning of each of those terms. The following selections captured my attention as general points of concern.

First, the commission appears to have been torn between recommending a unitary system of government or a federalized one. It sought a middle way by talking about devolution, meaning that the central government retains a lot of power but should relinquish a few to the various districts in the country, which today stand at 70.

While the idea of devolution is commendable, the snag is in the determination of the structure and number of provinces and districts to which the devolved powers would vest. What is the exact purpose of a province or a district? This is not clear in the draft bill. A closer look at the record shows that provincial boundaries in Kenya had been adjusted

more than five times in the colonial days from the establishment of colonialism to 1962. These were in 1902, 1909, 1918, 1924, 1933, and 1962. The existing boundaries were created in 1962 and while they might have made sense, at that time, to colonial authorities that imposed them, it is doubtful whether they are of much value anymore. Of what sense is it to have two geographically small provinces identified as generally mono-ethnic while the other six are multi-ethnic and/or geographically extensive? Given that the 1962 provinces were products of the 1962 Lancaster House Constitutional Conference and the heated politics of the day, would it not make more sense for the new Kenyan made constitutional dispensation to reexamine the notion and purpose of provinces in Kenya and how they should be constituted? Why should Nairobi continue to be considered as a province and a district at the same time? While the number of provinces and provincial boundaries have not changed since 1962, the same cannot be said of districts on which the proposed devolution of governmental powers is supposed to rest. The Lancaster House formula contemplated having 41 Senators to represent the interests of 41 districts then in existence. The draft bill proposes to have 70 National Council Members representing 70 districts and an additional 30 to represent other special interests. The number of districts have therefore increased, and have often increased at the whim of political expediency. What is the rationale for having the number of districts whose interests are to be so protected at 70 rather than less or more? Should the proper formula and rationale for creating districts not be set out in the constitution with the parliament having the final say as to whether a district is warranted or not? Once created, such a

district would enjoy all the rights, powers, and privileges of every other district and would therefore be entitled to a seat in the National Council, one of the two legislative chambers suggested in the Draft Bill.

The creation of a two chamber legislature can be said to be an effort by CKRC to move away from conceptual stagnation in Kenya's legislative thinking. It suggests a National Assembly, as the second chamber, to comprise the existing 210 elective constituencies to be supplemented by 90 additional selected members. The selected members are to be apportioned on the basis of the voting strength of the various political parties and the consideration of specified interests. The reservation of seats in the National Assembly for specified interests, based on the voting strength of political parties, is commendable but it is conceptually inadequate. It is inadequate because it accepts the current 210 constituencies as a given static, in the same way that it unquestioningly accepts the current structure and number of provinces and districts. And given that in the National Assembly it is theoretically the people of Kenya, instead of districts and other interests, that are represented, the Draft Bill fails to think through the existing discrepancies where some constituencies are under-represented while others are over represented.

There is need to conceptualise a formula for electoral proportionality. A constituency with less than 50,000 residents cannot, in reality or conceptually, be equal to a constituency with more than 300,000 residents. A suggestion of proportionality is to have probably an electoral constituency for approximately every 100,000 residents. A proportionality of this kind would be in

tune with the proposed national goals and values of equity, fairness, and democracy. Such reapportionment could be made every ten years following the mandated ten-year census whose results should be released within a specified time of probably one month.

The problem of provinces, districts and constituencies brings up the need to recast thinking in order to avoid the semblance of conceptual stagnation. At a time that Kenyans are re-evaluating many things, there is a necessity for an internal boundaries commission that would examine the notion, purpose, rationale, and viability and practicality of current provinces, districts and electoral constituencies in a changing Kenya as envisioned in the Draft Bill. Such a commission should examine the strengths and weaknesses of the present system of provinces and districts, whether they are actually needed as geographical entities within the country, how they should be constituted if they are needed, how many they should be and why, and how the restructuring should take place. Devolution of power to such reorganized, restructured and rationalized provinces and districts is therefore likely to be more meaningful than devolving it to the current irrational districts and/or outdated provinces. It would also help to move the country away from conceptual stagnation in matters of provinces, districts and constituencies.

Second, the overall objective of the Draft Bill is to give Kenyans a fair document upon which they can agree to accept as their constitution, one that is not discriminatory, one that is fair to all Kenyans irrespective of ethnicity, age, gender, social standing, and one that does not seemingly target individuals either for favour or

recrimination. Yet, one of the weaknesses to be found in the draft bill, whether deliberate or inadvertent, is that it does exhibit some elements of elitism, of targeting individuals or groups, and of showing signs of being discriminatory. A requirement that one must have a university degree in order to be a candidate for president automatically rules out roughly 90 percent of Kenyans and is inherently anti-democratic given that 90 percent of eligible voters might actually want that non-degree holder as their president. It also contradicts one of the suggested national values of promoting democratic practice in the country. What is more, there is no guarantee that a degree holder will be a better president than one without a degree. Kenya's first two presidents, Jomo Kenyatta and Daniel arap Moi, did not have university degrees. Other astute political leaders who were presidential material, as far as Kenyans were concerned, did not have university degrees yet they outshone their contemporaries who had university degrees. Amongst these leaders were Tom Joseph Odhiambo Mboya, Jaramogi Oginga Odinga, Josiah Mwangi Kariuki, and Gideon Ronald Ngala. Outside Kenya, some outstanding leaders did not have university degrees and these include Winston Churchill in England and Harry S. Truman in the United States. Such a requirement displays a tinge of elitism that is essentially discriminatory and undemocratic in a country claiming to value democratic tenets. While the requirement may be "republican," it is not "democratic."

The proposal also discriminates against age by barring people who are 70 from holding the office of president. No good reason is given for this restriction against the elderly yet the same bill bans discrimination against age. What happens if a person turns 70 after

being elected president, does he lose office immediately? If the assumption is that people who are 70 years old people are senile, such an assumption should not be a basis for constitution making because it lacks logic, is discriminatory, and anti-democratic. A better provision would be to require that all presidential candidates provide certificates of their good health, physically and mentally, for the voters to determine whether they are fit to be entrusted with the high office. Had such restriction been in existence in Kenya, the United States, or South Africa, those who would have been ruled out would have included Jomo Kenyatta in Kenya in 1964, Ronald Reagan of the United States in 1980, and Nelson Mandela in South Africa in 1994. This constitutional provision discriminating against the elderly is shortsighted, contradicts stated national values, and is undemocratic.

The Draft Bill is innovative in suggesting that there should be four branches of government with commissions being the fourth branch after executive, legislature and judiciary. The question that arises is one of the rationale for selecting the commissions that were selected and not others. Are the commissions so selected perpetual or can they be changed and new ones included?

One particular commission is of special interest to educators and given the number of university educators that are associated with CKRC responsible for the Draft Bill, its shortcoming is glaring. This is the Teachers Service Commission (TSC), which is charged with the responsibility of education in primary and secondary schools. At the same time, the power to run primary and secondary education will be devolved from the national government to district

governments. Who exactly has ultimate decision making on matters relating to primary and secondary education? More important than the potential jurisdictional conflict between the TSC and the districts is the complete silence on the issue of higher education. It is in the universities that Kenya's thinkers are likely to be groomed, encouraged, and promoted to be intellectually productive so as to help potential policy makers to see various issues that confront them. Failure to encourage and support intellectual growth at the universities is likely to leave Kenyan policy makers at the mercy of foreigners which, in itself, would be a way of compromising the sovereignty of the people of Kenya. Who, then, will be responsible for higher education, the national or the district government? And where does the current Commission for Higher Education (CHE) fit in or was it an oversight? A suggestion would be to replace TSC with a "National Commission for Education" that would incorporate both CHE and TSC as well as encourage and promote intellectual robust in all disciplines in Kenya.

There is at least one time, in Article 204, Clause 1. (J), in which there is a mention of faculties of laws of public universities electing two members to the Judicial Service Commission. The problem with this is the inherent assumption that chartered private universities in Kenya will never offer law degree programmes and that public universities will be the only ones teaching law to students in Kenya. If correct, the assumption is contradictory to the spirit of this Draft Constitution. This particular provision, wherever it appears, should be adjusted so as to eliminate this discrepancy and to be inclusive of all chartered universities in Kenya. As it is, it is

discriminatory to Kenyans and is contrary to national values.

The Draft Bill commendably lays down qualifications that potential office holders should have in high offices that require technical expertise. A few problems, however, can be discerned. There are contradictions in the "Appointment of judges" found in Articles 194 to 195. Article 194 states that whenever a vacancy occurs in the Office of Chief Justice in the Supreme Court, Office of President of the Court of Appeal, or Office of Principal Judge of the High Court, "the most senior judge of ... by reference to the date of appointment", to the respective court, "shall be appointed" Chief Justice, or President of the Court of Appeal, or Principal Judge of the High Court. What follows in article 195 on "Qualification for Appointment of Judges," however, negates Article 194. Article 195 will suffice to illustrate the point for the rest. It states, "The Chief Justice and Judges of the Supreme Court shall be appointed from persons who possess the following qualification-

- (a) fifteen years experience-
 - (i) as a judge of the Court of Appeal or the High Court; or
 - (ii) in practice as an advocate; or
 - (iii) full-time law teacher in a recognised university;
- (b) intellectual ability as demonstrated by academic qualifications and legal practice; and
- (c) high moral character and integrity.

The implication in this Article is that anyone can be appointed Chief Justice or a judge of any of the superior courts as long as he or she shows some intellectual prowess; is not of questionable moral character and integrity, and as long as he or she has served fifteen or ten years in one of three specified

capacities. These capacities are either as a judge of the Court of Appeal or High Court, or a practicing advocate, or a full-time law teacher in a recognised university. This contradicts Article 194 that asserts that only "the most senior judge ... by reference to the date of appointment" to the particular court would succeed as Chief Justice, President of the Court of Appeal or Principal Judge of the High Court. The anomaly between the two Articles needs to be rectified.

Different types of problems are also evident in the Articles relating to the judiciary. In discussing the procedure for removing the Chief Justice, mention is made of including two judges "from the member states of the East African Community" in constituting a tribunal. Would this not compromise the sovereignty of the people of Kenya by turning to foreigners to help determine whether a Kenyan judge is fit to be a judge? Is this display of lack of confidence in the competence of Kenyans warranted in a constitutional document? With regard to the proposed Kadhi's Court, Article 200, Clause 4, states that an "appeal from the Kadhi's Court of Appeal lies to the Supreme Court only on a point of Islamic Law...." Does this imply that some of the Supreme Court judges have to be qualified, and to be in possession of university degrees, in Islamic Law? If not, how then will the Supreme Court determine a matter of Islamic Law when none of the judges in that court has competence?

Mention of Islam also raises different issues in the Draft Bill. Islam and Hinduism are religions like Christianity, Judaism, Buddhism, or even Confucianism and yet the laws of the two religions are given special places in the Draft Bill that is not accorded other religions. Article 10 that

essentially declares that Kenya is a secular state in which all religions would be treated equally ends up contradicting Article 5.1. (d) which mentions Islamic and Hindu laws as specific categories of the laws of Kenya. Since laws of other religions are not mentioned, this amounts to treating some religions with favour. The appearance of religious favouritism is emphasized in Articles 199 to 204 in which Islamic religious courts are given prominence in the Draft Bill and since no other religion is so treated, these Articles contradict Article 10 on equal treatment of all religions. All the Articles in the Draft Bill that relate to religious matters, therefore, need to be recast and to be harmonized so as to eliminate the appearance of contradictions or favouritism.

And related to the issue of favouritism of a different kind, why is the legal profession alone singled out to be specified in the constitution as Article 212 when other professions are not? Is this not a matter of Statute as opposed to a constitutional provision? The impression created is that the CKRC, whether deliberately or inadvertently, tried to secure special sinecures in the constitution for particular groups that are not made available to other similar groups. If so, this was a mistake because it violates the national value of fairness to all.

The Draft Bill also envisioned the creation of a National Security Council and a Defence Forces Council that would be responsible for security of the country from both internal and external threats. A good attempt has been made to define who qualifies to be in the two councils but some comments are in order. Article 272 establishes the National Security Council

while Article 273 refers to its functions among which is the integration of domestic, foreign and military policies relating to Kenya's national security. As such the list of potential participants in the National Security Council should be as inclusive of key policy makers as possible. The one provided in Article 272 is inadequate because it leaves out the ministry of foreign affairs whose perspective on the international picture is crucial to a proper assessment of Kenya's security position in the world. This shortcoming ought to be rectified. With reference to Article 275 on "Commanding Officers," the one point that comes up is in connection with the appointment of service force commanders. Since the Draft Bill lays down minimum qualifications for other specialized high offices such as judges and auditor-general, should there not be specific minimum qualifications, in terms of military rank, for "Commanding Officers" of any of the service forces in Kenya? If so, this would be the case whether it is the army, the navy, the air force, or any other type of military force that parliament might create.

8. Overall Assessment

The Draft Bill was put together under pressure and yet succeeded in bringing together a lot of ideas that occasionally appear to contradict each other, or are seemingly half-measures. One of the problems with the Draft Bill is that it tried to be so detailed that it sometimes contradicted itself and ended up being repetitive. It is marred by unnecessary qualifications, conditions, and modifications to Articles that should stand on their own without reference to any other Article or chapter. If it is necessary to refer to other sections of the Draft Bill in order to understand what an

Article means, then that Article is weak and should be reworked to be self-sufficient and to stand on its own. The Draft Bill also reveals that different draftsmen were involved in different parts of the document and the harmonization may not have been as clear as it should have been.

Despite the noted shortcomings, the work that the CKRC did, and the resulting Draft Bill is commendable. The CKRC fulfilled its mission of collecting and collating the views of all types of Kenyans from different

geographical and cultural settings. It also succeeded, by coming up with the draft constitution, in trying to make sense out of all the views, opinions, and memoranda that it received. By producing the Draft, the Commission met the expectations of Kenyans who now have the responsibility to dissect, analyse, and refine the document to their satisfaction. After refining it and agreeing on what should be or should not be in the constitution, Kenyans should then go on to give it to themselves.

AUDIT & REVIEW OF THE DRAFT BILL TO ALTER THE CONSTITUTION

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1. Introduction

The draft Bill in the overall is very progressive and addresses most of the salient issues that have concerned Kenyan citizens for a long time. It tallies with new constitutions by capturing nascent concerns in democratic societies and is a commendable effort at bringing together the views of diverse persons into a coherent document.

I will concern myself with the two chapters I was asked to look at, namely chapters four (on citizenship) and five (bill of rights). In reviewing these chapters, I will suggest ways of improving the articles that I think need refinement, identify ways in which parts of the chapters deviate from common understanding, identify inconsistencies and failure of logic and advise on the implementation of the draft Bill. I will point out the sections of the two chapters that need to be clarified.

2. Chapter Four - Citizenship

2.1 *Section 16 - General Principles Concerning Citizenship*

This section is clear and grants all citizens equal rights, privileges and benefits while subjecting them to equal duties and responsibilities and entitling them to Kenyan passports and other documents of identification issued by the state to citizens.

2.2 *Section 17 - Retention of Existing Citizenship*

Section 17 (1) on retention of existing citizenship for persons that are already citizens of Kenya is clear. However, section 17(2) on persons who were not citizens under the operative constitution but who would qualify to become citizens by dint of this draft constitution needs to be clarified. The section should read as follows:

Every person who immediately before the coming into force of the Constitution was not a citizen of Kenya but would have been a citizen of Kenya if the Constitution had been in force is entitled, on application, *under the relevant section* to be registered as a citizen of Kenya.

2.3 *Sections 18-22: Acquisition of Citizenship*

These provisions are clear and remove the anomalies of the provisions in the 1998 constitution.

2.4 *Section 23 - Dual Citizenship*

Section 23 (1) and (2) are clear and in congruence with new thinking that allows dual citizenship as a way of tapping talents that would otherwise be lost to a country as a consequence of brain-drain. However, section 23 (3) is out of line with the entire section. Whereas section 23(1) permits "dual citizenship under the laws of Kenya" section 23(3) takes away that right when it states

that;

a person who loses citizenship as a result of acquiring citizenship of another country is entitled, on renunciation of the citizenship of that other country, to regain the same citizenship status, which the person formerly enjoyed.

The inconsistency and apparent contradiction between paragraph 23(1) and 23(3) needs to be dealt with through the removal of section 23(3)

2.5 Section 26 - Residence

This section lists persons that may reside in Kenya to include in section 26(1)(a) "a former citizen" of Kenya. It is not clear from the foregoing sections how one would become a former citizen of Kenya. This category should be removed or a sub-section added to section 24 on cessation of citizenship through voluntary renunciation or grounds other than fraud etc. this would make sense read with section 27 (d).

Parliament may enact legislation providing for the renunciation by a person of that person's citizenship of Kenya.

Since the categories of persons listed here can qualify to apply to become citizens, it is important to state that this provision only applies where such persons have not yet become citizens.

Section 26(1) (c) which provides that a child of a citizen may enter and reside in Kenya is problematic when read with section 19 on citizenship by birth unless that section provides generally that all persons that are citizens of Kenya may reside in Kenya. The presumption is that if you are a citizen by birth and cannot be deprived of that citizenship, you should be able to reside in Kenya.

It is also important to clarify at section 26(2) what is meant by permanent residents.

3. Chapter Five - The Bill of Rights

The Bill of rights is very exhaustive and congruent with the national goals, values and principles.

3.1 Section 31 - Limitation of Rights

Section 31(1) provides that a right or freedom set out in the Bill of Rights may be limited

(a) only by a law of general application; and
(b) only to the extent that the limitation is reasonable and justifiable in an open and democratic society.

Section 31 (4) should be part of section 31 (1) (section 31 (1) (c)). It should include justifications and operationalization conditions as is the case for the other limitations.

As it is, it is misplaced as it refers to equality, which is the subject at section 33. It could also be moved to section 33 and become subsection 3.

There is however, also the issue of incongruence between Section 10 of the Constitution on state and religion

10 (3) The state shall treat all religions equally, and the provision at section 34(1), which institutes differential treatment on the basis of religion.

3.2 Section 34. - Freedom From Discrimination

There is need here to clarify what "fair" and "unfair" discrimination is in both sub-sections (1) and (2).

In sub-section (3) the text is incomplete in the draft bill

(3) Despite clause (1), the state may take legislative and other measures designed to benefit individuals or groups who are

disadvantages whether or not as a result of past discrimination.

3.3 Section 35 - Women

This section would be made more effective by direct reference to affirmative action for women as has been done in the Ugandan Constitution by inclusion of a sub-section (6) in the following terms:

“Without prejudice to section 34 of this constitution, women shall have the right to Affirmative Action for the purpose of redressing the imbalances created by history, tradition or custom

Sub-section 7 should also be added in the following terms:

The state has the obligation to take steps to implement in law and administration the provisions of the constitution and of international instruments and standards on the rights of women.

While international law is one of the classes of law applicable in Kenya under section 5 and if “applicable in Kenya” is interpreted to mean those conventions that Kenya has signed and ratified, this provision would obligate the state to domesticate international conventions such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and other international declarations on women's rights.

One might argue that this provision is redundant in light of section 5 but we see at section 37 (8), on the rights of children that a similar provision is included with regard to international instruments on the rights of children.

3.4 Section 37

There is need to clarify who “parents”, “mother:” and “father” are. Parentage can be biological, social or economic.

3.5 Section 38

There is need to define what “family” means. Is *family* synonymous with *marriage*? Given that we recognize cultural and modern systems of marriage, family may be very expansive and non-conventional. *Extended family? Polygamous family? Heterosexual unions? Same sex unions? Sororate unions?*

3.6 Section 39.

A sub-section 39 (5) should be added
“Without prejudice to section 34 of this constitution, persons with disability shall have the right to Affirmative Action for the purpose of redressing the imbalances created by history

4. Implementation

The Constitutional Commission on Human Rights and Administrative Justice has about ten commissioners. The tasks of this Commission are very many and diffuse. For instance, the Gender Commissioner is expected to perform at least nine highly loaded functions listed under section 288(3)(c) of the draft constitution. This may militate against the effectiveness of the Commission. It is important to think through streamlining this commission's tasks to make them workable. One way of doing this would be by hiving off the Gender Commission from this Commission and establishing it as a fully-fledged commission.

**DON'T LEGISLATE FOR A GUIDE-DOG WITHOUT EYES:
A CRITIQUE OF THE DRAFT CONSTITUTION'S PROVISIONS ON THE
BILL OF RIGHTS AND PEOPLE WITH DISABILITIES**

**Lawrence Murugu Mute
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(CLARION)**

1. Introduction

As has been said perhaps too many times by now, the Draft Constitution is a fairly good working draft from which Kenyans can fashion out their new basic law. This presentation wishes to do two things: First, to discuss some issues around citizenship as proposed in the DC which Kenyans must take note of; and second, to focus on issues around the proposed Bill of Rights particularly as it relates to people with disabilities (PWDs).

2. Issues of Citizenship

The life-blood of any nation is its citizens. Careful discussion needs to take place in relation to a number of issues to ensure that this country has only first class and no second class citizens:

- (a) A concern generally applicable to the whole Draft is the extent to which exceptions to general rules are set out. The Draft establishes principles which then quickly degenerate into near-shell principles owing to the great number of exceptions ringing these principles.
- (b) In view of (a) above, the Draft only presumes to grant equality to all citizens;

In fact, it does not do this and its substantive provisions discriminate some citizens. Article 16 states that all citizens of Kenya are equally entitled to the rights, privileges

and benefits of citizenship and equally subject to the duties and responsibilities of citizenship. At the same time, Article 76 provides that "the electoral system is based on the right of all citizens to vote and to stand for election to legislative and executive bodies." Yet, by subjecting this entitlement to exceptions made in the Draft Constitution (article 16), persons who are not Kenyan citizens by birth cannot be candidates for president. Recalling the petty grudges which the political classes tend to raise to support their short-term interests *a la* Zambia (Kenneth Kaunda) and the potential for such pettinesses to explode into civil strife *a la* Courte Devoire (Alasan Watara), this provision is both ludicrous and dangerous. It is not an over-simplification to state that Courte Devoire's current problems emanate from this type of provision; and for what benefit? If the people of Kenya use a political process to elect as president a person who is a citizen of Kenya by naturalisation or registration, why should the constitution stop this from happening? Does the Draft believe in Henrich Ibsen's maxim of "the foolish majority"? People living on Kenya's boundaries would need to be very concerned about this provision.

- (c) What effectively amounts to discrimination of citizens on grounds of their youth, old age and learning peppers the Draft, while it is critical that all appointive positions are ringed by clear regulatory criteria for candidates,

elective positions should involve the barest minimum of regulatory criteria. The essence of elections is that the electors are able to make Judgements which, be they not sober judgements, the electors will still have to live with. It is the clear and legitimate responsibility of a constitution to set out specific criteria governing qualifications for persons in appointive offices. These take care of abuses which nominating authorities could cause to happen. However, a constitution must refrain from making a whole host of regulations on criteria *vis a vis* elective offices. It is discriminatory when the Draft includes provisions requiring that members of the National Council must be at least 35 years old, that presidential candidates must be between 35 and 70 years and that such candidates must have a degree.

- (d) The Draft does not include the duty of citizens to pay taxes which should correspond with a right to receive an account of how their taxes are spent.

3. People With Disabilities (PWDs) and the Bill of Rights

- (a) The Draft's provisions on affirmative action as they relate to PWDs require reconsideration. Article 34(2) of the Draft uses non-imperative language to the effect that the state "may take legislative and other measures designed to benefit individuals or groups who are disadvantaged, whether or not as a result of past discrimination ..." The non-imperative nature of this clause may, depending on the socialisation of policy-makers or legislators, impact negatively on PWDs. The argument here is that obvious situations exist in society today

where affirmative action measures are necessary.

- b) I do acknowledge that many in Kenya today are sceptical about the use or fairness of affirmative measures to correct the conditions of disadvantaged groups. In relation to PWDs, what must be made clear is this; Affirmative action for PWDs is intended to neutralise or temper the handicap occasioned by the relationship between the disabled person and the environment around him or her. A handicap occurs only where an uncondusive environment relative to a person's disability exists. A handicap exists if the social environment within which a physically disabled person is such that he or she cannot access buildings or cross roads. A handicap exists if the socialisation of employers is such that they have a mental block every time they are confronted with the prospect of employing a person who is blind or deaf. Arguments have been made to justify affirmative action as a corrective measure only on a short to medium term basis. The environment within which PWDs live can be improved through technology, socialisation, etc. To such extent, affirmative measures can be withdrawn. However, there are areas and issues on which degrees of handicap will remain, and a correlated extent of affirmative action measures has to remain. The key question is how to equalise opportunities which PWDs have.
- (c) Another concern regarding the BR and PWDs is the extent to which the Draft has sought to relate provisions in the BR with provisions elsewhere in the Draft. Related to this is the concern that the BR

must be backed up by other provisions in a constitution for its effective operationalisation. Since the Draft takes the approach of identifying and making provisions for various sectors of society, the succour so provided must be actual and not merely apparent.

- (d) The Draft has on a number of occasions clearly shied away from providing eyes or, if I may be allowed to mix metaphors, teeth to the guide-dog supposed to protect the interests of PWDs. In some instances, the Draft chooses to be general rather than specific; sometimes, it leaves too much room for actors to interpret its provisions. Anomalies of this nature must be corrected.
- (e) The following, then, require reconsideration:
 - (i) The principle of affirmative action applies as much if not more to people with disabilities as to women. Our national goals, values and principles should recognise this by setting the state targets *vis a vis* people with disabilities. For example, a percentage (perhaps 5%) should be allocated to people with disabilities in elective organs of governance; and
 - (ii) The proportional representation measures proposed in the Draft are not specific enough to ensure that parties will include PWDs on their party lists. Given any choice at all, our socialisation is such that political parties will opt out of including PWDs on their lists. The Draft should provide incentives to political parties to include PWDs on party lists. This will ensure that Article 76 is not a mere sound-byte when it proclaims: "elections shall ensure fair

representation of women, the disabled, and minorities".

- (f) Law should as far as possible refrain from legislating against language which may or may not be used by society. Thus, while the Draft seeks to respond to the real life issue of the negative language used with reference to PWDs, the provision requiring the state to "remove from official usage in any language words that are demeaning when applied to persons with disabilities, and to require the same in private use of language" is not useful and should be deleted. Mark you, Jesus's use of phrases and parables was quite insensitive! Rank and file PWDs feel very strongly about being equated to objects, but we should be advised that socialisation rather than legislation is the more effective way of dealing with this problem. Related to the above, for PWDs, their status as people is far more important than their disability. The drafters of the new constitution should note that reference to "the disabled" emphasises the disability rather than the person; "people with disabilities" is preferred.
- (g) There are dangers in the way Article 39 defines disability. "For the purposes of this Article 'disability' includes any physical, sensory, mental or other impairment, condition, or illness that ... has, or is perceived, by significant sectors of the community to have a substantial or long term adverse effect on a person's ability to carry out normal day-to-day activities; or ... forms the basis of unfair discrimination. Disability is a fairly specific term of art which refers to a particular type of person. If disability is defined so loosely that every

person who becomes ill will be able to reclassify himself or herself "disabled" for the duration of the illness, we will be missing the point.

4. Conclusion

In conclusion, let me raise a few more points on the detail of the Draft:

(i) In Article 39(1), "persons with disability are entitled to enjoy all the rights and freedoms set out in this Bill of Rights, and to participate as fully in society as they are able." The phrase "as they are able" is cumbersome and, in terms of the clause, meaningless; it should be deleted;

(ii) The Article requires the state to take legislative and policy measures to ensure recognition of PWDs' right to respect and human dignity, their education, access, etc. A specific concern which the Article does not address is employment;

(iii) I am intrigued by the Draft's provision that the official languages of Parliament shall be Kiswahili, English and sign language. Instead of referring to sign language in the above terms, the new constitution should provide that facilities for sign language and Braille shall be provided. The constitution should not misstate the fact that sign language is not a language *per se*; it is a term of art which describes a medium through which any actual language can be communicated;

(iv) The public registry of Kenyan laws which is required to be maintained in Kiswahili, English and Brail should also be maintained electronically; and

(vi) Use of the word "normal" evokes "abnormal" which is how PWDs are seen. The word "ordinary" communicates any intention "normal" communicates, and it should be preferred.

DRAFT BILL OF THE CONSTITUTION OF KENYA REVIEW COMMISSION. A REVIEW OF CHAPTER SIX - REPRESENTATION OF THE PEOPLE

Prof. Peter Wanyande

1. Introduction

Representation is discussed in Chapter six of the Draft Bill and is divided into three parts namely:

- The Electoral system and processes
- The Electoral Commission
- Political Parties.

In addition to Chapter Six, representation is also discussed in chapters: Three, Seven, Eight, Ten and Sixteen.

The importance of chapter six is that representation through elections is at the core of present day democracy. This is because it is through representatives that the citizenry gets the opportunity to influence their governance by holding their elected representatives accountable. The method and rules for choosing representatives must therefore be legitimate and the choice of representatives done by the right people. Rules about who can participate in electing a representative as well as those who are eligible to represent people must therefore be in place. Equally important is that appropriate structures and institutions for representation must be in place.

Going through the Draft Bill and particularly the chapters indicated above, it is quite clear that those concerns have been addressed quite comprehensively. The Bill spells out the structures and institutions of representation and participation such as are found in the various levels of government

(chapters Ten, Eight, Seven and Six). The rules, methods and procedures for conducting the election of representatives and those governing eligibility to vote a representative and be voted as representatives are also addressed. The bill also discusses the conduct of elections and the powers and responsibilities of the Electoral Commission. The Bill also addresses the issue of gender representation.

The proposals in this chapter as indeed in other sections are quite innovative and progressive. There are however a number of proposals that are not clear. There are also some that might present implementation problems. Other provisions require re-sequencing or re organizing. There are also a number of editorial errors that will have to be addressed. In the next few pages I point out the provisions that require clarification, those that require re organizing, and those that may present implementation problems. I will however, not dwell on the editorials since these can be dealt with in house.

2. Provisions on Representation of Women

Representation of women is discussed in Articles 77 (2) (a) and (b); 106 (a) and (b); 107 (5) (a) and 109(1). The gist of article 77 (2)(a) is that each political party must have at least 1/3 of candidates for each party being women while section (b) says that fifty percent of party candidates for proportional representation at public

elections must be women.

Two questions arise from provisions 77 (2) (a) and (b). First, what will happen to a party which through no fault of its own does not get the required percentage i.e. 1/3 of women? A party may not attract enough candidates even though it is quite popular. Are such parties to be denied participation in the electoral process? The point is that this provision is hard to enforce. This question applies to both direct elections and proportional representation.

Secondly, what will happen to parliament when the required number of women is not elected? Could it be argued that such a parliament is not properly constituted and therefore cannot carry out business? This needs to be reexamined.

There are also questions that emerge from the rule requiring 50% of the 90 members of the Lower House (National Assembly) elected on the basis of party to be women. This is problematic because when you take this together with Section 109 or representation of women and Section 77, we may end up with a situation in which more than half of parliament is women and thereby defeats the objectives of proportionality. In any case, this particular provision i.e. 90 contradicts or goes against the Bill of Rights, which talks about equality.

My suggestion is that we retain the provisions of Section 109 which requires that 1/3 of parliament be women. The 1/3 can be obtained or arrived at from the 90 presented by each party as described in 107 (1). In other words, each party will ensure that a certain number of its party candidates are women.

3. Independence Of The Electoral Commission

The provision that the Public Service Commission employs the staff of the Electoral Commission is likely to undermine the independence of the Commission. This is because the staff will have dual loyalty—one to the Commission, the other to the PSC. They are however more likely to feel more loyal to the PSC as their employer than to the ECK. Under such circumstances they can be manipulated to undermine the work of the Commission. These kinds of problems have been witnessed before. A case in point is the relationship between a category of civil servants, District Development Officers, who were coordinators of planning at the District level. In this, they supervised planning Officers who were under the ministry of planning and the District Commissioners. While the planning officers were functionally answerable to the Ministry of Planning they were administratively under the District Commissioners in the field. This created problems of loyalty ending up in great tension between the two.

My suggestion is that in order to ensure the independence of the Electoral Commission the Commission should recruit its own staff. My understanding is that being a body corporate the Commission can recruit its own staff.

Secondly, in Article 76 (7) it is suggested that an independent body free from political interference conduct Election. This is fine but I am of the view that independence from political interference alone is not enough. The idea would be enhanced if it were indicated that they must be free from political and any other forms of interference

4. Disqualification as an MP

Article 108-(2) c, says that a person is disqualified from being a member of parliament i.e. seeking elective post to parliament, if he/she is an undischarged bankrupt. Yet the rule of undischarged bankruptcy does not apply to a voter. In other words, a voter who is an undischarged bankrupt can actually vote at a parliamentary election. I find this strange on the grounds that if bankruptcy is such a serious offence that disqualifies one to seek elective office, then those who are bankrupt should not be given responsibility of choosing leaders. This is because the responsibility of choosing a leader is a very heavy responsibility that must be shouldered only by people who also qualify to stand for elections. My suggestion is that a voter who is an undischarged bankrupt should be disqualified from voting.

5. Recall of an MP

This is provided for in article 112 of the proposed constitution. This is a noble idea. It has been incorporated in the Ugandan constitution and I believe in some constitutions of other countries. However, clause 3 of article 112 is problematic in the sense that the 30% of the registered voters are required to initiate and sign the petition may be those who either did not vote at all or voted for the opponent of the sitting MP and may therefore initiate the petition out of malice.

Secondly, this may result into several malicious petitions. A way therefore needs to be found to discourage this. My suggestion is that up to 30% of the registered voters in each polling station be required to initiate and sign the petition.

This would ensure that people who actually voted for the MP would be included in the petition.

Alternatively, the requirement should be that 30% of those who actually voted should initiate and sign the petition. This can at least be defended on the ground that once elected an MP serves every constituent. It is however different from the proposed rule in that in the latter we are talking about people who actually voted and so can be said to deserve to put their MP to task even though they might not have voted for him or her. Those who did not vote even though they registered as voters can be said to have given up their right to have a representative, the relevance of the theory of implicit consent notwithstanding.

I am of the opinion that the right to recall an MP should be extended to the local authority representatives as well. I wonder if it would help to indicate somehow in this section, the role of political parties in guiding-as given of policy direction to government. Normally in functioning democracies, political parties campaign on policy platforms and expected to implement those policies when they come to power. Indeed parties and government lure power to democracies if they give to fulfil their policy promises.

Article 89 (1) States that one of the functions of EC is to register political parties. This is fine but would it not be better to transfer this section to the current section 84 (1) which in the proposed draft deals at length with functions of the EC. If this suggestion were acceptable, the 89 (4) would become 89 (1) in which case the section should be changed to read; Parliament shall by an Act of Parliament

provide for matters, which the registrar of political parties shall contain.

Article 94 (1) (b), I think, it may be useful to say "legitimate contributions to the Fund from any other source". In other words the contributions must begin a legitimate source. I think this is necessary on addition to 96 (3) (c) and (5).

6. Sequencing

The sequencing of the order in which the factors that should guide the Electoral Commission in the delimitation of constituencies as given in Article 86 2 (b) should change as follows:

- (i) Population density and the need to ensure adequate representation for urban and sparsely populated rural areas.
- (ii) Population trends
- (iii) Means of communications
- (iv) geographical features
- (v) the boundaries of administrative areas and
- (vi) the latest census of the population in accordance with the law.

7. Functions of the Electoral Commission.

I suggest that current 85 becomes 84 and the current 84 (2) becomes 85 (1) and current 84 (1) becomes 85 (2). In other words, talk first little about the establishment of the EC and follow it up with staff of the Commission then its functions and responsibilities.

8. Matters Requiring Clarification

Article 84 (e) deals with the functions of the Electoral Commission as it relates to the supervision of political parties. What does it mean to say that the ECK is responsible for

supervising political parties? There is need to spell out what this entails.

Secondly, what does it mean to say that the Commission is responsible for the management of Political Parties Fund? What does this entail?

Thirdly, does settlement of electoral disputes include disputes over election results? If then answer is in the affirmative then questions of the capacity of the Commission to do this comes to mind.

Article 77 (1) (b); I suggest that the body to which people are to be nominated should be spelt out. Does it mean for example, that there will be nominees to Village Councils?

The concept of "public elections" is used several times in the Draft Bill but I am not quite sure that its meaning is clear to all that read the Draft Bill. Could it be replaced by the phrase "election to Legislative and Executive bodies at all levels of government"?

Article 79 (c) (ii). The provision should be changed to read "has been employed in the constituency in which the application for the registration is made". In other words the word "there" currently used is not clear. It is also a question of the need to be consistent.

Article 79 is not clear. I suggest that a provision be made to the effect that a registered voter can vote only in the constituency in which he/she registered. This can be 79 (3). There is need to clarify paragraph (2) of article 80 which says that the question of disqualification as a voter is to be determined by the High Court. Does this provision imply that the High Court comes in when the condition given in (1) are disputed or is it that the court will determine whether conditions given in (i) have been

violated?

The word "voting" at the end of article 80 should be in bold since it appears to be a major sub-heading.

Article 81 (c) could be improved by saying that the votes cast at a polling station are counted, tabulated and results announced by the presiding officer at the poling station.

Article 83 (4) is not clear. What is meant by a "Superior Court of Record?"

Article 86 (4) is not clear. It may help if the word "Kenya" was inserted just before the word "Gazette". The same applies to section 90 (7). I think this is the official name of the Gazette being referred to this section as the Draft Bill.

Article 88 (b). It is not clear what is meant by "generate development of the Republic." Do we mean contribute to the development of the Republic? This needs clarification.

9. Independent Candidates

There is reference to independent candidates in section 97 (4) but not anywhere else in the document. I think that it would be a good idea to state somewhere in the document that there shall be independent candidates.

COMMENTS ON CHAPTER EIGHT (ON THE EXECUTIVE) OF THE DRAFT BILL OF THE CONSTITUTION OF KENYA REVIEW COMMISSION

Prof. Walter O. Oyugi

1. Introduction

These comments are made in response to the request by the Constitution of Kenya Review Commission to comment on the provisions of the said chapter as follows: To critically analyse the provisions of the chapter with a view to:

- a) Suggesting ways of improving them (i.e. the provisions)
- b) Identify ways in which the provisions deviate from common understanding
- c) Identify inconsistency and failure of logic (if any)

2. The Preamble

In his seminal work on constitutional government and democracy, Carl J. Friedrich,¹ (1958) in addressing the subject of executive leadership in the state system observes that, in general, the executive leadership may be vested largely in a single individual as it is in the United States, where the cabinet consists of essentially helpers of the chief executive; or executive leadership may be exercised by a group of equals as it is in Switzerland (and more recently one may add, in Yugoslavia after Tito and before the collapse of communism in that country); or it may fit somewhere in-between as for example in France. Friedrich observes further that over the years, the tendency towards monocratic (presidential) pattern seems almost universal; frequently in some countries being perverted into

dictatorship. The observations in question

were made more than half a century ago.

And more recently, addressing the same subject, J.D. Derbyshire² and I.D. Derbyshire (1999) identify the following types of political executive in the contemporary world*:

- *Parliamentary executive*: e.g. United Kingdom, Ethiopia, India
- *Limited presidential executive*: e.g. United States (and many other countries where presidential powers are subject to parliamentary mediation)
- *Dual executive*: which is characterised by the existence of the office of the President and the Prime Minister, who share power, with the President's power being considerably greater, as for example in France, Sri Lanka, Portugal and Morocco (although a constitution monarchy)
- *Communist executive*: which existed in the former Soviet Union and is still surviving in China, North Korea etc.
- *Unlimited Presidential executive*: This particular system is characterised by the existence of a "strong individual leader" whose position overshadows all other institutions in society. This is

¹ Carl J. Friedrich, 1950, "Constitutional Government and Democracy", Ginn and Company.

² J. D. Derbyshire and I. D. Derbyshire, 1999, "Political Systems of the World", Vol. 1&2, Oxford: Helicon Publishing Ltd. (a chart which can be very useful for civic education has been developed by David Lamba's Mazingira institute based on this book)

* The elaborations and examples presented here do not necessarily appear on the works cited.

commonly found in authoritarian third world states

- *Absolute executive*: These are found in states where non-constitutional monarchies are in existence. They resemble the absolute monarchies of the pre 19th Century Europe and before. In Africa, perhaps Swaziland illustrates the case vividly. Elsewhere most of these states are found in the Middle East e.g. Jordan, Saudi Arabia etc.

However, there is a need to note that there has never been and there will never be any pure system of governmental structure. There is always something that every government or political system share with others regardless of the classification that a writer or writers may give to one.

The rise of authoritarian tendencies in the body politic of the individual African countries since independence had, by the 1980s, eliminated any form of democratic political practice. The movement for multi-party democracy from the late-1980s in Africa has been an attack on 'personal rule' and a quest for the establishment of a political dispensation in which power is dispersed vertically and horizontally.

It is this search for the ideal democratic form of government which has led the Constitution of Kenya Review Commission to propose a structure of government which in their well considered opinion, they believe will reduce the current concentration of power in the hands of one institution: The Presidency.

In their presentation in chapter eight (on The Executive), in Articles 148-183 the Commission has identified, although not directly, the kind of executive they envisage for the country. This is what has come to be referred to as a mixed executive system. A

leading constitutional scholar Giovanni Sartori³ (1997) has referred to it as the *semi-presidential system*; this is very close to what the two Derbyshires refer to as *dual executive*. Discussing this system with the French setting in mind, Sartori identifies the basic characteristics of this system as follows:

- (i) It is a mixed system of executive authority
- (ii) It is a diarchy between a President who is the Head of State and a Prime Minister who is the Head of government
- (iii) A system in which dual authority structure replaces monocentric authority structure in that the President shares power with the Prime Minister
- (iv) The Prime Minister, who must be a Member of Parliament, must enjoy parliamentary support in order to remain in that position
- (v) The President is elected for a defined period of time
- (vi) The system allows President and Prime Minister from different parties to work together (but there is also the possibility that both could come from the same political party)

A closer examination of the provisions of Chapter Eight of the Constitution does suggest that the *semi-presidential/dual authority* is what the Commission is recommending to the Kenyan people albeit with some characteristics which are uniquely Kenyan and therefore intended to address the unique Kenyan situation.

In the pages that follow, an attempt is made to comment on the recommendations

³ Giovanni Sartori, 1997, "*Comparative Constitution Engineering: an Inquiry into structures, Incentives and Outcomes*", Columbia University: Macmillan Press.

contained therein with a view to assessing their potency and implementability.

3. Part 1: Principles and Structure of the National Executive

Article 148 addresses the principles of national authority and the accent here is on the exercise of power in the interest of the people and the Republic of Kenya rather than power to serve the interests of the power holder(s). It is a principle which *inter alia* seeks to depersonalise authority and power in the state system.

3.1 Structure of National Executive (Article 149)

The essence of the provision of this article is that the executive power is to be a shared one among three constitutional offices: the President, the Vice-President, and the Prime Minister-in-Cabinet. Since the President and the Vice-President are functionally two-in-one, the division of functions is essentially between the President and the Prime Minister. This is the system we referred to above as *semi-presidential or the dual executive*. Indeed, this is the case in countries such as France, Sri Lanka, and even Morocco where the system is in operation. Notwithstanding the letter and spirit of article 149, it should be noted that elsewhere in the Bill the executive power seems to be tilted in favour of the Prime Minister [see Article 170(2)].

The difference between the Kenyan proposal and other countries where a similar system is in operation is that in those countries the President emerges as the focal point in the national political psyche. In France for example, he chairs Cabinet meetings and in that sense he is very much part of the governmental process (as per 1992 amended constitution). In Morocco, also where the Monarch shares power with the Prime Minister, he is the one who chairs Cabinet meetings. The constitution also grants him the powers to sign cabinet decisions, I believe in his capacity as chairman of the

Cabinet meetings.

In Sri Lanka too, the exercise of power appears to be tilted in favour of the President as illustrated by the following provisions:

- he summons and prorogues parliament;
- he has emergency powers;
- he appoints and transfers senior public servants such as Principal Secretaries, Regional Governors, etc.

In the Kenyan case, it is being proposed that the executive power should be vested in the office of the Prime Minister and the Cabinet [Article 170(2)].

4. Part II: Authority of the President and Vice President

4.1. Presidential authority (Article 150)

These are spelt out in Article 150. They are mainly symbolic, depicting the office as the institutional manifestation of the unity of the nation. His authority over security related matters stands out clearly. Thereafter, the emphasis shifts to his overseer role over constitutionality of governmental actions.

4.2 State functions of the President (Article 151)

The functions are clearly spelt out but their actual performance are circumscribed by conditional clauses aimed at ensuring he does not act on his own impulses; which is to suggest that every action by the President has to have constitutional base. It is to be noted that in the performance of his functions, he is advised by the Prime Minister and his actions, as in the case of appointments, are subject to parliament's approval. But in addition, he has some unshared powers as outlined in 151(6). This balancing act is a radical departure from the present system where the constitution confers unrestricted powers on the President in many functional areas. The restrictions are good for the cultivation of the culture of accountability in government.

4.3 *Legislative Functions of the President (Article 152)*

The proposed constitution gives the President the following functions:

- right to take legislative initiative via the Cabinet;
- conditions for the approval or non-approval of Bills and Acts of parliament;
- oversight powers in ensuring public participation in the legislative process where applicable;
- ensuring that implementation of Acts of parliament are assigned to a particular Minister (I prefer the word Ministry to depersonalise the responsibility). It should be noted that there is no notable departure here from the current practice.

4.4 *Decisions of President (Article 153)*

The provisions of this Article has the effect of doing away with the practice institutionalised in the current regime of making impulsive decisions (the so-called Presidential decree) the implementation of which have often violated existing laws and procedures. This too is a move in the right direction.

4.5 *Curtailment of Presidential Powers (Article 154)*

The essence of this Article is to avoid the "outgoing" President from making key constitutional appointments during election period; it is also apt to prevent an acting President to do so during a temporary absence of the substantive President from duty. This provision should be supported.

4.6 *Right to Vote and Timing of Presidential Elections (Article 155)*

Direct election of the President is not new; what is new is the provision that he cannot also contest a parliamentary seat. This provision should be supported. The

designation of a given date as the date of the presidential election is sound in principle but the actual month and day should be determined after a decision has been made about which of the two elections-presidential and parliamentary-should be held first. According to the present constitution, the life of parliament ends in January, and it has been proposed that in future it should be 45 days before its time is due to end. This puts the date for parliamentary election to mid-November.

4.7 *Qualification for election as President (Article 156)*

The stipulated qualifications required of presidential candidates as well as those relating to disqualification are largely acceptable except for 156(c) on "high moral integrity and impeccable character". The question here is: who is to determine that and on the basis of what information?

4.8 *Procedure of Presidential Election Article 157)*

The procedures spelt out here are acceptable. However, two questions need to be raised regarding 157(3c) on the counting of votes in the polling stations. Reference is intended to the Electoral Commission declaring the results: who is the Electoral Commission in this case and through what medium is the declaration to be made?

Article 157(7) needs a closer definition. What does "within seven days of the election" refer to? Does it start from the first day of election or when the counting of votes starts? And apart from the incumbent President and the Chief Justice, shouldn't the declaration be sent also to all Presidential candidates?

4.9 *Questions as to Validity of Presidential Elections (Article 158)*

The recommendations contained in this Article should be accepted. Terms of Office of President (Article 160)

The provisions here are also apt.

4.10 Protection of President in Respect of Legal Proceedings (Article 161)

Except for provision 161(2a) the rest of the provisions are acceptable. With regard to 161(2a) an alternative method of serving notice on a sitting president should be identified e.g. notice through the print media.

4.11 Removal on Grounds of Incapacity and Impeachment of the President (Article 162 and 163)

The provisions in both sections are acceptable.

4.12 Office of the Vice-President (Article 165)

Ok.

4.13 Vacancy in the Office of the Vice-President (Article 165)

Reference in 166(2) to Speaker of Parliament and (3) to Parliament's $\frac{2}{3}$ rd vote is confusing since the new parliament will consist of two houses. And in 166(5) there is reference to Article 119(5) which does not exist in the copy of the Draft Bill in my possession.

5. Part III: The Prime Minister and the Cabinet

5.1. The Prime Minister (Article 170)

Article 170(2) confers executive authority within the Republic on the Prime Minister and his Cabinet (or in Cabinet), and in so doing takes it from the President in so far as the management of government business is concerned. This bold provision could be a source of friction *where* there is split majority (i.e. where the party controlling parliament is different from that to which the president belongs)

5.2 Appointment of Prime Minister (Article 171)

No comment

5.3 Terms of Office of Prime Minister (Article 172)

No comment.

5.4 Dismissal of prime Minister (Article 173)

No comment.

5.5 Appointment of Cabinet (Article 175)

This is one of the most contentious recommendations in the document. No disarming arguments have been advanced for choosing cabinet from outside parliament as if this is to be a presidential system where the Cabinet consists of helpers of the Chief Executive and are not required to be responsible to parliament.

Ideally, Ministers should be experienced politicians familiar with horse-trading that parliamentary democracy entails. By bringing parliamentary 'green horns' into key positions, the new constitution will introduce an immense patronage in the office of the Prime Minister, notwithstanding the requirement that the appointments be formally made by the President with the approval of the national assembly. By appointing thirty Ministers (15:15) from outside parliament, one is saying that the number of non-directly elected MPs should be 120 (i.e. including the ninety to be brought on board through proportional representation!)

My suggestion here is that since the ninety members will not have basic constituencies to represent and therefore not being full time MPs, they should provide the pool from which some Cabinet appointments should be drawn.

5.6 Decisions, Responsibilities and Accountability of Cabinet (Article 176)

Provision 176 (5b) relating to regular reports to parliament by ministers needs to indicate the periodicity. Or else the Prime Minister should be required to give full report about the performance of the government on a quarterly basis.

5.7 Assignment of Functions (Article 177)

No comment

5.8 Conduct of Cabinet Members (Article 178)

No comment.

5.9 Salaries and Allowances (Article 179)

The depoliticisation of the post of Permanent Secretary is commendable but he should be referred to as the Principal Secretary instead.

6. Annex

6.1 The President

France

- He shall ensure, by his arbitration, both the proper functioning of the governmental authorities and the continuity of the State.
- Appoints to the civil and military posts of the State.
- Appoints the Prime Minister. He shall terminate that appointment when the latter tenders the resignation of the Government.
- He shall appoint the other members of the Government and terminate their appointments.
- He shall preside over the Council of Ministers.
- He shall promulgate laws within fifteen

days following the transmission to the Government of the said laws as finally adopted.

- He may, before expiry of this time limit, ask Parliament to reconsider a law or certain of its articles. This reconsideration may not be refused.
- Submit a referendum
- Dissolution of Parliament
- Signs ordinances and orders of council of minister
- Declares state of emergency
- Appoints three members of C.C.

Morocco

The King shall appoint the Prime Minister. Appoints cabinet ministers as he may terminate their services
The King shall terminate the services of the Government either on his own initiative or because of their resignation.

6.2 The Prime Minister

France

- Countersigns decisions of president
- Directs conduct of government affairs
- Ensures the implementation of legislation
- Subject to the provisions of Article 13, he shall exercise the power to make regulations and to make appointments to civil and military posts.
- Can request extraordinary session to be convened
- Right to initiate legislation.
- Commits the Government's responsibility to the National Assembly on the passing of a bill
- May ask the Senate to approve a general policy statement.

Morocco

- Countersigns Royal decrees except exceptional ones
- Each House may hold private meetings if so requested by the Prime Minister, or by a third of its members.
- Answerable to the king and parliament

- The King shall preside over Cabinet meetings.
- The King shall promulgate a definitively adopted law within the thirty days following its receipt by the Government.
- Dissolves the two houses
- By Royal Decrees, exercise the statutory powers explicitly conferred upon him by the Constitution.
- Preside over the Supreme Council of the Magistracy, the Supreme Council of Education and the Supreme Council for National Reconstruction and Planning.
- Appoints magistrates
- Can declare state of emergency
- Exercises the powers lying with the

Sri Lanka

The President of the Republic

- Commander-in-Chief of the Armed Forces
- Summons prorogues and dissolves Parliament
- Appoints the Prime Minister, the other Ministers of the Cabinet and Deputy Ministers, and Governors of Regions
- Appoints and accredits Ambassadors, High Commissioners, Plenipotentiaries and other diplomatic agents
- Declare war and peace
- Appoints as President's Counsel, Attorneys-at-law
- Declares a state of emergency within a Region and to dissolve a Regional Council
- Action the advice of the Prime Minister
- Be responsible to Parliament for the due execution and performance of the powers and functions of his office

Parliament in terms of law making after dissolution

- Appoints the nine members of the constitutional council and selects chairman amongst them
Exercises the administrative powers
Responsible for the co-ordination of ministerial activities.
- Appears before each one of the two Houses, to submit the programme to be carried out.
- Ensures the execution of the laws
- Introduces draft bills

Prime Minister

- Head of cabinet
- Determines the number of Ministers and Ministries and the assignment of subjects and functions to Ministers.
- Advises the president
- Changes the assignment of subjects and functions and recommend to the President changes in the composition of the Cabinet of Ministers

**ORGANS OF GOVERNMENT, THE LEGISLATURE: A COMMENT ON
THE DRAFT CONSTITUTION OF THE CONSTITUTION OF KENYA
REVIEW COMMISSION**

Hon. Peter Oloo Aringo, E.G.H., M.P.

1. Introduction

When the French Emperor Napoleon Bonaparte commissioned the writing of a new constitution for the then turbulent France, he directed his political advisor Charles de Talleyrand to have it made short, precise and clear; in the spirit of trite military rules. Talleyrand differed with his master and countered; "no sir, it ought to be long and Obscure." But Talleyrand was among those who believed that "speech is a faculty given to a man to conceal his thoughts."

For Talleyrand, obscurity in working was not only inherent, but necessary to accommodate the unforeseen exigencies of the future and the political power dynasty of emergent beautiful France where time was needed to normalise the rule of the other new political class.

A constitution must be adequate in its coverage and elastic in its provision but it must also not be fictitious or unread. It must provide for living legacy. It must provide for dispensation, which not only contexts how people wish to govern themselves but it must also affirm and actualize their fundamental rights in law. But humanity is able to do only such things as are possible in any given circumstances.

The new constitution of Kenya is being made in a most complex and adverse and to

some extent hostile political situation. The CKRC has had to do its work in the face of a hostile, paranoid and manipulative regime which continuously demonstrated publicly its contempt for the work and mandate that the CKRC has been provided by law.

The CKRC has also had to seek out kind of a necessary equilibrium from two polarized positions; one represented by the current regime and the other one represented by the majority of the people of Kenya who wish to bring to an end the authoritarianism presidential system of government.

However, the greatest problem of the CKRC arose out of the persistent conflict between two theories of government prevailing in the Kenyan situation. On the one hand the incumbent imperial presidency created dictatorship and a theory of government based on control and domination and the restriction of the freedom of the citizen by the authoritarian President. On the other hand the CKRC heard from the people their unequivocal demand for a theory of government based on the sovereignty of the people. The people of Kenya have made it clearly known to the CKRC that sovereignty is only reposed in the people.

To its great credit, the CKRC takes the issue of the theory of government as its point of departure in formulating provision for a new constitution for Kenya. The CKRC should then have to proceed boldly from this basis in working out its formulations in the constitution.

But this was only to be, in a qualified manner. The fall out from this position has forced the CKRC draftsmanship into gymnastics. There is non-clarity on the question of applicable theory of government and this has imposed ambiguity, lack of precision and certainty in drafting aspects of the Bill of CKRC that contexts popular sovereignty in the proposed constitution as well as that of the supremacy of the constitution.

2. Sovereignty of the People

Instead of drafting article 1 (1), 1(2) as it is, why not merely say, with due respect to our fellow citizens of faith that;

- The people of Kenya are sovereign.
- It is from the people that the powers of state emanate.
- The people shall exercise their sovereignty either directly or through their democratically elected representatives.

Moreover, sophistry with which article (1) (30 (a) (b) (c) (d) and (e) is couched, could make better meaning if after article (1) and 1(2) - The pivotal proviso that Kenya shall be a "Parliamentary democracy" was boldly instituted.

Filling in this gap would help focus the rest of the provisions of the constitution within the parameter of not only the public demands that the people made, but accord to the requisite guide theory of government which is that of sovereignty of the people.

The 'people' here of course means: their diversity - nations, communities, social groups etc that would find their representation in the National Assembly and other representative organs of governance.

3. Supremacy of the Constitution

If visualized in the foregoing perspective, then the question of supremacy of the constitution as provided for in Article 2(1) would best be restricted to the meaning in Article 2 (2) i.e. in the sense of hierarchy of laws in Kenya.

The CKRC needs to clarify in this regard the issue of sovereignty of the people given its current formulation of Article 2 (1) on supremacy of the constitution.

Does the provision that sovereignty "belong to the people ...mean that the people are sovereign?

What would then be the meaning of "the constitution is supreme" in the light of such understanding of the sovereignty of the people?

Necessary clarification would help us make the appreciation as to whether Parliament as the key instrument in actualizing popular sovereignty is supreme in the sense for instance of the British constitutional convention or not.

These clarifications would have a direct bearing not only on the role and powers of the legislature in the new constitution, but on the applicable theory of government which the CKRC should have endeavoured to abstract from the field of evidence it has coalesced over the past number of months. This theory of government has to inform all tenets of the constitutions which the CKRC formulates.

If these clarifications were to be made, then the roles and powers of the organs of government would be positively formulated and or couched with necessary clarity.

For then, following upon the provision that

Kenya shall be a parliamentary democracy, the other subsequent pivotal proviso would be that "The people shall govern through their parliament."

4. Parliament

The CKRC has been faced with the problem of providing for an all-inclusive Parliament whose role would be fulcrumic, key and central in the good governance of Kenya.

The CKRC has given due appreciation of the meaning of the people of Kenya-being not only a collectivity of individuals and majorities, but nations (42 or more), communities, social and marginalized groups e.g. women, pastoralists, the disabled etc.

The CKRC appreciated the need to see this diversity represented in the Parliament of Kenya and is a reflection, among other things, of the principle of sovereignty of the people. The issue is, how best could this representation be actualized? I submit that there is, in the first instance, no need to have another chamber of Parliament other than the National Assembly.

There could be moulded an all-inclusive National Assembly within which there would be accommodated, the interests that the National Council is supposed to represent.

The propositions to include proportional representation for the National Assembly membership should explicitly be made to cater for this constituency and other special or specific interests, which would not otherwise find their place in Parliament through constituency seats.

The National Assembly should be made the true representation of the diversity of Kenya

as an all-inclusive and composite house. Later the matter of affirmative action, in regard to women's representation, could then be accordingly adjusted in time to meet the propositions of women representation as per the provisions of the CKRC draft bill.

A unicameral Assembly could be better managed to produce requisite and timely results in both deliberation and legislation. The National Council would be an added complication that may not be required in the current situation where democratic governance is once more being reinvented in our land after years of its asphyxiation.

As provided for, the National Council would be an unnecessary duplication of roles and work of a democratic representative National Assembly.

As currently provided for, the said duplication is not apparent, but real.

The role of parliament would of course have been more clearly set; following up from the principle of sovereignty of the people, it was stated that the people shall govern through their parliament as earlier suggested. It is this proviso that would be used as a basis to fine-tune the powers and duties of parliament in the governance fabric of Kenya. Then, it has responsibility in choosing higher governing leadership of government in Kenya as well as its directive and guiding principles for the governance of the country. Then, the proviso in the draft bill that the President would rather serve in the governance through their parliament.

The CKRC in its wisdom would have, as technocrats entrusted to help chart out for Kenyans a popular, democratic and constitutional way forward in governance drawn necessary conclusions in this regard. It would have brought before the people of

Kenya or drawn their attention to the fact that the Presidency elected separately on the basis of 'one person, one vote', could be used to create a solution of divided, competing or divergent legitimacy which holds possibilities of problems of instability of governance. The necessity of electing the leadership of government in Kenya through Parliament would have to a large degree removed such possibility and imposed a situation where governance by consensus would have to be nurtured.

The role of Parliament in the removal of the President on the grounds of incapacity or by impeachment as provided for in the draft bill is indicative of its key role in the resolution of important political problems in Kenya.

The best option in Kenya is to institute full Parliamentary democratic governance as is the case in India, Britain, Australia, Canada, Israel, Finland, Sweden, Denmark, Bangladesh, and New Zealand etc. In these polities, Parliament in the like of a vehicle, is not only the requisite break in government, but it is its motor and engine.

This is the pivotal point of departure which would conform to the applicable theory of government of sovereignty of the people and through which accountable governance would be put in place and nurtured without fear about the future.

In a full Parliamentary system of governance, the President chosen by Parliament would be provided with the opportunity to foster in the political culture of the country, a complementary and guiding role in the country such as the monarchs in European democracies or other heads of state or Presidents have done. In such a situation the President would match in tandem with the developments that are nurtured in the country's Parliament.

The President would then play the role of nurturing the soul and spirit of the Nation, practically win its confidence, and guide and promote its higher interests.

The President would indeed preside over the Nation, rather than rule as has been the case since the adoption of the Republican constitution.

The CKRC has done its duty to Kenya in sketching structures for the management of affairs of Kenya. There are however, certain novel provisions such as that of professionalised cabinet whose members would become *ex-officio* MPs when approved by Parliament.

The concerns of the CKRC about a Parliamentary government which would proceed on the basis of 'knowledge' rather than otherwise could be accommodated by among others, strengthening and professionalising the technical basis at the ministries including by engaging necessary or requisite technical assistance.

The rather inadequate level of competence of the current permanent secretaries should not be taken as a permanent feature of our ministries. It is critical for purposes of winning the legitimacy of Parliament and the people it represents, to choose ministers and the deputies from within its ranks.

The other constitutional issue that the CKRC should however look into with seriousness, is the institution of parliamentary secretaries. The institution would provide vital linkage between the national administration, the ministries and Parliament to root the presence of government within the house to enhance the systems of parliamentary democratic governance.

The CKRC could also in its wisdom, work out to set up within the body of the constitution itself, a Parliamentary Budget Office whose major objective would be to assist Members of Parliament to proceed in the deliberations in matters of Finance and Fiscal policy on the basis of “knowledge” rather than that of 'non-knowledge' as at present.

The importance of a budget office cannot be overstated, as budget and fiscal matters stand pivotal in the development of the country. It deserves to be made into a constitutional office to enhance its stature like that of Auditor General or Controller of the Budget.

The only other matter that calls for comment in the CKRC draft bill is that of the matter of the recall of MPs.

An alternative approach should be adopted to meet the concerns of public in this matter. The power of recall in extant circumstances in our country could be subject to abuse. If the new constitutional dispensation encapsulates a new code of ethics for state and public leadership then a healthy beginning and base shall have been set to deal with the problem of responsibility and accountability of leadership. Parliament itself, as the hub of governance in Kenya has to begin to build amongst its membership the consciousness and culture of responsibility and accountability. It would be appropriate to subject its membership to self regulation and disciplining of its members in the manner it is done in other responsible public service bodies such as those in the Medical, Legal and Accounting professions among others. Moreover, the relevant Committee of Parliament that deals

with matters pertaining to this question needs to be reanimated to work on a continuous basis in this regard.

The proviso of recall was prevalent in the constitutions of the Eastern European countries that had styled themselves socialist. There were however hardly any recalls based on these provisos. Instead it was the parties that removed Parliamentarians from office whenever their agitation as representatives touched on the credibility and legitimacy of extant powers.

The constitution must however be understood not to mean only the written document. The constitution is however well made up of the political and constitutional practices and government culture that will be engendered in the actualization of the new constitutional dispensation. This will develop over time to complement, supplement and even in some instances, transform the provisos of the written document.

Around each constitutional dispensation develops a political and constitutional culture that is intended to fill in the gaps that human foresight has been able to provide for. Such conventions will develop in accordance with the tempo of constitutional development of the country and will be either positive or negative to the extent that our people and their representatives will assume their responsibilities positively and negatively.

The CKRC deserves congratulations for proposing the rehabilitation of the Kenyan Parliament and attempting to make it the locus of the sovereignty of the people.

CHAPTER NINE OF THE DRAFT BILL OF THE CONSTITUTION OF KENYA REVIEW COMMISSION: AN OVERVIEW

Ahmednasir M. Abdullahi

1. Introduction

Chapter nine of the draft Bill comprises of 28 Articles covering the judiciary and other organs of the legal system. This chapter addresses the judicial system and judicial powers in part 1, while part 2 addresses the legal system. Part 3 addresses the profession of the law. In substance Part 1 of the chapter nine touches substantively on the various organs of the judiciary, the court system and qualification of judicial officers who will hold the offices of the various envisaged courts. One of the main features of this chapter that one notices quickly is the absence of clear and watertight legalistic phraseology, which in reality is a major characteristic of the Draft Bill. It contains clauses that are unnecessary and gratuitous. Further, one notices a number of seemingly legal issues, some have even be elevated to principles of law, when they can have no such pretence.

2. Part 1-The Judicial System and Judicial Powers.

Article 184(1) of the Draft Bill sets out in great detail a variety of misplaced quasi moral issues the courts should consider in handling civil and criminal cases. First, whereas as a starting point, law at the very basic and general classification can be broadly divided into civil and criminal law, a variety of legal issues arise which transcend this classification. For instance, the jurisdiction of the High Court in

admiralty cases in not a civil proceeding *per se* within the meaning of the Civil Procedure Act. So is the winding up cause under the Companies Act. So instead of referring to civil and criminal cases, let us have only the reference as being "to the case/suit before the court".

Another interesting proposition is contained in Article 184(3)(a-f) where the draft bill states that in adjudicating over civil and criminal cases, the courts "shall be guided by the following principles (*emphasis mine*). Whereas sub-paragraphs (a) and (b) restate some seemingly legal principles, sub-paragraphs (c), (d) and (e) can't have a claim to that status. In my view the issues raised therein are not legal principles either in law or in equity. If, however, the Draft Bill from now on creates these as new *principles* of law, (which I don't think it can, for it will be a constitutional absurdity to do so) then that is another matter all together. In my view that will be a big mistake. Each of the said sub-paragraphs address litigious and touchy issues of fact and law that are at present the subject of diverse case law and statutes, and their unnecessary insertion into the constitution merely adds avoidable confusion. These are issues that will be adequately addressed by a competent judiciary through reasoned case law over time. The constitution, in my view should avoid being too detailed as the Draft Bill is.

The drafters should not address narrow

issues and interests like for instance promoting "arbitration, reconciliation and mediation". These are slogans for arbitrators who are competing with the court system for work, and the drafters should avoid the inclusion of such clauses in the Bill, least they be seen to be lobbying for the narrow interests of a certain class of professionals.

In my view, the entire Article 184(3) should be deleted, for the prospective chaos loaded and locked in the clause is the tip of an iceberg with all the potential hazards icebergs possess. This subsection, in my view will literally stop, derail and bog down the court system in the country. It is a very unwise and ill-thought provision that lacks any imagination or foresight. It is unfortunate in that whereas the first article in chapter 9 should provide strong institutional solidity, the same instead sows the seed of confusion. Why have the drafters used the word "guided" in Article 184(3)? Considering the jurisprudential difficulties raised by the said word in section 3(3) of the Judicature Act, I am of the view that another less difficult word be used.

Last, Article 184(4)(c) again restates a desire that should not be encapsulated in a constitutional provision. This sub-paragraph addresses an issue that is empirically unascertainable and cannot be achieved; for how is compliance with this provision to be enforced and/or attained vis-a-vis the magistrates in Mandera or Lodwar, especially as it relates to the constitutional requirement of educating himself on comparative law?

Article, 185 of the Draft Bill addresses the hierarchy of the courts in the country. It sets out in clear terms the various courts as established by the constitution and leaves no

doubt on any major aspect. The only query I raise relates to article 185(c), for whereas it is very desirable to have the structures of the courts as established by the constitution known and delimited, it is undesirable to have the term "...traditional or local tribunal"... added into this provision. A traditional court is too vague a term to use in a constitutional provision Does it refer to African traditional courts, or traditional in what sense? Again, giving such courts such wide jurisdiction on "issues of local significance" is a recipe for disaster and confusion. Nothing could stop a future government from establishing or creating Kangaroo courts under this provision.

Article 186 of the Draft Bill addresses the historically vexing question of independence of the judiciary. This is a central pillar in common law traditional set up of the court system and in any civilised system. The article contains two superfluous provisions.

Sub-article (5) is unnecessary in a constitution. Why should the constitution set the benchmark for court fees? This is a mundane matter that should be addressed through circulars by the office of the chief justice or by the registrars of the various courts. Secondly, sub-article (3) in my view should define the term "judicial function" and give immunity for any judicial action done by a judge or magistrate as long as it comes within the confines of the established principles of law *as known*. If it remains the way it is, the immunity is blanket and the judges can do anything, write, award any judgement as part of their judicial function-while historically we know that it is not part of judicial function to transfer ownership of a company or a hotel to one party just because he/she bribed the judge. Kenya's worst corporate raiders are judges and the

same is no longer done in boardrooms but courtrooms.

This provision in the constitution addresses the independence of the judiciary from the traditional perspective. In the past, courts in Kenya have come under the heavy influence and pressure from financially or politically endured individuals and this unique pressure should be addressed by the constitution.

Article 187 establishes the Supreme Court as the highest court in the land, while Article 188 sets out the jurisdiction of the Court. The only reservation I have is in relation to 188(1)(a)(i) which states that the court will give advisory opinion on matters requested by the president under Article 155(5)(c). The latter article is permissive and not mandatory for it does not compel the president to seek advisory opinion on any specific issues he/she has difficulties with. Second, the court's prestige and powers will be greatly eroded if the president ignores any advisory opinion it gives pursuant to his/her request. In my view we must add a provision that makes such an advisory opinion binding on the president or remove it altogether. Sub-paragraphs 3 and 4 are yet again in my view superfluous. The courts should be allowed to develop the parameters of its jurisprudence and case law on all the issues raised in the said paragraphs through the common law doctrine of *stare decisis*. It needlessly loads the constitution with unnecessary provisions that remove the sublime and transcendent issues it ought to address, rather than touch on almost anything regardless of the triviality of the same.

Article 189 gives the Supreme Court wide powers and sharp teeth to act as a supervisory organ over the courts and ensure

that fair administration of justice at all levels of the court system are attained and maintained. This provision supports my contention that Article 188(3) and (4) are unnecessary. Article 190(3) and (4) in addition to the reasons I have given herein above should be deleted. Isn't it obvious in light of the court hierarchy established by Article 185(2) and 188(4) that the decisions of the Supreme Court are binding on the Court of Appeal?

The jurisdiction of the Court of Appeal is provided for in Article 191 of the Bill. Article 191(1)(a) states that an appeal shall lie from a "decree, judgment or an order of the high court". We should delete "judgment" since it is already provided that one can appeal against a decree. The latter is the synthesis of the former. That is why an appeal from a "ruling" is omitted as one can appeal from the order. In light of article 191(1), 191(2) is a repetition and should be deleted. I would have preferred that in light of the jurisprudential pronouncement in the case *Anarita Karimi Njeru-v-Republic*(No 2), Kenya Law Reports, 162(1979), that the word "law" in Article 191(1)(b) should read "written law"

The establishment of the High Court and its jurisdiction is a fairly straightforward matter. So is Article 194 that deals with the appointment of judges. The only matter that looks strange is Article 194(4) as it relates to the chief Kadhi. It is strange that under 194(1), (2) and (3) the president has no role in the appointment of the chief justice and the presidents of the other two courts of record. Does it mean that the Chief Kadhi assumes the equivalent status and position of the judge of court of record? If yes, why not make this an express term in this section of the constitution rather than at article

201(3)?

Before I leave the issue of the Kadhis, I think it is appropriate to address the constitutional provisions that address this aspect of the judicial system and the administration of Justice. Article 199 establishes (1) Kadhis' courts, (2) The office of chief Kadhi, (3) the office of senior Kadhi and (4) the office of Kadhi. This article is interesting in that it creates the courts and offices but fails to set out the hierarchy of the same courts and the composition of the Kadhi courts.

The jurisdiction of the Kadhi court is conferred by article 200 of the draft Bill. I will only add and strongly suggest that the jurisdiction of the court should include custody and maintenance of children in light of the judgment of the Court of Appeal in *Zuleika Mohamed Naaman-v-Gharib Suleiman Gaharib*, Civil Appeal Number 123 of 1997(unreported). This is a very important area that is dear to Muslims in this country and which the secular courts have given a number of derogatory judgments. We have to make right some historic wrongs committed against Muslim personal law. Article 200(2), (3) and (4) provide for the right of appeal from the judgment, decree or order of the district Kadhi court to that of the provincial Kadhi court. Again delete "judgments". But the question that must be raised at this juncture is: where are the latter courts created or established under the constitution? How do you provide for the right of appeal, when the courts to which you are appealing to or from don't exist in law? The same applies to the Kadhi court of appeal and the right of appeal to the Supreme Court. In my view, one has to establish very clearly and in specific provision the hierarchy of these kadhi courts

in article 199 of the Bill and then restate the same in the provisions of article 200 of the draft bill to provide for the mechanism for appeal from one court to the other.

Article 202 that sets out the qualifications of the Kadhis needs a little bit of amendments. In my view, the way forward is not to insist that the prospective candidate in addition to his qualification as an advocate, should have obtained qualification in Muslim personal law from a recognised university. This is unnecessary and vague. In any case what is a "recognised qualification in Muslim personal law"? Nothing like this as a qualification is known or can be objectively appreciated. For instance does it suffice if one takes a unit in Islamic sharia in one of the local universities? We should avoid the use of general terms that cannot be of value or specific in a document like the constitution. The further qualification in article 202(1)(c) is a gross absurdity. The qualification set out in 202(1)(b) is really enough. Why should we have the further qualification that the prospective candidate must be a graduate in Islamic law? The danger here lies in that considering the change in the curriculum of the Kenya School of Law, it might not be that easy for future graduates of Islamic sharia to be admitted to the law school and subsequently as advocates of the High Court of Kenya. This article sets out two competing sets of qualifications that are difficult to comprehend. I suggest that article 202(1)(c) should be deleted.

As for Article 203 that establishes the rules committee, two very short comments; one, why such a provision or establish such a committee *via* the constitution? This is already provided for under the Civil Procedure Act and a multitude of other statutes. Second, why should the Chief

Kadhi be a member of this committee when the Kadhi courts have their own rules committee under Article 200(6)? In my humble opinion this provision is scandalous to the constitution as sacrosanct document.

The qualifications of the judges are provided for under article 195 of the Draft Bill. It is interesting to note that one doesn't have to be an advocate of the High Court to hold the office of the chief justice or judge of the Supreme Court, the Court of Appeal and the High Court. A quick question: in light of this, why should one hold the Chief Kadhi to a different standard? This departure from tradition is interesting. What is the rationale? Probably it opens one more venue for individuals who are not members of the Law Society of Kenya. How big is the poll of lecturers who are not advocates? Are the numbers that many that we have to carter for them via a constitutional provision? This means no one can vouch for the applicant's integrity or trace the records of the prospective applicants like we are able to do from the records of the Law Society of Kenya. I'm of the view that when we relate this article to Article 196(1) that provides for the retirement of judges at 65 year, one will notice that the personnel turnover will be very high in the higher echelons of the judiciary. Take this example:

A is a graduate with a law degree at age 23 years. He goes for a masters Degree and starts teaching at a local university probably when he is 26 years. He teaches for 20 years and becomes qualified to be appointed as judge of the Supreme Court when he is about 46-50 years. The maximum period he will hold the office of judge of the Supreme Court is 15-20 years. The chance is that most of the judges of the Supreme Court will be appointed when they are over 55 years and above with a maximum tenure of

5-10 years. This in my view is wholly inadequate and will leave the highest courts having high personnel turnover and inconsistent jurisprudence. The age limit for the Supreme Court judges should either be unlimited with no upper ceiling or should at least be 72 years. The same should apply to the other courts of record.

In my view the Draft Bill attempts to address the present problem we have with the current judges of the High Court and the Court of Appeal in a most unsatisfactory manner. The solution to the problem according to the Bill is to reduce the retirement age so that within a period of 10-15 years most of the current judges will have retired.

The problem this creates is that in future you will have the problem of judges retiring at their prime, since you reduced the age by targeting a specific group of persons. The draft bill in my view loses sight of the future. It has to address the transitional issue separately from the more substantive issues it promulgates for posterity. As I try to show herein above this provision is a timid and inappropriate way to address the current problems facing the corrupt and inept judiciary we are saddled with and instead of providing the solution, creates more problems.

Article 197 is a welcome addition to our constitutional dispensation. The only suggestion I make is that we insert the word "shall" instead of "may" in article 197(1)(4) so that once the commission having found that the particular judge has a case to answer, the president must act on their recommendation. The desire is that the final say should not rest with the president but with the investigating arm, the Judicial

Service Commission.

The establishment and composition of the Judicial Service Commission is interesting. Interesting in the sense that the rationalization of its composition is difficult to comprehend. For instance what is the rationale behind Article 204(1)(b) that provides for a Muslim woman to represent the Muslim community, appointed by the National Muslim Organization. Important questions arise from this seemingly looking progressive subsection. I am personally not aware of the existence of an organization called "the National Muslim Organization" exists in this country. Assume it does whom does it represent? If the rationale was to give the Muslims a voice as minority in light of the appointments to be made to the Kadhi courts, then why specify the gender of their representative who has no specialised qualification other than being a Muslim woman? This provision should be changed to read either a Muslim advocate, whether male or female or one Muslim person to be nominated by SUPKEM.

The insistence of the having two advocates of 15 years standing is also undesirable in the sense that the profession has various shades of opinion represented by diverse age groups/bracket and historically as one becomes more established in the profession he/she gets more conservative and may be in favour of maintaining the *status quo*. This particular provision may lock out representation from large sections of members of the Law Society of Kenya whose membership at present is such that 80% of lawyers are those with 1-12 years standing. I suggest that the qualification as it relates to years should be completely deleted or reduce to 5 years almost.

Again, I don't see any reason why the NGO Council is given the constitutional right to nominate three lay members to the Commission. What is the rationale? Why not give similar powers or privilege to the Kenya Bankers Association; the Kenya Manufactures Association, COTU, Kenya Matatu Association etc? In my view no valid rationale exists why the NGO Council should have such a prerogative. The appointment of judges and their removal as provided in the draft bill are wholly inadequate. The mode for appointment is not known. Neither is it transparent. The various stages of identifying and recruiting judges should be set out clearly in the constitution. It should also provide for a mechanism through which the public can participate once an individual is identified.

3. Part II - Legal system.

This part of chapter 9 establishes the office of the Attorney General and that of Director of Public Prosecutor among others. The office of the Attorney General is created by Article 208 of the Bill. Nothing substantively can be said about the office other than in light of the absence of any useful function accorded to it by the constitution, it is advisable to delete those sections and transfer them to the part of the constitution that deals with the executive arm of the government.

The powers of the Attorney General have been transferred to the newly created office of Director of Public prosecution, which has immense powers under Article 209 of the Bill. This however mainly relates to prosecution of offences, and fails to address who the government lawyer for civil cases is. Note that this function or role in civil matters is not conferred on the AG under

article 208 of the bill.

The establishment of the Public Defender under article 210 is welcome. Its practicability and effectiveness may wait the test of time.

4. Part III - Legal profession.

Article 212 is innovative and a welcome addition to the constitution. I personally like paragraphs (c-f) for the professionalism and integrity they bring to the practice of the profession and the challenge they call. However, I have my reservations on paragraphs a-b for they impose a public function on members of the legal profession. The difficulty here is that members of the law society or the legal profession are not holders of a public office under the constitution. The duty to uphold the constitution as individuals with no public office creates a burden on members of the profession without a corresponding benefit

as members of the profession.

5. Conclusion:

Chapter nine of the draft bill is structurally a good enunciation of the main issues that affect this sector of the society. It however needs a better synthesis of the issues. We have to delete some of the superfluous provision of the chapter while at the same time crystallising the major issues. The articles on the qualification, appointment and removal of judges need further reflection.

The Report of the Constitution of Kenya Review Commission had a lot of good ideas that have been completely ignored in the draft Bill. Is this because of the court cases? I don't want to speculate, but one should be forgiven if he has that feeling that indeed the cases have watered down the radical proposals contained in the report. What a pity!

AUDIT REPORT ON THE DRAFT BILL OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2002

Lee G. Muthoga

1. Introduction

Constitutions are like door-locks. They are unnecessary for good and wise and honest rulers who exercise self-restraint and cannot deter tyrannical rulers determined to roughshod the rights of the people and be entirely indifferent to legal norms. Door-locks, like Constitutions, are unnecessary for honest people *who* pass through the door and cannot really prevent a determined burglar from having access, but they can and do deter the casual strollers who might otherwise come in and help themselves.

No Constitution made by man can be an entirely complete and realistic description of what actually happens. It is enough that it makes a substantial representative of the reality of the Nation and its governance, encompassing the procedures and processes by which state power is exercised by individuals, organs and organizations entrusted with its exercise and accounting for such exercise to the owners of that power, the people. One expects to discern in a Constitution the manner in which and the extent to which the Constitution channels and constrains the scope and direction of the power of government in general and the various organs of government in particular. It should provide, as far as it is possible to provide, an exact expression of what happens and who does what, where and when on important state and governmental activities and functions. It distributes responsibility for the various functions that

the government is expected to perform. It spells out the people's aspirations and values and secures their rights against abuse of governmental power. It guarantees their fundamental human rights and sets out a norm by which its people, its government and its organs are to be judged. It promotes accountability.

Another requirement of a Constitution is that it should facilitate participation of the citizenry in the composition and the running of their government. It should formulate a government of the people by the people.

A Constitution should also empower the citizenry to oversee the functioning of government and provide the means by which such audit can be made effective and remedial measures employed as necessary. The proper operation of the three arms of state with minimum conflict between them should be a goal to be achieved by any Constitution.

Any modern Constitution is also expected to facilitate commerce, trade and industry and to make provisions for the economic and social life of the Nation. No Constitution would be seen as complete today which is silent on the manner in which public resources are to be owned and utilized and which does not affirm the people's rights to participate in the economic and social life of the Nation.

The audit of the Draft Bill should therefore

be undertaken against the backdrop of those objects. The audit must, however, take cognizance of the fact that the Draft Bill is expected to provide a "Revised" and hopefully better Constitution than the current Constitution.

It is supposed to represent the views of the people of Kenya, their hopes and aspirations and to provide a way out of the present predicament in which they find themselves. It is expected to incorporate the internationally recognized norms of good human behaviour and governance and to provide for the better exercise by the people of Kenya, of their fundamental and inalienable human rights and freedoms.

2. Important Highlights in the Bill

Seen against those norms, the Draft Bill, in my judgement, passes the test in that:-

(i) It spells out clearly and adequately the philosophy of the Nation, its values and aspirations and the principles upon which the Nation is founded. Unlike the current Constitution, it makes it a point at every stage to define the principles and the policy goals sought to be achieved. These are enunciated in Chapters 1 - 4. Of particular significance are the declarations of sovereignty and supremacy contained in Chapter One. These are either absent from the current Constitution or stated in a feeble way as does Section 3 of the present Constitution. The present Constitution is silent as to whom the executive authority belongs. It merely vests the executive authority of the Government of Kenya (as opposed to "of the state of Kenya" or the Republic of Kenya) in The President. This phrase which appeared in the Independence Constitution in the revised 1967 edition in

Section 72 of Chapter V of the Constitution, which provided for the Executive Branch of Government, has been misinterpreted and mis-used to make the Presidency all powerful. The presidency, in the representation of the current holder of that Office, has gone about amassing all state power unto itself and thereafter systematically decimating all other organs of state that were designed to provide checks and balances. It is refreshing to see that in the Draft Bill, the sovereignty and supremacy of the people and the source and ownership of Executive authority is clearly spelt out.

(ii) It provides a composite Bill of Rights encompassing political, social and economic rights. This is substantially better and much more expansive than what is provided in Sections 70 - 73 of the present Constitution. Chapter Five of the Draft Bill is a most comprehensive provision of the first, second and third generation rights as they are understood in the free world today. It spells out many that are immediately realizable and enforceable but also contains many that will for many years to come remain in our wish list. The wisdom of this is of course a matter of debate. There is divided opinion on whether rights that are clearly not immediately realizable due to the state of economic development should or should not be enshrined in a Constitution. A very animated debate on this question was conducted during the drafting of the United Nations Convention on the Rights of the Child (CRC). Lobbyists for inclusion won and it is now clear that it was right that the Convention be framed the way it was. Governments have been forced to give thought to developing capacity to provide children with the rights granted to them by the Convention. Our own Government has been forced to decree free primary education

although it is yet to come. I am an inclusionist.

(iii) It provides a much more strengthened Electoral System and Process and, in addition to all other things, incorporates political parties as constitutional organs. This has the effect of insulating political parties' management from partisan intrigue and harassment by the government of the day. While this may be a good thing, there is need to consider whether the provisions of Sections 87 - 100 are not better provided by a legislative measure which can be more easily amended than the Constitution.

(iv) The Legislature has been extended to include in Parliament a National Council. The role of the Council and its appropriateness will need to be discussed. It is clearly an improvement from the present position where we have only one Chamber. Institutional rivalry, however, can make the smooth operation of both organs impossible. The cost of running these two institutions should also be taken into account. The potential for conflict exists especially where party membership in the two organs are different. Problems can also arise in delay in legislation arising from differences of opinion between the two houses.

Section 142 of the Draft Bill makes provision for dissolution and prorogation of Parliament thereby taking away one of the much-abused power of the Presidency - the power to dissolve and prorogue Parliament.

3. General Comments on the Bill

Not surprisingly, Chapter Eight will prove the most contentious of all the Chapters in the Draft Bill. There are many Kenyans who, I believe due to the effects of years of

Presidential one-man rule, cannot quite comprehend a situation where any one appointed by the President can exercise power and authority independently of and not subjected to the President. Everyone seems to imagine a potential conflict in the working of the two offices. I do not myself share such views. I see the Draft Bill as having ingeniously distributed state responsibilities to the two offices so as to make each directly accountable. The Prime Minister takes charge of the National Assembly and its legislative and other functions. His right to hold office does not derive from the President. It derives from the Electoral victory of his party. He is therefore a Peoples' Prime Minister. This is in spite of the fact that he is not elected as such to that office. He is, however, as subject to the electoral fortunes as everyone else. In most instances, he will be a senior official of his party and the party's electoral fortunes will often times rest with him.

The President, on the other hand, is elected along with his Vice President by universal adult suffrage. He derives his power and authority from the people. The Bill then clearly and, I dare say, cleverly identifies for him what functions he has to perform and what functions are to be performed, in the name of the people, by the Prime Minister. I think the Chapter is a masterpiece in "role Crafting, distribution and delineation". The concept of Executive/Cabinet Government with a Prime Minister is a novel one and needs to be carefully explained to the NCC. It could be rejected off-hand without giving it due consideration.

Chapter Ten on Devolution of Powers is of course one of the most important of the Chapters in the Bill. It is designed to provide a response to the Majimbo question and to

satisfy the "Federalists". It should be audited on the extent to which it succeeds in achieving the goals of decentralizing government, making it less coercive and dictatorial and permitting power to be exercised at more points than the centre.

This Chapter will pose the greatest challenge in its implementation and will probably require in the initial stage a well thought out special implementation programme executed by an organ of government headed by a person with Executive authority at high level. The need to achieve a fairly uniform implementation pattern with democratically established organs coming into existence in roughly the same manner and on a similar time scale will pose the greatest challenge of the implementation of this Constitution. Initially, and prior to the implementation of this Chapter, it may be thought prudent to establish a "Devolved Government Trust Fund" into which sufficient funds may be voted to ensure uniform and expedient implementation of this Chapter in Constitution and establishing the Councils Committees and other organs that need to come into existence to drive the spirit of the Chapter. An implementation oversight Council/Committee with a life span of say 2 to 3 years might conceivably have been established to oversee the implementation of this Chapter.

The Draft Bill has done well to make specific provisions on Land and Property. But I can see provisions such as Section 233 on ownership of land being extremely controversial. The strength and weakness of this Chapter will be reflected in the Legislation mandated to be enacted by Section 235 (4). The Chapter is otherwise a significant enrichment of the Constitution

and considerably improves the current constitutional position, which has been extremely unsatisfactory. In the current Constitution, Land (other than Trust Land) has been treated in the category of property generally in Section 75. Parliament has then enacted statutes providing for incidents in it, its utilization and its compulsory acquisition. Trust Land is the only category of Land that was allocated a Chapter to itself no doubt due to the sensitivities of the land question at the time of independence. In a country like ours where land is considered one of the principal (primary) means of production, it is essential that the Constitution devotes a significant Section on the land question. This has been done in the Draft Bill. The establishment of the National Land Commission as a Constitutional Organ is particularly satisfying. It is certain to curb "grabiiosis", a land affinity and possession disease which has reached epidemic proportions in this country!

Another important addition to the Constitution jurisprudence will be concerned with the protection of the Environment and Natural Resources to which Chapter twelve is devoted. The current Constitution makes no provisions for protecting the environment. It could not have been considered a matter of any significance or concern in 1963 and indeed since. It is a major improvement to include these provisions and create a Constitutional duty of each one of us to "safeguard and enhance the environment". The National Environment Management Commission will now become a Constitutional organ, thereby giving it much greater power and capacity than is presently conferred by the statute. Of particular significance is the enhancement of the right to a clean and healthy environment from being merely a statutory right to a

Constitutional right, justifiable under Section 241. This is both bold and innovative. It is a giant "strike" for the environment.

The Public Finance and Revenue Management provisions incorporated in Chapter 13 appear to me to be a significant improvement from those in the current Constitution. This is, however, one of the Chapters I don't feel too comfortable in critiquing. I may, however, observe that the uplifting of the Central Bank of Kenya from a Statutory to a Constitutional establishment is certainly a good thing. It will help those in-charge of the monetary and fiscal policy to make decisions not coloured by political considerations.

Chapters 14 and 15 provide for the Public Service and The Armed Forces and Services. Their inclusion in the Constitution is certainly an improvement. I have not reviewed the specific provisions.

The Leadership and Integrity provisions contained in Chapter Sixteen pose a very interesting challenge. They are bound to promote transparency and accountability in leadership. It is, I feel, a chapter which should have provided a direction to Parliament to enact a legislation providing for the better and more effective enforcement and monitoring of enforcement of the provisions of this Chapter and the values and aspirations enunciated in this Chapter.

The Constitutional Commissions and Constitutional Offices provisions of the Draft Bill are welcome. Consideration may be given of the need to provide for the establishment of or to establish a mechanism by which Constitutional office holders,

particularly Judges and the Attorney General, can ventilate any grievance they may have against the government or any of its organs.

On the whole, the Draft Bill should result in a far better and more people participatory Constitution than what we have today. It is in many respects truly a "Peoples Choice".

4. Judicial and Legal System

The Current Constitution devotes Chapter IV, comprising of Sections 60-69 to the Judicature. It provides for the establishment of the High Court, the appointment of Judges and the tenure of office of the Judges of the High Court. It also establishes a Court of Appeal and other Courts including the Kadhi's Courts.

It confers on the High Court alone the responsibility for the interpretation of the Constitution.

In Part 3 of that Chapter, it establishes the Judicial Service Commission in which it reposes the power to appoint persons to hold or act in any judicial office. The Constitution does not contain any provisions on the legal system nor does it make provisions for any other offices in the system.

A judicial system is expected to be able to provide for the exercise by the citizenry, the basic rights provided for in the Constitution. In the Draft Bill, the right to a fair trial is provided for in Clause 69 of the Bill. Our Judicial system must therefore be one that facilitates the enjoyment, to the fullest possible extent, of that right to the full. Included in that right is a right to a public trial before an ordinary court or tribunal and the right to have such a trial begin and

conclude without unreasonable delay. Also included is a right of appeal to or review by a higher Court. Another right associated to the above is the right of an accused person to have a copy of the record of proceedings within 14 days after they are concluded in return for a small fee. As everyone knows, tremendous delay in enjoying the right of appeal where provided, is caused by the inability of the Court to provide parties with records of proceedings timeously. Delay, in the hearing of a trial or an appeal often results in injustice. It contributes to the cost rendering it simply a denial of justice.

A Constitution must also make provision to enable the judges to discharge the responsibilities of their offices independently of all forms of pressures. The Draft Bill must therefore be audited for its capacity to enable Judges to be independent. Needless to say, we need Judges who are trained for the job, and whose work can stand criticism of ordinary mortals. Today's Judges must be treated as fallible human beings whose official conduct is subject to the same critical analysis as that of other organs of government.

The Constitution must provide a mechanism for facilitating the conduct of such examination. Judges must not be allowed to operate like members of a priesthood, who have great powers over the rest of the community, but are otherwise isolated from them and misunderstood by them to their mutual disadvantage. The Draft Bill must be examined to see to what extent it facilitates Judges to serve society as its true members. The provisions for judicial administration, appointments, discipline, training, criticism and publicity must not hinder or detract from their ability to serve society. I think it is of crucial importance

that the Judges should be trusted by the public, and there is real danger of false perceptions giving rise to mistrust and cynicism. The Constitution must enable the Judges to overcome this mistrust, which in a large measure results from their unwillingness to make an accurate assessment of their role in society.

To a large extent the Draft Bill measures to this standard. It sets out an ethos for the exercise of judicial power in Section 184. This is missing from the current Constitution. There are no guidelines for the exercise of judicial power in the current constitution.

The Independence of the Judiciary is explicitly enunciated as a Cardinal pillar for the exercise of judicial power. Again the present Constitution does not have an explicit provision to guarantee the Judges independence. His independence is assured via his oath of office and the entrenchment of the tenure of his service.

The Draft Bill introduces in the hierarchy of Courts a new Court, the Supreme Court, which comprises of the Chief Justice (head of Judiciary) and six other Judges. This Court is given a supervisory jurisdiction over all other courts in express terms. This is the first time that such a jurisdiction is explicitly conferred by the Constitution. It is a very important provision in securing the performance of other courts. Section 189 represents perhaps the most important provision of this Chapter. If appointments to the Supreme Court are properly made, that Court might make a great difference in the manner that our Courts work. The Court of Appeal, though somewhat strengthened, has lost its "terminal court effect" in that some appeals go to the Supreme Court and some

original jurisdiction is exercised by the Supreme Court.

One of the most abused functions in the current Constitution has been the appointment of Judges. Over the last decade and a half, appointments have been made on extremely inexplicable basis. It has not been possible to know why those who have been appointed have been and why others who appear patently appointable have not been appointed. What has been obvious, though, is that ability and competence have not been taken into account. Sections 194 and 195 of the Draft Bill now ensures that everyone will know the basis upon which appointment of Judges are made or not made.

The retirement age of Judges has now been equated with that of other judicial officers at age 65 years. This is one of the contentious provisions. The retirement age for Judges rose from 68 years at independence to 70 years and later to 72 years and now stands at 74 years. Serving Judges will feel short-changed by the lowering of the retirement age unless it is made not to apply to them. Their argument, which is legally fallacious in my judgment, is that their terms of service may not be altered to their detriment and that that means that they may not be required to retire at an earlier age. They see Section 62 and Section 4 of the Constitution of Kenya (Amendment) Act 1990 as constituting a contractual term in their Contract of Service, which cannot be departed from even against an offer for damages. That of course cannot be correct. Security of tenure is a devise that the public has to protect the Judge from capricious acts of the Executive. It cannot be a contractual provision because if it were, no Judge would ever be able to resign his office before attaining the contractual age. It may,

however, be considered whether the age might be increased, for judges, from the 65 years contained in the Draft Bill to say 70 years like the Presidency.

Accountability of the Judge to the public has now been assured by the provision of a means of petitioning for the removal of a Judge in Section 197 of the Draft Bill. Under the current Constitution although the procedure for removal is provided, only the Chief Justice can invoke the provision by representing to the President that question of removal be investigated. In the case of the Chief Justice there is no one to initiate the inquiry unless it is the President.

Section 200 has provided for the jurisdiction of Kadhi's Court, which is likely to become quite contentious. The extension of the jurisdiction to the determination of Civil and Commercial disputes between parties who are Muslim may be seen as being contrary to the policy of unification of Courts which led to the enactment of the Magistrates Courts Act. That Act abolished the African Courts and integrated the Civil jurisdiction in all the Courts so that customary claims become determinable by the ordinary Civil Courts. It appears like, in the case of Muslims, this is now being undone. Christians feel cheated and are apt to treat this as the introduction of Sharia Law, which appears to have raised eyebrows in other countries, notably Nigeria. It may be useful to incorporate in this section a "for the avoidance of doubt" provision to the effect that in no circumstances will the Kadhi's Court administer Criminal Law or keep the jurisdiction of those Courts to the one provided by the present Constitution or Section 200 (1) of the Draft Bill. If, however, this provision is to be kept as it is, then there is need to incorporate consent of

the parties in the case of determination of Civil and Commercial disputes. Persons should not (by reason of the faith they profess) be subjected against their choice to the particular courts. The right to go to other courts therein referred to should be expressed in the positive by stating that the Kadhi's court will have and exercise this jurisdiction only where both the parties expressly and demonstrably voluntarily say so.

The number of Kadhis to be appointed should not, in my judgment, be contained in the Constitution. It is difficult to justify a number, which may prove too many or too little. The number should be left to be prescribed by an Act of Parliament.

The cost of the parallel system of Courts created by Section 200 is also a matter that is of concern. When the policy of unification of Courts was introduced in 1967, one of the attractions for it was reduction of costs. It is inadvisable to undo the unification by creating a parallel tier of courts for Muslims. In any event there exists as of now a substantial body of judicial authority and opinion emanating from the High Court on which questions of Muslim Law could profitably continue to be adjudicated without the need to establish a parallel Courts system of costs.

6. The Rules Committee

My view is that the Rules Committee should

not be a Constitutional institution. Each Court should have a Committee to make rules of practice in it. The Civil Procedure Act and Rules should be made via Parliament as and when necessary to modify the rules.

The provision for the establishment of the Judicial Service Commission (Section 204) is superb, and its functions as enumerated in Sections 205 and 206 are well thought out.

7. Legal System

One of the most contentious offices amongst the Constitutional Offices today is the Office of the Attorney General. That office has since independence been the source of concern especially in the manner in which it discharges its many responsibilities. It is comforting to see how the Draft Bill has broken it down admirably. It is not clear where the Attorney General's powers exercised over the functions of the Registrar General have been placed. Nor is it clear who assumes the responsibility of Parliamentary Draftsman.

This section recognizes the practice of law as a public trust and enunciates duties for its practitioners. Principal amongst these is the duty to uphold the Constitution. It is a major departure from customary practice to enshrine these in the Constitution. It poses, however, a significant challenge for all of us. I hope we shall not be found wanting.

COMMENTS ON DRAFT BILL OF THE CONSTITUTION OF KENYA REVIEW COMMISSION CHAPTER 10: DEVOLUTION OF POWERS

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The following are comments and suggestions on the indicated sections of chapter 10 of the Devolution of powers.

1. Part I: Principles and Objectives

213(1)

- (c) The word 'ensure' promises more than what is realistic with regard to equitable sharing of national and local resources. A more appropriate word would be 'encourage' or 'promote'.
- (g) It is not clear what the term "facilitate decentralization of central government powers and the location of central government institutions away from the capital territory to ensure equitable distribution of resources in all the provinces"... means. Implementation of this proposal will be difficult in many ways.
- (h) Insert the word efficiently after effectively in the following phrase "to promote essential services to the people effectively and economically".
- (k) add another objective: To create incentives for the devolved authorities to generate wealth for the benefit of its people and the nation at large.

2. The word 'equitable' should be replaced

by the word 'fair': due to the fact that the share of the devolved authorities will differ according to the criteria adopted such as population, volume of revenue generated by the authority or level of need.

- 3. I suggest the following amendment be made to this section: "Devolved government will control a nationally agreed proportion of resources generated within the authority for use for specified functions for the benefit of the local community".
- 4. Replace the word 'ensure' - with 'encourage and promote'
- 5. Replace the word 'ensure' with 'promote'. It is also important to stress here that it is the duty of National and Devolved authorities to maintain law and order instead of pushing the responsibility to the community.

2. Part II: Principles of Devolved Governments

214 (1) The phrase: "Subject to the Constitution" is vague. Since this document will be the Constitution, provisions or other issues alluded to in this phrase should be clearly specified here. (b) This clause is vague.

(d) "members of councils and the

executive can be recalled by registered voters" - ... The method to be used must be provided specifically with clear identification of the circumstances that would lead to the recalling.

(e) Insert the word 'members' after the word "of". It is also important to provide clear guidelines how this one third of members of the councils would be elected.

3. Levels of Government

215 (I): While it is important to devolve powers, it is important to recognize that creation of too many levels will be both too expensive to maintain and could also be highly cumbersome to deal with all these levels. Some of the lower levels like village and locational governments should be replaced by voluntary committees which are not paid through the National or Devolved governments' exchequers.

It would be more efficient to have only District Authorities (leaving out village, locational and provincial authorities) in which clearly designated parts of the area form wards or constituencies for electing representatives in the district government. An alternative proposal would be to retain Locational and District authorities and leave out village and provincial authorities.

Article 221(1) Provincial councils do not seem to play a specific role which cannot be handled either at the district level or at national level.

4. Staffing of Devolved Authorities

Article 223 (1) It is not clear what will happen to civil servants and facilities currently under the

provincial administration when the system is abolished. I propose that they should revert to the Central government for re-deployment.

223 (3) This clause is vague and could cause confusion. If National government's public officers are to be deployed in Provinces and District Authorities, this must be clearly designed and be uniform for all district/provincial governments.

5. Financial Arrangements

Article 224 (1) The clause is not clear.

It is recommended that the major sources of revenue for the National government and other levels be clearly specified.

Article 224 (3) The statement that "national revenue be shared equitably between the National and Development governments" is vague. The word equitable could be misleading. The clause should be rephrased to indicate that the sharing will be implemented in accordance to an agreed formula, perhaps enacted by the National government, or provided for in this constitution

Article 225 (1) The clause is not clear because there are missing words.

Article 225 (3): (a) "unconditional grants, based on the criteria of population and geography and any other relevant factors"...

It is recommended that the word 'geography' be specified in concrete, measurable terms to avoid confusion.

The phrase "other relevant factors" is also vague. These must be clearly specified to

avoid confusion and claims of unfairness during implementation.

6. Share of National resources

Article 226 (1) This clause is potentially controversial and may be difficult to implement. The phrase: "communities in whose areas the resources are generated" is not clear. It is perhaps referring only to certain clear mineral resources; what about other activities like services, etc, which may not be easily quantifiable in an area? There is need to come with a neutral objective criteria for allocating resources to the devolved levels of governments.

Article 226 (2): It is not clear what the phrase "revenue from national resources shall be shared equitably between the Districts and National Government" means. What is equitable. 50-50? What about the other levels i.e. village, locational & provincial governments?

7. International Relations

227 (I): The name: "Ministry of National Government" does not seem to be appropriate for the functions described in the clause.

Article 227 (3) & (4): There is need to clarify the issue of sending public servants to the districts and provinces, especially with regard to their specific roles and how they relate with these devolved authorities, if they are sent by the national (Federal) government.

Article 227 (5): How do you suspend an elected council/government? There is need to formulate a more democratic mechanism for removing an ineffective elected government at the districts or provinces. This mechanism should involve the people themselves. Alternatively, an impartial judicial process could be used.

Article 228: There is need to re-think about the use of the concept of devolved government vis a vis other possible more widely used or common terms such as local governments.

PUBLIC FINANCE AND REVENUE MANAGEMENT: DISCUSSION ON PUBLIC FINANCE AND PUBLIC SERVICE

Njeru Kirira

1. Introduction

The Draft Bill covers many issues that have been of concern to many Kenyans. Since its publication, many comments have been made either on outstanding matters or on what is already in the Draft. Many of these issues have already been availed to the CKRC-therefore; these notes will endeavor to avoid repeating what is already in the hands of the Commission. For ease of reference, our comments follow article-by-article format.

2. Article 99: Restriction on use of Public resources

This article restricts the use of Public resources for the purposes or interests of a political party. However, there are many instances when public resources are misused or have been used for interests other than political parties.

For this reason, it is proposed that the Article be expanded to cover use of public resources for purposes other than those provided in the Constitution and any other law passed by parliament. This will address the problem of use of public resources to reward friends and relatives, as has been the case with public land.

3. Article 140: Committees of Parliament

It is not clear whether this article gives power to Parliament to protect public

interest outside Public sector. For example, where a private corporation acts in a manner which prejudices public interest, e.g. insider trading in capital markets, quoted stocks or manipulates accounts as experienced recently in Enron, USA.

It is therefore proposed that Parliament should be given powers to make laws and enquire into any matter necessary for the development of good governance in Kenya

4. Article 244: Imposition of tax

Clause (2) of this article provides for transparency in waivers of taxes. The article is good but to deal with other forms of revenues and charges not classified as taxes, it may be necessary to include;

- (i) any taxes and other revenues and charges due to the public.
This will include accrued interests on unpaid taxes/ moneys.
- (ii) require Parliament to make a law to detail procedures and format of reports and dates when the reports should be submitted.
- (iii) the necessary law should cover all taxes and charges of equivalent effect of rural electricity levy, sugar levy, dairy industry levy. They all need greater accountability.

5. Article 248 : Appropriation Bill

This article has provided for two aspects, under (2) and (5), namely:

- (i) A situation where money has been

appropriated but the amount is found to be inadequate for whatever reason.

In this case, the supplementary expenditures can be incurred before reporting to parliament. However the expenditure should not exceed 10% of the approved budget and if the additional financial requirement exceeds 10%, the Minister should first seek parliamentary authority.

- (ii) Expenditures in respect of goods and services for which no provisions/ moneys have been appropriated.

In this case, the 10% does not apply, therefore, the Constitution should require that;

- money spent be reported to Parliament within four months of first drawing money
- in practice, emergency expenditures are charged to the Contingency Fund
- require the minister to provide details of the nature of emergency, where it occurred and how it will impact on subsequent expenditures
- also require the Parliament to enact a law to deal with this aspect-such a law may include such issues as revenue raising issues and expenditure management.

Many other countries have laws which provide for both revenue and expenditure management, they include;

- Budget Act-Uganda
- Fiscal Responsibility Act- New Zealand
- Charter of Budget Honesty Act, 1998- Australia
- Budget Transparency and

Accountability Act- as in British Columbia and Canada.

The Commission may consider splitting Article 248 (2) and (6) into two sub-clauses as explained above.

Among the issues to be included in a respective law, whether called Budget Act or Budget Transparency/ Accountability or Honesty Act, should be a requirement that the government reports regularly on Budget and Budget Strategy Implementation.

6. Article 249 and 250: Public Debt

The management of public debt is the most worrying aspect of fiscal policy management. Kenya continues to accumulate debt liabilities with no sign of restraint or concern over the distribution of debt burden between current and the future generations. The current generation has been encouraging debt financed consumption, but transferring the debt liability to the future generations. As the economy shrinks, the debt burden is rising at an unsustainable rate.

In many countries, governments are required to ensure public borrowing maintains both "Net worth" and intergeneration equity in their expenditure management and practices. This Policy was recommended by a government sponsored Public Expenditure Review in 1997, but so far it has not been implemented. We continue to borrow and pass on the burden to the future, for example;

- In calendar year 2002 when economic growth was barely 1.2%, domestic borrowing increased by 27.7%.
- the Minister's budget speech for

2002/03 confirms in that calendar year, credit to government increased by 20.3%, while credit to private businesses shrunk by 6.0%¹, over the same period.

- According to the Central Bank's, Monthly Economic Review for August 2002, during the Fiscal year 2001/2002, July 1st 2001 to June 30th 2002, credit to government grew by 5.3 % while credit to private sector shrunk by -3.4%.

This imbalance is largely responsible for our poor economic performance.

To halt this untenable situation, the article on Public borrowing needs to be strengthened further.

It is therefore proposed that in conduct of public borrowing the government be required to:

- (i) observe the "net worth" principle
- (ii) the government ensures intergeneration equity
- (iii) the short-term domestic borrowing be confined, strictly, to evening out revenue fluctuations and not to finance (iii) consumption.
- (iv) borrowings in form of Treasury Bonds and long-term debt be used to finance productive investments only.
- (v) In an appropriate law, the Parliament be required/ obliged to:
 - (vi) monitor use of Public debt resources
 - (vii) conduct regular debt audits to ensure money is not diverted
 - (viii) hold any person who infringes on the

net worth principle personally liable.

- (ix) ensure that in any one year, the combined value of bonds and long-term debt, does not exceed the development budget.
- (x) Article 253 needs to require parliament to pass a law in respect of modalities and procedures of this office, preferably as part of Internal Audit Department.

7. Accountability and Audit

7.1 Article 256 : Accountability

While the provision that an accounting officer will be held accountable to Parliament for funds under them is good, it would have been better if it provided "contrary to existing law and instructions".

With this provision, nobody can use "instructions from above". Again, the provisions of the Article together with Articles 249 and 246B on Budget Management and 244 on imposition of taxes.

Article three should be extended to include "any person holding a political or public office". Many public offices use public funds for other purposes, mainly personal and issue notes such as "IOU" as they take cash. To avoid such misuse, public officers should be included in this article.

7.2 Article 253: The Budget Controller

This office seems to have been proposed as a result of disappointments with current oversight institutions, which mainly focus on controlling inputs i.e., issuing out money. None of them addresses quality of expenditure or value for money. For

¹ Source: Budget Speech for Fiscal Year 2002/2003.

example, the 1997 Public Expenditure Reviewed (PER) established a large stock of stalled projects. Most of these projects remain uncanceled to date in spite of PER recommendations that the projects be categorized and be dealt with as follows:

- (i) Those to be cancelled and abandoned i.e. the low priority
- (ii) Those to be sold out or transferred to the community
- (iii) The high priority which need to be completed on priority basis.

By January 2002, the Finance Minister complained he had received claims on pending Bills, mainly on stalled projects, amounting to Ksh 19 billion. This amount represents invoices issued by contractors of the stalled projects but who continue to bill the government on the pretext that they are still on site. Some of these claims have been securitized and claimants issued with treasury bonds which are immediately negotiable through the capital and money markets. These bills represent one of the creative avenues used for diverting public funds which the controller should check.

Therefore, among the functions this office should do is to relate money spent to the outputs or results. It would not be enough to confirm money is spent for the intended purpose, he should ensure there is no waste e.g. where a tender is floated and one person qualifies but the price is paid double what the market value is, this should constitute an irregularity.

8. Public Service : Chapter 14

The Draft Bill proposes the creation of several new offices. To avoid a situation where this results in duplications, it is necessary to provide for the principle to avoid, under article 258, unnecessary duplications of functions between existing and new offices.

This country has had too many commissions appointed to investigate matters of public interest. It however, many of the commission reports never get beyond the presentation. Kenyans can be forgiven for the feeling that in most instances, these commissions are used to reduce public pressure for change. As soon as public attention subsides or is diverted, the commission becomes irrelevant.

To avoid the current misuse of commissions to waste public funds and circumvent public demand for change, it appears necessary to provide for reporting procedures for commissions appointed and financed by public funds. To achieve these objectives, it is suggested that:

- (i) funding of any commission should include details of what it will investigate, the period of its tenure, to whom it will report and when;
- (ii) Any commission appointed to investigate a matter of public interest to report findings within three months of the end of its work;
- (iii) A copy of the report to be filed before an appropriate committee of Parliament.

COMMENTS ON DRAFT BILL OF THE CONSTITUTION OF KENYA REVIEW COMMISSION : CHAPTERS THIRTEEN AND FOURTEEN

Jimnah Mbaru

1. Introduction

My comments on chapters thirteen and fourteen are predicated on the assumption that Kenya's proposed constitution is to usher in a Developmental State. For clarity, a developmental state may be defined as one whose activities whether in the intervention in the economy, formulation and implementation of policies, creation of institutions and legal framework, management of public finance, creation of professional civil service etc, are all aimed at speeding up equitable economic growth. It is in this spirit that my comments should be seen.

2. Public Finance and Revenue Management

2.1 Principles and Objectives

2.1.1 Create Surplus Capital

One central principle and objective of public finance is to create "surplus" capital for a country's economy consistent with economic growth of a country. This principle enables a government to plan management of its revenue with a view to creating a budget surplus where expenditure is less than revenue raised. This principle should be incorporated in the draft constitution.

2.1.2 Importance of Planning

Given that Kenya has inadequate financial resources, value of planning should be emphasized. This means that whenever there are public programmes to be considered whether in revenue raising or utilization of resources there must be a consideration of cost versus public value of the activity. I feel this principle should be emphasized as a guide in planning.

2.1.3 Allocation and distribution of public funds - 243 (i) (e) and (f)

In allocation or distribution of public funds consideration should be given to the growth sectors of the economy in particular. Secondly, consideration should be given to "Life of project" concept. This means that once a project has been approved, funding of such a project should be more or less automatic.

This avoids delays, uncertainty and wastage. Currently there are many incomplete projects in this country. If such a principle were followed, the country would have saved a lot of money.

2.1.4 "Scrap and Build" principle

This is a new principle, which I feel should be included in the constitution.

This principle or concept implies that once the overall government budget has been

determined following the agreed approval process to fund a new project or activity, another activity would have to be scrapped.

This principle has two advantages;

- (i) It enables control of government staffing and creation of new organizational entities as well as unplanned expenditures. For new activities to be introduced, cutbacks elsewhere whether in a government department, ministry or overall government must be achieved to offset the increase.
- (ii) This principle leads to imposition of bureaucratic discipline. As a policy it means that cutbacks is a condition precedent to acceptance of increase. It also enables the civil servants to make rational planning and decisions as opposed to arbitrary cuts across the board, which is the current practice in Kenya.

2.1.5 Public property disposal

It should be a central policy of public finance and revenue management, that whenever public property has to be disposed it should be disposed with the principal objective of raising public revenue. This means that the principle of pricing such disposals will be based on the market value. This principle should be incorporated in the constitution as a check against any possible misuse of public resources.

2.2 Appropriation Bill: Supplementary Estimates

Section 248 (2) (a) and (b) allows the introduction of supplementary estimates, but if the above principle of "Scrap and Build" is accepted then the issue of supplementary estimates would become irrelevant. A need

for additional funds would only arise under very extraordinary conditions, like the need for funds in case of a war.

I feel, therefore, that the purpose of supplementary estimates should be conditional and clarified in the constitution.

2.3 Reporting to Parliament

Reporting to parliament on the state of national finances should be a constitutional requirement. The cabinet should report to parliament regularly but at least twice a year, in November and in March of every year.

2.4 Report by "Cabinet" instead of Prime Minister

The draft constitution talks about reports by "prime minister" in various sections. I feel the words "prime minister" should be replaced by the word "cabinet". The reason is that we should institutionalise the "cabinet" as the body making these reports so that it becomes a collective action. Otherwise the prime minister may be tempted to get the reports from the finance minister for tabling in parliament only. Power could also get into the head of a prime minister.

3. Central Bank of Kenya

3.1 Composition of the Board

In selecting the proposed 5 members of the Board, consideration should be given to sectoral representation. For example, agriculture, manufacturing and the service sectors should be represented. N.B. No civil servant should be allowed to sit on the Board to ensure complete independence of the Bank.

3.2 Functions

The function to promote economic development in section 252(1)(f) should be expanded to read, "to promote economic development and full employment". This expanded mandate would enable the Central Bank to balance the need for stable prices against the need to create or increase employment.

A new function "to promote the Bond market" should be included. The bond market offers alternative competition to commercial banking loans.

A second function should be to promote Kenya as a strong international financial and services centre. (iv) A third function to promote development of local banks and financial institutions should be added.

3.3 Public Hearings

The Governor of Central Bank should be required to attend several public hearings. At least four (4) public hearings should be made in a year and twice to a parliamentary committee created for this purpose. This requirement should be included in the draft constitution. The purpose of these hearings is to ensure that the Governor is continuously accountable to the Parliament and the Kenyan public.

3.4 Captivity by Big Banks

There is a need to ensure that the Central Bank does not become hostage to the big banks in its policy formulation and implementation at the expense of the smaller banks.

4. The Controller of Budget

4.1 Qualifications

Section 253 (2) (a) is too restrictive. 10 years experience in accounting or finance after qualifying is good enough.

4.2 Retirement age

The retirement age should be set at 70 years. It is open in the constitution.

4.3 Reporting

Under section 253 (6) it is recommended that the controller of budget should report both to parliament and the minister in charge of Budget and Planning. This is to ensure that the planning division receives a feedback on the impact of budgeted expenditure on the economy as a whole.

5. The Auditor-General

As relates to the retirement age of the Auditor General, the constitution should fix this at 70 years. It is open in the constitution.

Section 254 (5) should be consistent with the other Articles that have referred to "President with advice of Prime Minister." For consistency, it should be either "President with advice of Prime Minister or "President with advice of Cabinet".

6. Economic and Social Council

Section 257 proposes the creation of this institution. However its functions are purely advisory. Its recommendations are not binding. It should not be included in the constitution. It is an institution, which could

be created under an Act of Parliament if its services are felt necessary.

7. The Public Service

It should be clarified what do you mean by "equitable" provision of service' in clause 258 (c).

It is recommended that clause 258 (h) be expanded to state "merit as basis of appointments and promotions "through passing a series of merit examinations."

Clauses 258 (h) and (j) create an inconsistency. 258 (h) takes care of 258 (j). Both cannot be implemented at the same time.

7.1 Appointment of Public Officers

All officers including permanent secretaries should be appointed by the Public Service Commission with the exception of Head of Civil Service. The purpose is to totally depoliticise the civil service.

The Head of civil service should be appointed by the president on advice of cabinet and the National Council. I believe this procedure of appointment will lead to the evolution of a truly professional civil service based on meritocracy.

7.1.1 Qualifications of Permanent Secretaries

All persons to be appointed to a position of a permanent secretary should have completed and passed a course in public law, regulation, public administration and economic development.

7.3 Limitation of number of civil servants Law

A law should be passed to limit the number of civil servants known as "Limitation of Number of Civil Servants Act". It would set the maximum number of civil servants to be employed. This Act would also facilitate implementation of the "Scrap and Build" concept. The constitution should, therefore, set a limit of number of civil servants to be determined by an Act of parliament. This law should lead to elimination of corruption in employment in the public service.

7.4 Qualification of Director Kenya Correctional Services

The constitution should also define the qualifications of the director. I recommend that they should be the same as those of Commissioner of the Kenya Police Services as vide section 266 (1) (a).

7.5 Retirement age of civil servants

The retirement age of civil servants should be set at between ages 45 and 55 years.

8. Other Comments

8.1 Devolution

It is my view that the cost of devolution should not be all that great since in many areas, we should merge the local authorities government and the provincial administration. The current costs of running the provincial administration should be enough to run the Secretariat of the devolved government.

Secondly, a Financial and Fiscal Commission set up, as an independent body under the constitution should be able to deal with issues of Revenue Sharing and

Financial allocations. Section 225 (1) sets up such a commission. The commission should also be able to advise on Taxes which the devolved government would levy.

8.2 *Conflict between President and the Prime Minister*

The constitution creates these two institutions. I feel however that the allocation of duties to these two institutions could be a recipe for chaos. In the first instance, the President has a national mandate. For him or her to be elected, he must have had a programme of action which he would implement once in office. But it appears that he does not have the real power to implement such a programme.

On the other hand, virtually all executive powers are vested in the Prime Minister, who does not have a "national" mandate as he is not elected directly by the people but he is only the leader of the majority party in parliament. In the exercise of power by these two strong institutions, conflict is bound to result.

It is my view that the only system that can work effectively in this country is a Presidential System, where the President appoints all members of the cabinet including the Prime Minister. Developing Countries generally need a strong executive revolving around a strong presidential institution.

8.3 *The Spirit of the Constitution*

The spirit of the constitution tends to emphasise "distribution and allocation" of resources. The frequent use of the word "equitable" sounds socialistic. The spirit of free enterprise or entrepreneurial spirit is not emphasised in the constitution. And yet this

free enterprise spirit is now acceptable as one of the drivers of economic growth and material accumulation. We should re-examine the spirit in the draft constitution.

8.4 *Preamble to the Constitution*

We should add a section emphasising "Our determination to create a wealthy nation where all people enjoy a high standard of living." This clause should give whichever government comes into power a vision to create a "developmental state" which is constantly looking for opportunities to increase the national wealth of our country.

CHAPTER FIFTEEN (15) OF THE DRAFT BILL NATIONAL SECURITY AND DEFENCE ESTABLISHMENT

Col. Rtd. J. N. Nguru

1. Overview of the Chapter

A good effort has been made to make constitutional provision for national defence and security, but in our view, more needs to be done.

National defence and national security are two separate concepts, actualized through different means and should be addressed separately.

The provisions on national defence leave out some essential principles and create confusion in roles and reporting lines e.g.

(i) The cabinet, which together with the president are the Executive, has been allotted no role at all, yet, it is expected to sanction policy and funding for defence .

(ii) Civil military relationship, an essential element of a another democracy has not been addressed

The memorandum from Department of Defence has expressed concern over the amorphous paramilitary role of the police, the Administrative Police and the National Youth Service. Some of the activities and uniforms of the three forces encroach in traditional military territory and the confusion should be cleared.

The role of the Prison Service, renamed Correctional Service, in defence and security is not clear and should not be presumed to exist.

These inadequacies need to be addressed as recommended in the provisions below.

2. National Defence and Security

271. Kenya's national security and defence shall be the responsibility of the Executive acting through the National Security Council and subject to the authority of parliament.

272. The responsibilities for national defence and security shall be discharged through three distinct service established, commanded and managed separately viz.

1. Kenya National Defence Forces
2. The Kenya Police
3. Kenya National Security Intelligence Service

3. Operating Principles:

273. The Kenya National Defence and Security Services shall be non-partisan and no service or any of its members shall promote the interests or causes of any political party, grouping or individuals, or hinder in any way the interests or causes of any political party, grouping or individual, providing that the right of the individual to vote shall not be curtailed.

274. Service in the Kenya National Defence and Security Services shall be open to all qualified Kenyans without discrimination of any kind providing that all citizens are liable for service in the event of WAR And

national emergency at the discretion of the president.

275. The National Defence and Security Services shall be trained, commanded and act under the constitution and the law, including international law and conventions and treaties to which Kenya is signatory, and shall be subject to the will of Parliament and the authority of the duly established civil power

276. Disciplined, professional and loyal defence and security forces are a symbol of national unity and a source of national pride, and Kenya Defence and security forces shall be recruited, trained commanded and employed to reflect a national outlook and promote these values.

277(1) The Kenya National Defence and security services shall be trained and employed in accordance with universally acknowledged principles and practices while to the greatest extent possible respecting the values and traditions of the various communities in Kenya and anywhere else in the world they may be deployed.

(2) Without prejudice to the operational effectiveness of any force, formation or unit provision shall be made to address individual conscientious concerns for war and armed conflict

(3) Barring specific professionals required by law to subscribe and belong to professional regulatory and registering bodies, members of the defence and security services shall not belong to any trade union or any organization purporting to represent the rights of workers

(4) Members of the Defence and Security services may profess and practice any religion or faith of their choice, but no members shall propagate or promote any

religion or doctrine outside the Chaplaincy organization

(5) The national defence and security services may create and maintain such reserve units as may be authorized by Parliament.

(6) Each service shall have distinct colour, flag, uniform insignia and badges of a rank reserved strictly unto itself and which no person as group shall emulate

4. Kenya National Defence Forces.

278. 1). There is hereby established, the Kenya Defence Forces consisting of: -

- a. The Kenya Army
- b. The Kenya Air Force
- c. The Kenya Navy

2). The individual forces may be organized, commanded and administered in such formations and units as the President, in consultation with the National Security Council, may direct.

3). Parliament shall enact appropriate legislation for the effective general management and administration of the Defence Forces.

279 The Kenya National Defence Forces shall be subject to civil authority and shall only be used in:

- 1). Defending the nation against external aggression and maintaining the integrity of the national territory.
- 2). Aid to civil power in maintaining law and order when called upon to do so by the President.
- 3). Support of the operations of the United Nations and other International Organisation Conventions and treaties to which Kenya is signatory.

280 In joint law and order operations involving the Kenya Defence Forces the Kenya Police and other law and order agencies, the National Defence Forces shall take precedence.

5. National Security Council.

281. 1) There shall be a National Security Council consisting of: -

- a) The President.
- b) The Vice President.
- c) The Prime Minister.
- d) The Minister In-charge of Defence.
- e) The minister in charge of Internal Security.

2) The Chief of General Staff, the Commissioner of Police and the Director, National Security Intelligence Service shall be opted to seat ex-officio in the Council but not vote.

3). The President shall preside over the meetings of the Council and in the absence of the President the Vice President, and in the absence of the Vice President, the Prime Minister shall preside.

4). The Council in consultation with the Cabinet, shall make rules of procedure to guide the conduct of its business.

5). The Permanent Secretary responsible for matters relating to National Defence shall be Secretary to the Council and shall not vote.

5.1 Functions of the National Security Council

283. 1) The National Security Council shall have the responsibility to: -

- a) Interpret, relate and integrate national policy to the requirements of National Defence and Security.
- b) Assess national objectives, commitments and risks, and propose appropriate security and defense policies

c). Identify and co-ordinate the input of other national agencies and departments towards national security and defence.

d). Exercise supervisory and oversight role on the operations of the national defence and security services.

e) Create appropriate organs and structures to manage emergencies and national security crisis.

2). The Prime Minister shall keep the President informed on the state of security of the Republic and the operational status of the defence forces.

6. The Commander In Chief.

284. 1) The President, shall be Commander In Chief of the National Defence Forces and shall have responsibility for: -

a) Overall employment of the National Defence and Security Services through their respective ministers and oversight councils

b) Commissioning, promotion, and appointment of officers and conferment of awards and decorations to the members of the defence and security service on the advice of the their respective Councils.

c) Appointment of officers to head the services and their

subordinate councils on the advice of the National Security Council and the respective service councils and subject to the approval of Parliament.

d). In consultation with the National Security Council create and or dissolve units and formations of the services on the advice of their respective Councils.

7. Kenya National Defence Forces

7.1 The Defence Council

283. 1). There shall be a Defence Council consisting of:—

- i. The Minister In-charge of Defence.
 - ii. The Chief of General Staff.
 - iii. Commander, Kenya Army
 - iv. Commander, Kenya Air Force
 - v. Commander, Kenya Navy
 - vi. The Permanent Secretary, responsible for matters relating to defence.
- 2). The Minister shall preside over the meetings of the Defence Council and in the absence of the Minister, the Deputy Minister shall preside
- 3) The Principal Staff Officer on the staff of the Chief of General Staff shall be Secretary to the Council but will not vote.
- 4) In consultation with the National Security Council, the Defence Council shall make rules of procedure to guide the conduct of its business.

7.1.1 Functions of the Defence Council.

284. 1). The Defence Council shall be responsible for: -
- a). General administrative oversight of the defence forces.
 - b). Provisioning and equipment of the defence forces.
 - c). Advising the President on the commissioning promotion and appointment of officers and the award of honours to the personnel of the defence forces.
- 2). Subject to the constitution and the law the Defence Council shall formulate and promulgate regulations for the efficient management of the Defence Forces to include: -
- a). Staff Organisation and Chain of Command.
 - b). Equipment Schedules and Staffing.
 - c). Terms and conditions of service.
 - d). Recruitment and Training.
 - e). Discipline.

7.2 Chief of General Staff.

285.1). There shall be a Chief of General Staff, appointed by the President in consultation with the National Security Council and subject to approval by Parliament.

2). The Chief of General Staff shall hold office for one term of five years and may be removed during the term for incompetence, incapacity or disloyalty on the recommendations of the National Security Council subject to approval by Parliament.

3). The Chief of General Staff shall be responsible to the National Security Council for the general direction and efficient administration and employment of the defence forces.

7.3 Defence Forces Commanders.

288.1). There shall be individual and separate defence service commanders for: -

- a). The Kenya Army.
- b). The Kenya Air Force.
- c). The Kenya Navy.

2). A Defence Force Commander shall be appointed by the President in consultation with the National Security Council on the advice of the Defence Council and subject to approval by parliament.

3). A Defence Force Commander shall hold office for a term of five years and may be removed by the President on the advice of the National Security Council in consultation with the Defence Council for incompetence, incapacity or disloyalty, subject to approval by Parliament.

4). The Defence Force Commander shall be responsible to the National Security Council through the Chief of General Staff for the efficient operational employment of the forces under command and to the Defence Council for the effective management and

well-being of the personnel under command.

7.4 Nation Security Intelligence Service.

287. 1). There is hereby established the Kenya National Security Intelligence Service.

2). The National Security Intelligence Service shall be responsible to the NSE for:-

a). Gathering, interpreting and dissemination Information and intelligence of relevance to Kenya's National Security and economic well-being.

b). Advising on the formulation and implementation of measures to enhance Kenya's National Security.

c). Monitoring social and political trends in the country and assessing their potential impact on National Security.

d). Maintaining a data bank on social, political, economic and Military trends in the East African Region and the world generally and assessing their potential impact on Kenya's National Security.

3) The National Security Intelligence Service shall operate under the constitution and the law respecting the privacy and other rights of individuals and groups conducting their economic, political and social activities within the law.

4) Parliament shall enact appropriate legislation to regulate the organization, operation administrative, funding and oversight of the National Security Intelligence Service.

7.4.1 National Security Intelligence Committee.

289 1). There shall be a National Security Intelligence Committee consisting of: -

a) Minister in charge of Internal Security

b) Permanent Secretary for Internal

Security

c) The Permanent Secretary In-Charge of Defence.

d) Director of National Security Intelligence Service.

e) Commander, Military Intelligence Corps.

f) Director of Operations, Police Headquarters.

g) Head of Economic Division, Ministry of Finance.

h) Director of Political Affairs, Ministry of Foreign Affairs & International Co-operation.

2) The Minister shall chair the committee.

3) The Commander Military Intelligence Captain shall be the secretary to the committee.

4) Subject to approval by the National Security Council the committee shall formulate and adopt their own rules of procedure for the conduct of their business.

5) The Committee shall be responsible to the National Security Council for the efficient discharge of the functions of the Service.

7.4.2 Director, National Security Intelligence Service.

290.1). There shall be a Director of National Security Intelligence Service, appointed by the President in consultation with the National Security Council, and subject to approval by Parliament.

2). The director shall not be a serving member of the Defence Forces, the Kenya Police, or the Kenya Correctional Services.

3). The director shall hold office for a maximum of two terms of five years each and may be removed from office during a current term for incompetence, incapacity or disloyalty by the National Security Council subject to approval by Parliament.

7.4.3 *National Security Intelligence Oversight Board*

288. There shall be a National Security Intelligence Service Oversight Board consisting of:-

- a). A judge of the High Court appointed by the Chief Justice who shall chair the Board.
 - b). A Senior Defence Forces Officer barring the commander of the Military Intelligence Corps appointed by the Chief of General Staff.
 - c). A Senior Police Officer barring the director of operations appointed by the Commissioner of Police.
 - d). A Senior State Counsel appointed by the Attorney General.
 - e). A Senior Civil Servant with diplomatic service experience appointed by the Head of the Public Service.
 - f). Two prominent lawyers of known integrity and commitment to community service proposed by the Law Society of Kenya, and who shall be required to execute an oath on confidentiality.
- 2). The Board shall be appointed by the President in consultation with the National Security Council.
 - 3). The Director of National Security Intelligence Service shall be the secretary of the Board and will not vote.
 - 4). The Board shall exercise oversight over the National Security Intelligence Service and provide for the Director policy guide lines on:-
 - a). Recruitment and personnel development.
 - b). Ethics and socio-legal accountability.
 - c). Financial Accountability.
 - 5). The Board shall operate independent of other departments of government but shall be required to : -
 - a). Deliberate on issues referred to it by the National Security Council and submit a report.

- b). Submit copies of minutes of all meetings to the Council.
- c). Submit periodic reports on the no-technical operations of the service.
- d). Review the budget proposals of the National Security Intelligence Service and submit their recommendation to the National Security Council.
- 6). The individual members of the Board shall not hold their position for more than five years, and the Council has the discretion to require the appointing authority to replace its nominee at any time.
- 7). The Board in consultation with the National Security Council, shall formulate rules of procedure to guide their business.

8. **The Kenya Police**

289 I) There is hereby established the Kenya Police Service.

- 2) The Kenya Police Service shall be a national force and the only one with the authority to exercise the functions of a police force.
- 3) Subject to approval by Parliament and in consultation with the National Security Council and the Police Service Commission, the President may direct the organization and devolution of authority of the police service including special units as will ensure the most effective enforcement of law, order and security and prevention of crimes.
- 4) The police force shall cultivate a culture of civility and respect towards and cooperation with the community, maintain an environment of friendliness with the community and promote community policing.
- 5) Members of the police force shall have no role or authority in the judicial process other than as witnesses.
- 6) Parliament shall enact appropriate legislation to regulate and guide the

management and employment of the police force.

8.1 *Functions of the Kenya Police Service*

290 1) The functions of the police service shall be:-

- a) Enforcement of law and order
- b) Prevention and detection of crime
- c) Apprehension of offenders
- d) Security of the general public, national leadership and public institutions

8.2 *Police Service Commission*

291 1) There shall be a police service Commission consisting of:

- a) the minister in charge of internal security
 - b) the Commissioner of Police
 - c) the secretary to the Public Service Commission
 - d) a senior State Council appointed by the Attorney General
 - e) Head of Operations, Police Headquarters
 - f) Head of Personnel Police Head quarters
- 2) The Permanent Secretary responsible for internal . security shall be Secretary to the Commission.

8.2.1 *Functions of the Police Service Commission*

292 1) The Police Service Commission shall be responsible for:-

- a) General administrative oversight of the Police service
 - b) Provisioning and equipment of the police services
 - c) Advising the President on the formation and appointment of police officers, and the award of honours of police officers, and the award of honour to police personnel.
- 2) Subject to approval by the National

Security Council, the Police Service Commission shall formulate rules of procedure to regulate and guide its business

3) Subject to the constitution and the law, and the approval of the National Security Council, the Police Service Commission shall formulate rules and regulations to guide the management and operations of the police force.

8.3 *The Commissioner of Police*

291 1) There shall be a Commissioner of Police appointed by president in consultation with the National Security Council on the recommendations of the Police service Commission, and subject to approval by Parliament

2) The Commissioner of Police shall exercise general direction on the management and employment of the police force.

3) The Commissioner of Police shall hold office for one term of 5 years, and may during the term be removed from office by the President in consultation with the National Security Council subject to approval by Parliament, for incompetence incapacity or misconduct.

8.4 *Kenya Police Service Oversight Board.*

292 1) There shall be a Police oversight Board appointed by the National Security Council in consultation with the Police Service Commission to oversee the conduct of the police and handle complaints from the public against the police.

2) The Board shall consist of:-

- a) A judge of the High Court appointed by the Chief Justice who shall chair the meetings of the Board

- b) Two lawyers of integrity and public standing appointed by the Law Society of Kenya.
- c) Two members of the public nominated for their integrity and commitment to community service .
- d) A senior State Council appointed by the Attorney General.

3) The Permanent Secretary in charge of internal security shall be Secretary to the Board but not voting.

4) Subject to approval by the National Security Council, the Police Service oversight Board shall formulate rules of procedure to regulate and guide the conduct of their business.

**CONSTITUTION OF KENYA REVIEW COMMISSION
DRAFT BILL : CHAPTER (15) - DEFENCE FORCES AND NATIONAL
SECURITY**

Brig (Rtd.) E. G. Kihia

1. Introductory Remarks

We commend the Commission for the work done to be able to come out with this Draft Bill. This provides a good base upon which a modern constitution can be developed based on the needs of Kenya and the aspirations of its people. While recognising the importance of involving the "people", the views of the practitioners should be sought and the expertise available nationwide in diverse professions utilised to be able to finally come out with an implementable constitution.

Chapter 15 enjoins two functions, Defence and National Security, which are not exactly the same but are complimentary. The heading of the Chapter needs to be changed to reflect more incisively what the Chapter is all about.

2. National Security in Relation To Defence

National security has broad implications which go beyond the traditional roles associated with Defence Forces. It essentially covers matters related to the existence of national stability, civil order, safety of the individual and property. Thus, National Security is internally oriented while Defence is externally oriented. Threats to domestic peace and stability could however be externally generated. This then becomes a direct concern of the

National Security Intelligence Service and Defence Forces.

Every Government Branch and organ of state has something to contribute to National Security. Internally generated threats could be ignited by a host of reasons including shortage of food, water, employment etc. Accordingly, National security is a primary responsibility of the Government in its totality and a direct concern of the National Executive, principally the President and the Cabinet.

National Security is a term applied mostly in association with the activities of the Civil Police in the enforcement of law and order. The expertise and capabilities available to the Military Forces may be deployed should the need arise in support of civil powers to restore public order or to counter civil insurrections. This is a secondary role for the Defence

Forces and is a primary , role for the Civil Police. For this reason, the Police and the Military Forces are jointly referred to as "Security Forces" when working together, with the Police having a higher responsibility. The Military will normally take over command of the operations when they move in.

The National Intelligence Service is an organ or agent of state established to

monitor any activities, events or circumstances which may upset national stability and in effect security of the state. The service is in itself not charged with the responsibilities for preventive, enforcement, defensive or offensive action. It is an early warning system designed to maintain surveillance and collect information on all activities which may prejudice national security for the Government to take timely action. In its activities, the National Intelligence strides over the responsibilities of the Civil Police and Defence Forces. It therefore compliments the Defence Forces and the Police.

Hence, National Security embraces the Police, the Defence forces and the National Security Intelligence Service. To capture this effectively within the constitution, it is recommended that one chapter is created combining the three services. However, there is nothing wrong in retaining the police where they are under chapter 14.

They are more associated with the Judiciary and the Civil Service at the working level. In the alternative, Chapter 15 should be split into two parts each focussed on one service. It would however be more appropriate for the National Security Intelligence Service to have a separate part under Chapter 14. This would make Chapter 15 exclusive to Defence Forces to reflect their separate identity.

3. Specific Observations

3.1 Establishment of the Defence Forces

The Draft Bill does not establish the Defence Forces or the Security Services. Both are established under existing Legislation. The constitution should

establish the two Services to provide a base for the rest of the Provisions and any other legislative action, which may be needed.

3.2 Functions of the Defence Forces

The roles of Defence Forces need to be covered in the constitution. These may include the following:

- a) The defence of the Republic against external aggression.
- b) Support to Kenya's Foreign Policy in pursuit of national interests. (This would provide justification for offensive action).
- c) Support to Civil Powers in the maintenance of order.
- d) Aid to Civil Authorities during national emergencies, catastrophes and in development activities of strategic and security significance or to help the civil society.
- e) Support to Kenya's commitments to the international community through the United Nations, Africa Union or any other similar organisation to which Kenya is a signatory.

These roles are critical and need to be discussed, verified and agreed with all the parties concerned before inclusion in the constitution.

3.3 Recruitment into the Armed Forces

The constitution ought to mention the internal composition of the Armed Forces recruitment pattern to reflect its ethnic and racial mix in the society.

3.4 Role of the Executive

The Cabinet, which is chaired by the Prime Minister, is the top policy making organ of the Government. The National Security

Council and the Defence Council, which are chaired by the President, are subordinate to the Cabinet. The Cabinet must ultimately approve decisions taken by these two organs. This effectively subordinates the President to the Prime Minister and the Cabinet, and could be a source of tension or conflict. To avoid this, the President should be part of the Cabinet or given powers over the Cabinet directly and without ambiguity.

The Minister is responsible for implementation of Government policy on Defence through the Defence Council, which is chaired by the President. This nullifies the role of the Minister unless it is the wish that the President assumes direct control in the management of Defence policy. This also applies to National Security. The President can however have the discretion to chair these vital organs in times of a national crisis. The President should ideally operate through Cabinet committees on functions which are his direct responsibility. Non-Cabinet members can be in attendance as advisors or for any other reason. Under these circumstances, decisions arrived at in such committees would be recognised as having the same weight as the cabinet. This would allow the Minister to retain the chairmanship of the Defence Council and the National Security Council, charged with policy management and implementation.

The President is authorised under the Bill to declare war or a state of emergency in his executive role. He must in addition be mandated to deploy the Defence Forces, recall the Reserves, and mobilise the Nation. He is the only one authorised to issue an executive order or directions in this respect. This may be done before Parliamentary approval is obtained in the event of a

surprise attack or to pre-empt an eminent attack. These actions would need to be justified to the Nation and Parliament thereafter. A clear chain of command for the Defence Forces will be provided under this provision as an added advantage.

4. Matters of Interest to Defence and National Security in other Chapters

There is need for better harmonization, and linkage with other chapters which contain some aspects of concern to Defence. This includes Chapter Four on Citizenship, Chapter Five on the Bill of rights and Chapter Eight on the Executive. Some of these aspects need to be transferred to Chapter 15 or re-emphasized.

Some of the details contained under Article 71 on the Bill of rights regulating a "state of emergency" do not appear appropriate to this Chapter. They should either be transferred to Chapter Fifteen or be subject to separate parliamentary legislation. The limitations imposed on the presidency are too stringent and may render the conduct of smooth and successful operations impossible. There should be flexibility and a demonstration of faith in the Executive on matters concerning national interest.

The Judiciary should not be permitted to intervene on matters touching on national security. Individual rights are difficult to uphold in the intensity of war and emergencies. Inquiries are however permitted on suspected flagrant violation or abuse of human rights thereafter which serves as a restraining factor.

4. *Para-Military Forces*

Para-Military forces are mentioned under Article 264(2)(h) on Kenya Police and Article 274(1) on Defence Forces. Something more should be said about this unique force. The idea of a third force striding as it does between the Civil Police and the Military was conceived by Britain for use in their colonies to contain civil disturbances and insurrections. It becomes necessary when such disturbances are beyond the capacity of the police in terms of training and equipment. The military are not suited for this task as it is not within their primary role or may be committed elsewhere.

Despite this, the idea is controversial and unacceptable to modern democracies particularly so in the west as it is prone to miss-use against the citizens. The British population cannot countenance the existence of such a Force in their country. Kenya's General Service Unit (GSU) is in this category. It was created during the emergency and has become a permanent feature since then. Such a force may be under command of the police or the military depending on the purpose for which it is

created. Kenya has a strong case for Para-military Forces to counter banditry activities, cattle rustling, border surveillance etc. There may be a need to create one in future under the command of the military.

In view of their unique roles and double image, Paramilitary Forces should have provisions under Chapter 14 authorising establishment of such forces should the need arise. This should detail the circumstances under which they may be established, authorized, employed and deployed. The role and command of the existing forces with similar characteristics would be re-evaluated in line with the new constitution. Since they are all concerned with internal security, the name "Para-Military Police" should be adopted.

5. Conclusion

This Chapter needs comprehensive revision before enactment. The commission should consider these observations and make the necessary amendments to the Draft Bill. Defence and National Security are vital and sensitive issues. It is suggested that consultations are made all round including expert opinions from neutral sources before the final Bill is produced.

POLICE DEPARTMENTS PROPOSAL FOR AMENDMENTS TO C.K.R.C. DRAFT CONSTITUTION - CHAPTER 14 PART II

King'ori Mwangi

1. Introduction

The Draft Constitution creates some new organs of governance while abolishing some existing ones. After the launch of the document, the Police Department was interested to see the status accorded us in view of the numerous issues raised by the public and ourselves.

A panel of officers appointed by this Headquarters perused the Kenya Constitution of 1963 namely - The Kenya Independence Order in Council 1963, the current constitution namely - the Constitution of Kenya (revised edition (1998) 1992 and the draft Constitution of the Republic of Kenya, 2002.

After a careful perusal, we felt the 1963 constitution provisions for Kenya Police had been more comprehensive, adequate and addressed the needs of Police. The current constitution, though inadequate is more clear in terms of the administrative powers of the Commissioner, relationship between Kenya Police and the Public Service. Section 108(2) (a) and (b) of the current constitution clearly states the power relationships of delegated authority between Public Service Commission and Commissioner of Police regarding confirming appointments, power to exercise disciplinary control and the power to remove officers from office. The Constitution also describes how the Commissioner may delegate his powers to

other members of Kenya Police.

The Draft Constitution however is silent on these power relationships, creating a vacuum that may render the smooth operations of the Department impossible. The 1963 Constitution had created other senior ranks besides the Inspector General, the current Constitution does not create other ranks and this is always addressed administratively. However, the Draft Constitution creates only three ranks namely a Commissioner of Police and two Deputy Commissioners. This in effect ignores the development which has taken place over the years.

In our opinion, the new Constitution should be aimed at making the Kenyan Society have more confidence in their institutions, identify with and observe our laws to restore their confidence with the Republic. Kenya Police will have to play a *very crucial role* towards achievement of this Kenyan dream. Thus, Police as an institution central to any modern society *MUST be* empowered through the constitution to deliver quality services and to remain above suspicion. In our opinion, a credible police is the only route through which Kenyans can realize democratic policing.

After perusing the Draft Constitution we feel the document did not add any value to our present condition. The Draft does not empower the Police to play a crucial role in the envisaged new society.

2. Brief of What The Police Need Enshrined in the New Constitution

- (i) Elevation of Commissioner of Police to Inspector General.
- (ii) Clearly stated security of tenure for the Head of Police.
- (iii) An independent Police Commission responsible for all police matters.
- (iv) Two terms of four years each and not ten years.
- (v) Present ranks of Senior Deputy Commissioner I and II and Deputy Commissioners to be left standing.

3. Case for the Police Service Commission

Though most of the justification for the amendments is contained in the attached annexure, kindly let me quote the legal notice No. 718 of 10th December, 1963 known as - Statutory Instruments. 1963 no. 1968. The Kenya Independence Order in Council 1963 on Kenya Police Chapter IX.

Section 157 (1) - There shall be a Police Force which shall consist of a Regional Contingent for each Region, a Nairobi Contingent and the specialized branches.

157(3) (a) The Police Force shall be under the general command of an Inspector general of Police.

Section 160(1) There shall be a Police Service Commission which shall consist of two ex-officio members, that is to say-

- (a) the Chairman of the Public Service Commission, and
- (b) such justice of appeal or judge of the supreme court as may for the time being be designated in that behalf by the Chief

Justice, and three appointed members who shall be appointed by the two ex-officio members acting jointly but after consultation with the Inspector General.

(2) The Police Service Commission shall be presided over by such one of the appointed members (here in after referred to as "the Chairman of the Police Service Commission") as may for the time being be designated in that behalf by members of the Commission.

3.1 Independence

Section 160(13) subject to the provisions of this chapter, the Commission shall, in the exercise of its functions under this constitution, not be subject to the direction or control of any person or authority.

3.2 Functions Of Police Service Commission

Section 161 (1) In addition to other functions; it shall be the duty of the Commission to keep under review all matters relating to salaries, allowances and other conditions of services of members of the Police Force and to give advice thereon to the Minister.

4. Conclusion

As a department, we have been making representation to various Commissions, and to the Government requesting for a Police Service Commission for purpose of addressing the chronic problems of administration, operations and otherwise adversely negating our ability to deliver quality service.

Lack of independence, inadequate salaries and operational facilities has always been

identified as the main cause of police problems. These areas are addressed in the appendix herebelow.

6. Appendix

6.1 Recommendations by the Police

6.1.1 Introduction

After perusal of the draft Constitution, we note with concern that it does not add value to our present condition, and circumstances that have led the Kenya Police to the present perceived dismal performance of their mandate.

We do appreciate the concerns raised by various people and groups complaining against our alleged poor performance. However, as a department, we expected the eminent persons appointed as commissioners to examine the history of Kenya Police from the time of independence to date and find out how and why our services to the public declined to the present levels. This should be examined both in terms of our independence or lack of it and the facilities accorded to the department. We feel the recommendations contained in the Draft Constitution to be simplistic, and cosmetic in addressing the problem affecting the police.

The changes recommended will not enable the police to provide better services to the public or advance the developing democratic culture and practices envisaged in the new Constitution.

6.1.2 Police Service Commission

In our opinion, the problems of the Police Department started when the Independence

Constitution arrangements were interfered with. When the Police Service Commission was scrapped, the rank of Inspector General was removed and police was placed under the public service commission.

All efforts to address the problems affecting police officers in terms of emoluments, allowances, equipments and other enabling facilities are always considered along side the rest of the public service. Yet Police Officer's work, and expectations by the public are very different. We feel that only a Police Service Commission, which is devoted to handling our problems, can make any positive change in the Department.

The case for a Police Service Commission was first deliberated upon by the Versey Commission of 1946, the Ominde Commission of 1988 and recently by the Ng'eny Commission. Previous Commissions were of the view that due to the enhanced stature of the Police Force, level of professionalism and operational demands, the service needed some measure of autonomy from the Public Service Commission indicated that they did not have adequate time to address the implications and the intricacies involved in creating a separate Service Commission for the Police Force, but in the mean time recommended for a Standing Review Committee to address adequately the problems of the Police Force; We feel that the new Constitution should travel the extra mile to create the Independent Police Service Commission.

As the Department enters the 21st Century this argument is more valid than it was over 50 years ago. It is, therefore, our considered opinion that this issue should take center stage.

One of the most contentious issues that would adequately be addressed by the envisaged Police Service Commission is the Police Force's terms and conditions of service. Without doubt the Government is not in a position to adequately remunerate Police Officers while still under the Public Service Commission because of the subsequent ripple effect. For example some specialized personnel (Doctors, Engineers, Pilots, etc) are not adequately remunerated, due to ceilings beyond which officers cannot be promoted. Consequently, upgrading in rank remains as the only compensation mechanism available, a method which in the long run interferes with the organizational management of the Police commands.

Since not all professionally qualified officers can be promoted to senior ranks for the purposes of remuneration, some of these officers have opted to leave the service for the private sector. This exodus has forced the government to spend huge amounts of money in training personnel it cannot sustain and retain due to poor remuneration.

A Police Service Commission is the only organ through which these cases can appropriately be addressed in order to attract and retain professionals in the service.

The establishment of Police Service Commissions to cater for the needs of Police Force is now the trend worldwide. With the current spirit of the East African regional Co-operation where the objectives is to harmonize police operations, we may have to borrow a leaf from our counterparts in Uganda and Tanzania whose Police Force have Service Commissions to address their unique needs.

6.3 Grouping in the Constitution

As a Department, we strongly feel the C.K.R.C ought to have shifted the Kenya Police from Chapter fourteen to Chapter fifteen to rest with Defence Forces and National Security.

This is because the nature of Police work is both essential and related with Judiciary, the Military and Intelligence Services than the civil service. Police perform 95% of all prosecution duties in Kenya inspite of our difficulties. Majority of Police officers have served in operation areas of this country or are currently deployed there, where their main work is Military in nature, fighting invading armed groups from hostile neighbouring countries besides the local armed cattle rustlers.

The Criminal intelligence's work to collect, collate and use involves as much risk as all other intelligence services. Besides, police is usually the arm of the government, which receives intelligence information collected for action.

With the new threats from terrorism the grouping of police together with other Defence forces becomes very necessary. Grouping the Kenya Police with other security services gives us equal footing while competing for funding and other meager resources from the Government.

No meaningful development- economic, social or even political can be realized by any society, unless police is enabled to carry out its mandate.

The Police needs to be given a premium, to create environment conducive for enjoyment of all other rights by Kenyans.

6.4 *Ranking in the Police Service*

The Commission while making the draft appears not to have been aware of the structure currently existing in the Department. Currently, the establishment by D.P.M. in terms of Senior Officers is;

One Commissioner of Police

Three Senior Deputy Commissioners 1

(a) The Principal Deputy to the Commissioner

(b) The Director of C.I.D

(c) The Commandant G.S.U.

Five Senior Deputy Commissioners II.

(a) The Director of Operations and Logistics

(b) The Director of Planning and Training

(c) The Director of Administration

The three above are based at Police Headquarters.

(d) The Head of Anti-Corruption Police Unit -within C.I.D

(e) The Commandant Kenya Police College Kiganjo

Beside the above, all Provincial Police Officers, Formation Commanders, three deputies of Director of C.I.D, Deputy Commandant G.S.U, and several Police Headquarters staff are all in the rank of deputy Commissioner.

The Police Department has for many years been recommending to the Government to create the rank of Inspector General to head Kenya Police as it was at the time of Independence. The position should be deputized by Deputy Inspector General. With the overall head being an Inspector General. C.I.D and G.S.U should be headed by persons of the rank of Commissioner of Police.

The other positions of Senior Deputy

Commissioners of Police and Deputy Commissioners of police to remain.

The justification of this recommendation are three fold:-

- (i) The Head of Kenya Police will be equivalent to their counterparts in Uganda, Tanzania, Malawi, Zambia, Rwanda and most of the COMESA region.
- (ii) We recommend the Director of C.I.D and Commandant of G.S.U. to be Commissioners of Police with a view to accord the two Formations a measure of autonomy without necessarily creating another Police Organization. The Commissioner will then retain the role of supervision and Co-ordination.
- (iii) The growth of Kenya Police both in terms of number of personnel and mandate since independence justifies its elevation to the level of Inspector General. This is the reality in most parts of the World.

The Draft Constitution as it is today would mean abolition of all the positions held by Provincial Police Officers, Director of C.I.D, Formation Commanders and many other Headquarters staff.

This will impact very negatively on both the morale and execution of our duties. The current holders of these ranks would have nowhere to work; yet their demotion would have obvious effect. We feel the intention of the C.K.R.C was meant to enable and not disable the Kenya Police.

6.5 Security of Tenure and Independence of the Police Service

The draft Constitution has not addressed the public fear that Kenya police lacks the independence to carry out its mandate without administrative interference from any authority or individual.

For the Commissioner of Police and his personnel to be able to enforce the Law and protect the right of all, He requires security of tenure enshrined in the Constitution, stating when and how a Commissioner of Police can be removed. It makes little sense to create a constitutional office without expressively stated security of tenure.

6.6 Qualification For Appointment As Commissioner Of Police

The draft Constitution has pegged the appointment of a Commissioner of Police to a qualification of a degree from recognized university.

We have noted that other similar services like the Military and Prison services are exempted from this requirement. Though good to have high academic qualification, this we found limiting as follows;

(a) Initial academic qualification does not always translate to good management and commanding ability.

(b) This requirement seems to downgrade the various trainings a person must go through and qualify before being considered for Senior Promotions i.e various courses offered both in Police College, and Paramilitary training school, Management courses offered to officers in G.T.I. Mombasa, K.I.A, National Defence College, Senior Command Courses, Military and Police academies in other parts of the world.

Besides, police training are always tailored to suit the task an officer is deployed to perform. Police training is geared towards their work. The following examples illustrate our point.

- (i) An O.C.P.D/O.C.S may be offered a course in Management, Criminal Law, Conflict Management and Senior Commanders Course
- (ii) A Company/platoon Commander in G.S.U. or A.S.T.U will be offered a course in Military operation, and Conflict Management.
- (iii) A P.C.I.O./D.C.I.O will be given training in criminal Law, Law on evidence, fraud investigation, prosecution and Forensic Science.

The above three categories have all been properly trained, but is it possible or fair to state which category is better trained?

If a Senior Administrative position arises, we feel a police services commission may be in a better position to evaluate suitability rather than an initial qualification.

6.6.1 Period of a Person to hold the Office of The Commissioner Of Police

The proposed one term of ten years a Commissioner would serve is found unsuitable. It is continuous for too long.

We recommend maximum of two terms of four years each. A term to be of four years so that they should never correspond with Presidential or Parliamentary election periods. This ensures that a Commissioner is never appointed to satisfy narrow political interests of a given period when emotions are high.

We feel the constitution should enable the

new Kenya Police Service in delivery of security/safety services to Kenyans and not disable the Department by:

- (i) Creating the position of Inspector General
- (ii) Creating a clear security of tenure of the Head of Kenya Police Service.

- (iii) Creating Independence/autonomy of the Kenya Police Service through a creation of Police Service Commission
- (iv) Maximum of two terms of four years each and not one of ten years (v). Avoid abolition of ranks already established.

DEPARTMENT OF DEFENCE COMMENTS

Brig. T. K. Githiora

1. Chapter on Defence and National Security

As proposed by The Department of Defence's (DOD) submissions to the Review Commission, Chapter 15 concerning "The Defence Forces and National Security" has been included to in the principles and objects of Defence and National Security. It establishes the organs and command appointments responsible for proper management of Defence and Security.

It would be appropriate to consider additional principles-

- (i) That the military is subordinate to the civil power
- (ii) That the function of national defence is separate and distinct from police or administration functions which are fulfilled by appropriate organs. This approach will serve to "demilitarise" the other security oriented forces in the country in matters of training and operational deployments. The change of designation from Armed Forces to Defence Forces would be part of this clarification of the differences of roles.
- (iii) The secondary role of "aid to the civil power" in the maintenance of order especially in natural or other emergencies. This needs to be included.
- (iv) That only the government may raise

armed forces. The provision in Section 274 that forces may only be raised by an Act of Parliament does not meet this restriction fully.

- (v) That Parliament may provide for the management and functions of the defence forces. An Act of Parliament will be necessary for this purpose.
- (vi) That members of the Defence Forces should meet requirements of good character, discipline and professionalism Section 271 (4) which requires them to avoid being partisan or furthering political parties is insufficient.

2. Establishment of a National Security Advisory Committee

DOD's proposal for the establishment of this technical committee with the essential task of coordinating and advising on intelligence matters crucial to national security seems to have resulted in a National Security Council in the Draft Bill. This development is welcome and underscores the need, even more urgently, for the technical Advisory Committee.

Firstly, however, DOD suggests that the National Security Council membership be adjusted to reflect the accurate functional responsibility for National security -

- i. President - Chairman
- ii. Prime Minister
- iii. Minister in charge of Internal Security
- iv. Minister in charge of Defence
- v. Minister of Foreign Affairs

- vi. Attorney General
- vii. Chief of Defence Forces
- viii. Director-General of the National Intelligence Service
- ix. Commissioner of Police Head of the Public Service- Secretary

The National Security Council would receive technical support on Intelligence from the National Security Advisory Committee composed of-

- i. Chairman appointed by the President,
- ii. Permanent Secretary Foreign Affairs,
- iii. Permanent Secretary Defence
- iv. Permanent Secretary Internal Security as Secretary
- v. Director of Military Intelligence Deputy
- vi. Director of National Intelligence Service
- vii. Deputy Commissioner of Police

3. Defence Council and Command in the Defence Forces

3.1 Defence Council

S. 274 (2) establishes a Defence Forces Council chaired by the President. It is suggested that the name remain Defence Council which is answerable to the Commander-in-Chief for overall control and direction of the Defence Forces. Accordingly, its composition should ideally reflect this accountability and remain as follows-

- i. Minister of Defence – Chairman
- ii. Chief of Defence Forces
- iii. Vice Chief of Defence Forces
- iv. Commander Kenya Army
- v. Commander Kenya Air force
Commander Kenya Navy

- vi. Permanent Secretary Defence - Secretary

The powers and functions of the Defence Council and all the powers it has would be set out in the Act of Parliament governing the management of the Defence Forces. The attempt to do this in Section 275 (6) and (7) of the Draft Constitution is inappropriate as it states only a few details of powers, duties and functions and leaves out many others.

3.2 Command in the Defence Forces

This should be the accurate heading for Section 275. " Commanding Officer" the heading used in the draft is a specific legal term for officers commanding formations at regulated levels of command well below Service Commanders. It will be appropriate to set out Command in the Defence Forces in this part as follows-

- i. The President as commander-in - chief has operational command to deploy Defence Forces both in Kenya and outside Kenya and perform . other functions as provided by an Act of Parliament
- ii. The Minister of Defence is responsible for Government Policy on Defence.
- iii. The Defence Council is responsible for overall control and direction of the Defence Forces subject to the powers of command of the C-in-C.
- iv. The Chief of Defence Forces is the professional head of the Defence Forces and principal military adviser to the President and Government on Defence matters. Subject to the powers of command of the C- in -C and the general direction of the Defence Council he has command

and general superintendence of the Defence Forces.

- v. The Service Commanders are responsible for command and administration of their respective services subject to the command and directions of the Chief of Defence Forces.

3.3 Appointment of Chief of Defence Forces and Service Commanders

3.3.1 The Chief of Defence Forces

The appointment of the Chief of Defence Forces is ideally to be made by the President. Such consultation as he may undertake in making the appointment is informal as it takes into account seniority, suitability for the command appointment as well as established traditions and the best interests of national security and the military mission.

It is not appropriate to include the requirement for consultation with the National Security Council.

The position of the Chief of Defence Forces does not require security of tenure provisions. However, it should be included in the Constitutional Officers Statute only for remuneration privileges purposes.

3.3.2 Service Commanders

The appointment of Service Commanders by the President should similarly not be formally required to include

consultation or recommendations.

4. Other Aspects

The Bill of Rights (Chapter 5) contains various freedoms which the Defence Forces may find necessary to subject to permitted limitations. In this regard, Section 31 together with the relevant sections containing those specified freedoms should carry a proviso that the rights to life, opinion, expression, association, assembly/picketing, movement and residence and the protections against discrimination and forced labour may be limited in respect of members of the Defence Forces to safeguard discipline and order as well as the fulfillment of the military mission especially during active service in emergencies and war.

5. Conclusion

Defence and security are a major National Institutional pillar helping to guarantee organised development and societal progress. Disciplined and professional Defence Forces are capable of offering this guarantee. A Constitution provides a very sound basis for that discipline and professionalism. DOD is confident that our Defence Forces will uphold the dignity of the country's military Institution, its traditions and national character through this collective recognition of Defence and national security as a distinct constitutional principle which the draft Constitution seeks to do.

PROPOSALS OF INTENDED CHANGES IN THE KENYA CORRECTIONAL SERVICES TO THE DRAFT CONSTITUTION

Abraham M. Kamakil

1. General Comments

We warmly appreciate your inclusion of this department throughout all stages of the constitution review process. We are privileged in having been short-listed to discuss further our proposals to the constitution review commission. On behalf of the Kenya Prisons Service, and on my own behalf I wish to express our sincere gratitude to your commission for considering most of our proposals for the new Constitution of Kenya.

Most prominently is the review to scrap capital and corporal punishments, which were indeed dehumanizing and outdated.

After perusal of the short version of the draft report of the Constitution of Kenya Review on the Kenya Correctional Services we have identified a few areas that need elaboration and verification and amended them accordingly subject to your guidance especially in chapter fourteen and nine respectively.

2. Chapter 14 Part III - Kenya Correctional Services - Appointment of Director General of the Kenya Correctional Services

We had proposed to change the official title of Commissioner of Prisons to Director General of Correctional Services and not Director of Correctional Services as indicated in the Draft Bill

2.1 Professional Correctional Services Members.

At the moment the few professional officers working in Kenya Prisons are only seconded from other Ministries and this has created conflict of interests.

As the department is moving away from addressing crime through punitive measures and emphasizing on the correction of the offenders it is important for the professionals to work directly under the jurisdiction of the Director General of the Kenya Correctional Services.

The use of Professionals is in line with other Correctional Services which have successful rehabilitation programs, in countries such as South Africa, Namibia, Uganda and Cameroon among others. Similarly, other members of the disciplined forces in our Country employ their own professionals who are relevant to their role e.g. Armed Forces have full fledged professionals, hospitals manned by their medical personnel, their own lawyers and many professions in various fields. The Kenya Police have their own medical personnel - lawyers, pathologists including their own pilots.

3. Appointment of Director General of The Kenya Correctional Services

We propose that Section 269(1) should create the position of Director General of

Correctional Services.

3.1 Appointment of Director General of Correctional Services

Appointment of the Director General of Correctional Services should be done by the President after approval by Parliament and to hold office for a term of ten years.

To Section 269 (3) we propose that, a person considered for the appointment of the Director General of the Correctional Services should have: -

- (a) Served in the Correctional Services for at least 15 years, and
- (b) Has a degree in Social Sciences issued from a recognized University or its equivalent relevant to Correctional Services, or
- (c) Has proven record of intellectual and working ability as demonstrated through the Correctional Services career.

4. Probation and After Care Services

We propose that Probation Services be a unit within the Correctional Services under a senior deputy Director. This will be in order to ensure successful integration of the prisoner into society as the two duties of the two departments are closely related. This has worked well in Japan, Britain and Uganda among others.

4.1 Separation of Remands from Convicted inmates

Of the 40,000 prisoners in prisons, 40% are remands. They incur great costs in terms of transportation and accommodation

For efficient running of the Correctional Services we propose that:-

- i. The remand services be ran as an autonomous body with provisions for finances and personnel as a separate entity but under the Director General of the Correctional Services.
- ii. A time limit should be set in which a remand prisoner can stay in custody
- iii. The period served by remands should be considered when sentencing subject to the weight of the offence committed.
- iv. Arrangements could be put in place for fines to be paid in installments.

5. Management of the Kenya Correctional Services

The Kenya Correctional Services shall be under the command of the Director General of Correctional Services who shall be assisted by three senior deputy Directors, namely senior deputy Director Administration, senior deputy Director of Professional Services and senior deputy Director Probation and After Care Services.

They will be charged respectively to manage;

- (a) Administration
 - Rehabilitation programs, e.g. training of prisoners.
 - Management of remand homes
 - Management of Correctional Service staff
- (b) Professional Services Effective administration of Professional Personnel:
 - Medical staff,
 - Legal Staff
 - Psychologists,

- Psychiatrists,
 - Counsellors,
 - Accountants among others.
- (c) The Probation and after Care Services: Effective administration of: -
- Re-integration of prisoners into the community after release to complete the rehabilitation process.
 - Supervisory role in non-custodial services.
 - Provision of courts with pre-trial reports
 - Provision of reports for the board of review of prisoners sentences.
 - Implementation of parole.

6. Other Recommendations For Consideration

6.1 *Chapter Nine sec. 211 (2) — Prerogative of Mercy*

We propose that the Director General of Correctional Services should be a member of the prerogative of mercy committee to give advisory services in regards to persons

held in custody and appearing before the committee.

6.2 *Retirement age for Correctional Officers*

The Contemporary Internationally accepted retirement age for Correctional Officers is 60 years. In Japan whose Correctional Services are recognized under the UN Standard Minimum rules, the retirement age is 65 years, in UK too it is 65 years. In India it is 62 years. Correctional Service is a professional service which requires training and wide experience on the job. This takes along time to achieve.

We therefore propose that the compulsory retirement age for Correctional Officers be raised to 60 years while voluntary retirement age be 55 years.

Finally, I wish to commend the Constitution of Kenya Review Commission for the achievement accomplished so far.

SECURITY SERVICES AND THE CONSTITUTION AN ANALYSIS AND REVIEW OF THE CONSTITUTION OF KENYA DRAFT BILL 2002

National Security Intelligence Service

follows:

1. Introduction

Chapter 15 of the Draft Bill entitled The Defence Forces and National Security deals with the establishment of the National Security Council, the defence council and defence forces while at the same time stating the principles and objects of defence and National Security.

Our Paper will concentrate on National security and especially as it relates to the place of the Intelligence Service in the constitution and its role in society. From our discussion of the above we shall draw conclusions and make suggestions for improvement on chapter 15 of the draft bill.

2. The Role of intelligence in a Democracy.

Intelligence services are required in a democracy for the best interest of society, aiming to sustain the conditions in which citizens' rights and freedoms can be fully exercised. They must be part of constitutional order and be bound by laws of the land. Intelligence services have a legitimate role in the protection and development of every society.

Principally, Intelligence services together with other security apparatus support policy makers with timely and meaningful information to assist in decision-making. We see the role of intelligence organization in a democracy being summarized as

- (i) Safeguarding the Constitution
- (ii) Promoting the interrelated elements of security, stability, co-operation and development, both within the society and in relation to the society
- (iii) Upholding the individual rights enunciated in the Constitution
- (iv) Intensifying collection efforts in crime in support of law enforcement services.
- (v) Promoting the society's ability to face foreign and domestic threats and to enhance its competitiveness in a dynamic world.
- (vi) Assisting the defence forces in the collection of tactical and combat intelligence.

We have perused the constitutions of other countries and noted that the establishment of intelligence organs has in most constitutional orders been left to the legislature. However countries like South Africa and Uganda have made provisions for the establishment of the intelligence in their constitutions.

3. National Security Intelligence Service.

3.1 Current establishment

The service is currently established under an Act of Parliament, Act no. 11 of 1998.

Under the Act, the following provisions are made:

- (i) The service is established with the object of detecting and identifying threats and potential threats to the security of Kenya both from within and without by investigating, gathering, collating, interpreting, storing and disseminating objective and timely intelligence to the President and other policy makers.
- (ii) The Act creates the office of the Director General who is appointed by the President for a term of 5 years renewable once. The Director General has security of tenure and is designated the principal advisor to the President on National Security and intelligence matters. The Director General is responsible to the President for the compliance to all laws by all service officers.
- (iii) Two divisions of the service are created Internal and External-both under Directors of Intelligence, responsible for domestic and foreign intelligence respectively. However, the Director General is empowered to create other Divisions of the Service.
- (iv) Officers of the service do not have arrest powers and are expressly prohibited from engaging in the activities of any political party or subjecting any person to torture. Before any entry, search and seizure, officers must apply for a warrant from the High Court.
- (v) National Security Intelligence Council is established, composed of ministers for Security, Finance, Foreign affairs and the Attorney

General. This council oversees the functions of the service.

- (vi) There is established a complaints commission whose object is to inquire into complaints against officers.

3.2 The Intelligence Service and the Draft Bill

The draft constitution imposes a clear duty on the state and its organs to protect the security of citizens. According to "the people's choice" the commissioners noted that the security services consist of the Police (including the Administration police), Military forces, and the Intelligence service. They rightly observed that these bodies are almost invisible in the existing constitution.

The commission further noted the existence of civilian oversight of security services either through law (as with the intelligence) or practice (as with the Military).

For the intelligence service they recommended;

- Legislation to provide for a committee of parliamentarians, not including ministers which include members of both Government and opposition and which reviews the work of the intelligence service and its budget and reports to parliament. Such Act should provide for the maximum co-operation of the intelligence services with the committee while requiring secrecy where necessary.
- The legislation was also required to provide for an independent complaints mechanism.

In departure of the proposals in the people's

choice, the Draft Bill does not mention the Intelligence service other than in passing where the Director (Director General) National Security Intelligence Service is mentioned as a member of the National Security Council. This denies the service visibility or a constitutional framework to base its existence.

It is our proposal therefore that NSIS be established in the constitution as per the following proposals contained in appendix 1. We prefer proposal 1. The chairman. Public Service Commission through his earlier presentation on Government departments under his docket proposed the entrenchment of the service in the constitution and the establishment of the office of the Director General. However, this representation was not reflected in the current Draft bill.

The idea of a parliamentary oversight is the practice in established democracies though such a body must (again, as happens in older democracies) act within the parameters of confidentiality. This oversight body is recommended in our case and will enable the service to meet the principle of political neutrality, meet the democratic requirements of transparency and accountability to the people yet be able to function efficiently.

4. General Audit of the Draft Bill

We have perused the Draft bill and have the following comments to make generally:

4.1 Composition of the National Security Council

The report of the commissioners (“The people’s Choice) lists as one of the principles that apply to all Security Organs the principle of Civilian control. To give effect to this principle we propose that the

National Security council should include the following; -

- Minister for Foreign Affairs should be a member since security borders on international Relations
- Minister for Finance should be a member to advice on financial implications on any security decisions.
- National Security Council in the discharge of its duties should be advised by the Defence Council, the National Security Intelligence Council and the Internal Security Council.
- The Director General, National Security Intelligence Service, the Chief of General Staff and the Commissioner of Police should be members of the National Security Council in advisory capacity. Director for correctional services need not be member.
- Minister in charge of Internal security should be a member.

4.2 Implementation

Implementation of this constitution will be very costly and therefore financial provisions should make for that propose.

There is a constitution commission, which will ensure the implementation of the constitution. It may entail the following; -

- Circulation of the constitution in
- English and translated versions for better understanding
- To the people's sensitization and awareness

**5. Appendix 1
Suggested Amendments to
Chapter 15 of the Constitution of
the Republic of Kenya Draft Bill**

Amend Article 272(l)(k) to read;
(k) Director General of National Security
Intelligence Service.

5.1 Proposal I

Insert Article 275A to read;
Part II- National Security Intelligence
Service

Principles and Objectives

275A(1) The primary Object of the National
Security Intelligence Service (the service)
shall be to provide Intelligence that is
timely, objective and independent of
Political considerations to-

- (a) The President
- (b) The Prime Minister
- (c) The Cabinet
- (d) The National Security Council
- (e) Chief of General staff and Service
Commanders

(f) Government Ministries and Departments
(2) The service shall be responsible for
Security intelligence and Counter-
intelligence to enhance national security,
defend the Constitution, the interests of the
State and the well-being of the people of
Kenya

(3) In furtherance of the above objects the
Service shall Investigate, gather, store,
evaluate, correlate, interpret, disseminate
information, whether inside or outside
Kenya, for purposes of detecting and
identifying any threats or potential threats to
the Security of Kenya

(4) The Service shall in its functions observe
respect for human rights and fundamental
freedoms and the rule of law.

**Establishment of the National Security
Intelligence Service**

275B (1) There is established a service to be
known as the National Security Intelligence
Service.

(2) The Service shall be organized and
administered in such manner and shall
exercise such functions as Parliament may
by law prescribe.

**Appointment of the Director-General of
the National Security Intelligence Service.**

275C(1) There shall be a Director- General
of the Service who shall be the principal
advisor to the President, Prime Minister and
Government on matters relating to national
security and intelligence.

(2) The Director General shall be
appointed by the President in such manner
as shall be prescribed by Parliament.

(3) The Director General shall hold
office on such terms as may be by law
prescribed by Parliament.

5.2 Proposal II

Insert Article 275A to read;
Part II-Intelligence Services

275A(1) Parliament shall by law establish
an intelligence Service and shall prescribe
its composition and functions.

(2) No intelligence Service, other than any
intelligence division of the Defence force or
the Police Service, shall be established
except by or under an Act of Parliament.

(3) Any intelligence Service shall in its
functions observe respect for human rights
and fundamental freedoms and the rule of
law.

CHAPTER ELEVEN – LAND AND PROPERTY; AND CHAPTER TWELVE – ENVIRONMENT AND NATURAL RESOURCES

Prof. C.O. Okidi

1. Introduction

We understand the audit exercise to mean a systematic review of the text in the order of their presentation and without any attempt to propose reorganization. That would be unnecessary and un-called for in a document which has enjoyed creative and detailed work, over considerable time, as the Draft Bill. The purpose of the audit is not to find any wrong or improper presentation. Rather, it is to ascertain if there are aspects of the Draft Bill which can be improved or apparent gaps which could be filled.

For these reasons, our approach to the audit and review exercise will proceed on Article-by-Article basis, within Chapters Eleven and Twelve respectively. Through that process, we shall:

- (a) propose any changes or clarification;
- (b) propose provisions which fill apparent gaps; and
- (c) point out any possible changes or modification in Articles outside the two Chapters and which could improve internal consistency in the text.

It should be noted that this commentator presented to the CKRC a written Memorandum entitled “Environment, Natural Resources and Sustainable Development in Kenya’s Constitution-Making. A revised version taking into account some of the questions raised during the presentation, was submitted to the Commission. The current submission must

therefore be brief and targeted.

2. Land and Property

(i) Land policy framework is a critical issue in Kenya as it affects overall sustainable development, as well as national security. For about 15 years from 1979, each successive National Development Plan proposed the creation of a National Land Commission and a Land Policy. Presumably because of the sensitive nature of the subject of land policy, nothing was done.

(ii) We suspect that the provision which requires the State to “define and keep *constantly* under review ...” is so open that the sensitive obligation may not be observed effectively. Specific periodicity should be included. A review every twenty years might be reasonable. A waiver or extension by Parliament may be added as a caveat but only on specific terms. There may be no review within reasonable duration unless the State is given a timeframe. “*Constantly*” is not a timeframe. The draft has done well to provide a timeframe of 2 years for initial review (Art. 235(4)). It would do better to prescribe a timeframe for subsequent reviews. This should be streamlined with an amendment to Article 237(c) and (d), where “from time to time” provision is not helpful at all.

Article 234(2)(f) identifies “the territorial sea and sea-bed” as constituting part of public land of Kenya. While the domain of

territorial sea is clear in law, that of *sea-bed* as such, is not. It may be accurate to refer to the territorial sea and the sea-bed *up to the end of the Exclusive Economic Zone as defined in First Schedule to this Constitution*".

The problem of the "... spontaneous settlement communities in urban areas" is one of the most delicate issues for public order in Kenya. It has been handled badly, as discussed in the detailed Memorandum of February 2002. We propose that while their resettlement is being organized as required by Article 235(4)(vii), the communities should be protected by the Constitution. The Constitution should specify that their removal should be subject to *due process* of the law in order to criminalize the cruel, brutal and disorderly practice of their forced removal in the past. Even if one was to argue that the settlement was illegal in the first place, we must remember that thieves and robbers enjoy the right to due process of the law. Mob justice has never been accepted as legitimate practice in civilized societies and this Constitution must not countenance it by failing to protect well-known victims.

The practice of acquisition of land for public interest under Land Acquisition Act (Cap 295 Laws of Kenya) and similar laws elsewhere, have led to inequities as the calculation of financial compensation are out of touch with realities. The funds are hardly sufficient to purchase land elsewhere. Eventually the displaced people end up poor and landless. If, as the State assumes, land can be purchased or otherwise accessed elsewhere, then let the State obtain it and provide compensation on land-for-land basis. The old assumption that the "development" work, for which the

displacement is effected, is important work and is important enough to justify suffering inflicted on a section of the population is manifest injustice not to be sanctioned in a constitution. The constitution should require land-for-land compensation.

Establishment of the National Land Commission in the Constitution (Art 238(i)) is welcome, given our submission in para 7, above. But as we are aware of the reluctance of the national policy to establish such a Commission, it is imperative that specific guidelines be provided for its organization, functions and powers under Art.237(3). A mischievous parliament may emasculate the Commission and render it ineffective in the discharge of its all-important task.

3. Environment And Natural Resources

Enunciation of principles of sustainable development to be taken into account in protection and exploitation of land and natural resources is laudable. However, we find the mention of only two principles (Article 239(2)(a) and (b)) to be incomplete and inadequate. At least six other principles, also in this commentator's January 2002 Memorandum, are forcefully pertinent. These are:

- Polluter pays principle
- Inter-generational equity
- The precautionary approach, comprising precautionary principle and environmental impact assessment
- That environmental exigencies must be integrated into development planning and management
- Essentials of international cooperation in management of the environment
- Imperative of legal and institutional

mechanisms, for each identified function.

We note that free access to information on environmental situation is included in the Bill of Rights under Article 63(i)(c). But access to information is a twin component of public participation and its *condition sine qua non*. It would be pertinent if it is coupled under Article 239(2)(a), even though a broad provision exists in Article 47

Question: Shall we ponder the context within which the principles can be applied in law? Would they only be significant in interpretation of the scope of rights and duties? Or do they carry actionable obligations?

Entrenchment of the National Environment Management Commission in the Constitution is a welcome alternative to the office of the Director General, under Environmental Management and Co-ordination Act, 1999. This will require realignment of the institutional structure and functions under the Act to bring it in line with the Commission. But apart from para (2), the functions of the Commission are essentially advisory, which does not justify the constitutional status. The provision of Article 240(2) which purportedly empower the Commission to supervise and coordinate implementation is overly general and vague. For instance, the Commission is not specifically authorized, much less required, to establish agencies, as its essential components, to supervise and coordinate the implementation of all rules and policies relating to the environment. It is that kind of provision which would provide links to the institutional structure under the 1999 Act, however modified.

The weakness in the role of the National Environment Commission should be read with the provisions of Article 241 which deal with enforcement of environmental rights. Given the level of education and economic capacity of Kenyans today, and in the foreseeable future, it is unrealistic to expect that they will, as individuals or groups, pursue the enforcement of the environmental rights. This is why in the 1999 framework law there is a provision for a Complaints Committee to supplement the enforcement powers of the Director General.

It would be manifestly idle for the Constitution to make provisions as in Article 241 without an institution with corresponding competence to ensure their enforcement. The powers of the National Environment Commission do not extend that far. And if the Commission is supposed to perform such a function then it should be explicitly stated. Let it be clear if the office of the Public Defender, established under Article 210, is supposed to include an Environmental Defender.

At the level of detail, see Article 241(1) where the statement "... *in relation to that person*" must be deleted. It contradicts the provision of para (3) of that Article which expresses the modern liberal *locus standi* provision. The latter is preferred as being consistent with the existing Section 3(4) of the 1999 framework environmental law.

The provision of Article 242 which requires Parliament to enact legislation seem somewhat idle because it does not provide any direction or guidelines. It would have been more useful if, for instance, it specifies that parliament shall enact *legislation which promote sound environmental management and sustainable social and economic*

development and then proceed to provide specific guidelines or requirements. Such guidelines and requirements were presented in Section VI of the Memorandum of February 2002. It is unnecessary to reproduce *in extenso* from a document already in the records of CKRC, and which presented arguments and facts in historical perspective.

It will be sufficient to present our proposal to the effect that Parliament shall review, and where appropriate, ratify by two-thirds majority, any concession, contract or other planned transactions for exploitation of Kenya's natural resources, provided that conditions for sound environmental management and sustainable social and economic development are met.

For the determination of sound environmental management and sustainable economic development, the proposal for determination of sound environmental management and sustainable social and economic development shall incorporate contribution of the transaction to the following for review and assessment by Parliament:

- (a) industrial development plan, showing how the planned activity will contribute to Kenya's industrial development. This should exclude chances of exporting raw materials without value added;
- (b) socio-economic development plan: showing how the proceeds will be used to promote sustainable socio-economic development;
- (c) revenue management plan for the proceeds from the transaction shall be managed to promote sustainable development;
- (d) resettlement plan, showing the

arrangement for resettlement of population to be displaced by the project;

- (e) environmental impact assessment, which will have been prepared in accordance with the 1999 Act, anyway, but to be seen in the composite context;
- (f) environmental management plan: to show how environmental management will be conducted in the project area on a continuous basis; and
- (g) environmental restoration plan, to show how the area affected by the activity will be rehabilitated or restored.

The Constitution should add an explicit provision that all concessions, contracts and transactions which are in effect before this Constitution comes into force shall, within two years from that date, submit similar reports to express their commitment to comply with the seven requirements.

The foregoing proposals should be considered in view of the significance of national natural resources and the history of their abuse where clear conditions of their management to promote sustainable development, are not in place. Kenya should benefit from the rich insights and experience available to avoid trends towards abuse outlined in the February Memorandum. More recently there have been further examples from minerals rich Angola where revenue from national revenue, to the tune of US\$1billion was easily lost, at ago, in a graft (*Saturday Nation* 19.10.2002 p.27). More horrifying and controversial stories are currently coming out of the Democratic Republic of Congo. It is axiomatic that where there is no systematic legal regime

the chances of abuse and conflict are inevitable.

In Kenya setting the question of permit and security for exploitation of titanium at the Coast still rages with controversies, despite the EIA provision in the 1999 framework environmental law. It underscores how inadequate EIA actually is for promotion of sustainable development. Hon. Mwai Kibaki, one of the leading contenders to presidency in the current succession campaigns, was reported to have declared that if elected, his government would not respect any contract which does not ensure that proceeds from the titanium will be used to properly address socio-economic plight of the local population (*Saturday Nation* 12.10.2002 p.3). Three days later, the Government announced that they had not taken any decision to licence the exploitation of the titanium by Tiomin Mining Company (*East African Standard* 15.10.200 p.32).

We submit that the concern of investors is to avoid uncertainty and lack of clarity in the law. The proposal in Para. 18 above specifies, like no other law, the range of legal requirements and in a constitution. Investors would also welcome transparency in information required and authority of parliament which would reduce opportunity for graft. The requirements for EIA have not provided that certainty.

What we have seen is the somewhat hesitant legal suits which attempt to handle EIA alongside with vague provisions on resettlement. The danger is that these will lead to bad cases and bad decisions creating bad precedents which will, in turn, undermine the legal order of environment, sustainable development and security of

tenure for investors. The remedy is to present the investors and the government with the specific guidelines and criteria; let them do what some people may consider as difficult work and settle for an investment environment where all parties are satisfied and the tenure is secured.

Paragraph 18 above provides an aspect of modern environmental law which is missing from the current draft. Old style environmental law, at the time U.N. General Assembly convened Stockholm Conference, knew provisions for (i) enforceable rights and duties, in order to prevent deleterious effects; (ii) penal sanctions for violation; and (iii) institutional mechanism for enforcement, primarily the attorneys-general and the courts of law. The current Draft Bill primarily covers the three aspects with the additional provision of a passive and ineffective National Environment Commission.

Recall now that developing countries compelled the organizers of the Stockholm Conference to introduce the Founex Report which added planning and management of natural resources and the environment in order to promote development. This philosophy became the foundation for Brundtland Report and sustainable development which are the bedrock of Rio Principles and Agenda 21. It is the acceptance of these principles that have led to the popularity of environment and sustainable development among developing countries like Kenya. This commentator has simply placed the proposal in the context of constitution-making for Kenya and gave precedents in the February Memorandum. It will be recalled that partial application of such law have been witnessed in Chad and Ghana. To reject the proposal in paragraph

18 above is to drag Kenya to the pre-Stockholm era, where many countries belong, and to miss an opportunity avoiding continued conflicts, poverty and unregulated plunder of natural resources.

This commentator has heard it argued that we should avoid overloading the Constitution. Proponents of that argument have not, however, demonstrated the “axle-load limit” of a constitution. Contents of a constitution should be determined by necessity rather than limits on number of pages. Rational management of environment and natural resources to ensure sustainable development, as a new area of intellectual and management thought, should be treated generously in the Constitution.

4. Other Issues

There are at least two other issues of critical concern to this reviewer but which were not readily identified in the text. They may be covered but we did not have enough time for a detailed study to see the scope of coverage.

4.1 Establishment and Governance of Public Universities

Experience in Kenyan public universities particularly since 1980’s shows the frailty of relying on [existing] statutes. Constitutional provision should cover: (a) conditions for establishment; (b) appointment or

designation of Chancellors and Vice Chancellors; and (c) function and tenure of chancellors and vice-chancellors. Provisions should also be made to make vice chancellors accountable to the senate. Finally, consideration should be given to a constitutional base to a common university system but which does not undermine completion.

4.2 Conduct of Foreign Relations

The present reviewer was particularly keen to see the provisions on the role of parliament in treaty-making process. No such provision is under the Role of Parliament in Article 102. Possibly, it is a role reserved for the National Council, as is the case with the Upper House in the U.S. which we have not reviewed. It will be recalled that the February 2002 Memorandum dealt at length with the making of environmental agreements and offered proposals which can be broadened to treaties in general. Our concern is that conduct of foreign relations is a prominent theme which deserved a Chapter of its own.

DRAFT BILL: INITIAL REFLECTIONS

Prof. Wangari Maathai

1. Overview of the Draft

First, I want to congratulate the Commission and acknowledge with much appreciation this excellent piece of work in the form of the Draft Bill. It is obvious that they read many documents and sorted out many issues. It is a major accomplishment that they produced, with the time, such an all embracing, easy to read document, which reflects the views of a wide range of Kenyans.

The second observation is that the Draft Constitution Bill reveals a strong undercurrent of a people, who wrote the constitution with a strong negative experience in the background. This background is of a people, who have been living under tension, anger, frustration and anxiety. They are a people with a feeling of insecurity, deep mistrust of each other, with lack of faith in government institutions and leaders. They have suffered and do not wish to trust their leaders again. They feel a need to be rescued from a corrupt and oppressive system, which abused their power because there was not adequate checks and balances and so they almost wish to stifle the government.

Their leaders pillaged their resources and must be stopped. They have experienced deception, they suffer a culture of fear and corrupt practices and alienation. There is a society which ignored children, women and other groups perceived marginalized and therefore needing special protection from those perceived to have marginalized and forgotten them, as if they did not have a responsibility to themselves. There is fear of the strong and the populous, which in 1963 resulted in the formation of a political party for the perceived small communities. Politicians have used that fear to create a mental division between Kenyans. That may

be why they feel the need for an Upper House, or must retain political districts and constituencies, rather than provide broad principles, which will guide future state managers, or feel the need to manage Nairobi with special terms.

The strong arm of lobbyists by special interest groups is visible and tends to want to ensure that every detail about their welfare is taken care of. There is not a general feeling that we can create a constitution, which can protect everybody. Yet a constitution such as the USA one, was created when black people were slaves and therefore not in the minds of the founding fathers. But today, black people use it to claim their rights. Can't we do the same without having a sentence about marginalized groups in almost every article! Suppose future wisdom dictates otherwise?

With that state of mind, Kenyans appear to have reacted strongly and want everything written down in the constitution, wanting to have every detail taken care of. It is as if they fear that if it is not written down, it will not be respected by the authority.

The net result of that state of mind is that while some sections of the draft are beautifully crafted, some sections sometimes go into such details as to begin to look like a working manual rather than a constitution intended to provide broad principles to be interpreted by those people entrusted with it and who need to interpret the law with wisdom, fairness, openness and Justice. The constitution begins to look longer than anticipated especially when one wishes it were a small document resembling a pocketbook.

2. Preamble

Recognize the freedom fighters and the struggle for freedom. Capture the fact that ours has been a long struggle to freedom. The struggle goes back to when colonialists entered our country, during the colonial period and during the post colonial period when our people struggled against oppressive, exploitative and dictatorial regimes.

To the 3rd paragraph: remove the word "social" to have unqualified justice

3. Chapter one: Sovereignty of the People and Supremacy of the Constitutions.

Article 1 (3) (d): To whom are the Commissions accountable? (6) Matters or materials" Which? Commonwealth law?

Article 5. (1) (c): What does the word African embrace? Race? Black people of the continent of Africa? Indigenous black communities? In (d) reference is to religious character!

4. Chapter two: The Republic

Article 6. (2): This is unachievable in a country where local languages are largely ignored. In Courts of law citizens unable to express themselves in English and Kiswahili are worse of than the dumb and deaf (see article?). About 100 years of criminalization and trivialization of indigenous languages, during which time all "important, educated decision-makers must speak English, makes the local languages a non-issue even to those who suffer because they cannot speak

English or Kiswahili with competence and confidence). They too accept that not to speak the two languages, especially English, is something to feel ashamed about because it reflects their "stupid" status. It nurtures an inferiority complex of our national psyche.

Article 9. (3) & 63A (and there is no 63B!) Language;. Using similar criteria as those used in South Africa, the constitution should recognize the indigenous languages, whose contemptuous fate has been due to criminalization and trivialization by the colonial educational system of anything African. Both English and Kiswahili create two distinct classes: an elitist class, which communicates in English and a subservient class, which communicates in Kiswahili. Those citizens who speak neither of the languages are completely alienated from state affairs and form the largest third class. To such, Kenya is a foreign country, which they access only through interpreters! They are completely alienated and often poor and powerless. They are easy victims of political manipulation since their politicians interpret to them what the rest of Kenyans are up to and advice them how they should react towards their perceived, "enemies and competitors". To embrace them, they must hear, read and understand in their own language, what their sovereign state says to them.

Article 10. (3) Including Satanism? Tolerance of uncontrolled mushrooming of religions, which are inherently foreign, can be divisive and destructive to the spiritual psyche of citizens at this stage of our development. Legal guidance is needed. Are secret societies allowed?

Article 13. The Jamhuri and Madaraka Day should be combined to one day to mark the

transition from colonial to independent state. A day to honour heroes of freedom through the ages and across ethnic lines should be identified to give citizens a sense of pride and confidence. Also, to appreciate the struggle of their forefathers towards self liberation from tyranny of all sorts.

5. Chapter three: National goals, values and principles

Article 14. (14) Shelter "impossible without looking into interest rates in housing finances and into land policy"... a clean "and healthy" environment)....

Article (17)... how about committing to domesticating international agreements, to which Kenya attaches its signature?

Article 15. (1)Not achievable unless indigenous languages are adopted and therefore utilized along with foreign languages (English and Kiswahili).

Clause (k) Conserve and protect the environment

Clause (m) ... "desist"..... Is that all we can do, to desist? And if we don't?

Clause (n) what are we really called to do here? This is a national constitution! Do we need these duties stipulated or should they be coded in a general principle? Is it reflected in other constitutions? Or are we reacting to our own current situations?

Clause (2) Why would we call non-citizens to share our values? Would they break the law if they did not? Do we stop them practicing their own values?

6. Chapter four: Citizenship

Article 17. (1) We know of cases of people who, through corruption, paid to acquire Kenyan passports. Such cases should not be

swept under the carpet. They should first go through the "truth Commission", have the corrupt practices dealt with and then have them apply following the normal channels. Acquisition of citizenship through corrupt practices is not any less criminal than acquiring plots of land through corrupt practices. If transitional justice requires that stolen property be first returned to the people, "stolen" passports should also first be returned. The only way that we can stop these forms of corruption is if people know that if they are caught, they face dire consequences. Otherwise, new leaders can always sweep mistakes of previous leaders under the carpet and start all over again after every five years! If so, we need not even bother write a new constitution because the old one is just fine.

Clause (2) How far back do we want to push this allowance? This is can be misused.

Article 20. 3 years is too short. Such a person should be given permanent residency. Citizenship Should take at least 10-15 years. Let us not create a loophole for misuse or have a category of people in mind as we enact the law.

Article 21.not less than 15-20 years... This should be longer than in article 20.

Article 22. ...This provision is liable for misuse. Words like "appears" are too vague for a constitutional document.

Article 23. (1) This law is made with some people in mind, especially with the new policies in US where people get Green Cards or where people go out to work in foreign countries, etc. But it is liable to misuse. Perhaps we should adopt the PIN (Person of Indian Nation) idea, where

people from India can always go back to India to live or invest without any hassle whatsoever, even when they hold passports from other countries but do not hold an Indian passport.

Clause (2) And (3) Liable to misuse. One would hope that Kenyan citizenship is a valued status. We want to avoid the impression that Kenya is one place where citizenship is cheap and valueless.

Article 26. Should this requirement not be in the law to be enacted by Parliament rather than be in the constitution? This powers are stipulated in article 27.

Article 28. Why do we need to stipulate in the constitution that the person should be of "moral standing"? Is there anytime, when public officers should be expected not to be?

7. Chapter five: The Bill of Rights

Article 34. (1) Also, discrimination against the status of health e.g. If with HIV/AIDs

Article 37. (1) The term "parents" should be defined to ensure that we do not mean two men or two women (in a homosexual relationship where the partners adopt a child and become that child's "parents"). And what would we say about the African custom, where a woman "marries" another woman, for reasons very different from the western style homosexuality? Are such two women "Parents" Is this constitution trying to go too much into detail and therefore too restrictive for future interpretations, which will be guided by the situations of the future?

Article 38; (4) Can "parties" also mean parties of the same sex and therefore allow homosexual marriages?

Article 44: (4) Uncontrolled freedom to conduct Religious instructions in state-owned institutions can give rise to divisive competitions for space and influence. This is another example of too much instruction by the constitution, allowing no room for interpretation based on circumstances of the time and place. Again, Kenya is a multiethnic and multi-religious society but freedom should not be unguided.

Article 54. (1) There is concern that while property in general is entrenched in the draft constitution under the Bill of Rights, land despite the recognition of its significance to Kenyan Peoples' livelihood, is not explicitly entrenched in the Bill of Rights as a fundamental issue of concern. We recommend that land as a property be specifically mentioned here so that it is entrenched under the Bill of Rights.

Article 56. What do citizens do if the state does not provide social security assistance?

Article 57. ... health care. But where? In any hospital? Who takes care of the bill? the state?

Article 58.Education of what quality?

Article 59. (1) ... Visit interest rates and give guidance (2).... Does this apply to "slum" homes?

Article 60. What do the hungry do to the state? Or those who have no clean drinking water (61).

Article 62.what is reasonable? That is a vague word in a constitution.

Article 63. What will state do with Kenyatta Hospital (and others), who routinely ask for

the ethnic affiliation of patients? Remove those cards from government offices and institutions?

Article 63. (1) (a).... that is safe and healthy. It is the environment that must be safe and healthy.

Clause (b).... Conserved and protected. Remove word "reasonable" to avoid misinterpretation and a loophole.

(iii) secure ecologically sustainable development (the rest are a repeat)

Clause (c)about the quality of the environment

Environment should to come prior to 59-62 (all of which are basic needs, which are met by utilizing aspects of the environment)

Article 63. (1) (b) environments conserved and protected.... Remove reasonable and replace with "adequate".

Clause (c) Say "quality of the environment"

Clause (d) rather than restrict to article, say this constitution".

Article 64. (1) (a) Who decides that they are appropriate?

Clause (2) ... "must / should" not endeavour 68. (b) in this case the mother tongue?

Clause (g) ... "compelling reasons" is liable to misuse.

Article 70. (e) ...what form of education?, Reading materials or distance education?

Clause (g) Are these visits private or supervised? What is reasonable duration of frequency? Aren't such details too small for a constitution?

Article 71. The Kenya Gazette remains an exclusive document, largely unavailable, due to language and distribution, to

members of the public.

Article 75. (b) and (c) To what extent do we want to be governed by non-Kenyan laws, which have not been domesticated?

8. Chapter Six: Representation of the People

Article 79 (1) (b) word "ordinarily" is vague. The person should have that status. This section needs clarification. It is clumsy. If a person is a citizen and therefore qualifies to vote, what else do they need? Perhaps tax status is a better way of assessing eligibility.

Clause (c) (i) and (ii)...in practice this section does not apply because many voters do not possess land or residential buildings and often register in the constituency where their candidates are. Voting 80. (b) the ballot....; and presiding and counting officers carry no votes on their bodies.

Clause 86. (2) (b) (iv) the clause is not clear. Clause (4) What type of order? Not clear.

Article 90. (1) The national character.... If a minority community forms a political party, it should only be able to give it a national character if it produces more members through proportional representation. Otherwise, it would be denied its right to form a party.

Clause (2) (a) How can one judge that a party is "purely" founded on....? If there is democracy etc. such parties would die a natural death.

Clause (7) This requirement is reactionary. It should be said that audited statements should be available to members of the party. Publishing in newspapers can be very expensive.

Article 97. (3) The Any person. Why any person, it should be any member.

Article 98. (4) A member... .the seat. How is the resignation to be effected? written or verbal?

9. Chapter Seven: The Legislature

Article 103 (3) (m) this appointment should not be the business for the Legislature because it is a religious (Islamic) Judge and Court, having decided that the Republic be secular.

Article 105: (a) There is concern over the specific role of the National Council or Upper House. Also, over the heavy burden on the taxpayer in supporting two houses. But there may be merit in having an Elders' Council, perhaps to be the custodians of our national identity, sovereignty, national symbols etc., borders. Languages and culture, internal conflicts reconciliation etc.

Article 106: (1) (a) a specific number 70 should not be given in the constitution.

Clause (2) Constituencies should not be based on districts but rather on population and proportional/adequate representation, which will change in time.

Clause (3) (ii) Nairobi has a large population. It should be represented by a proportional number of women, rather than specify that it will be only two.

Article 107. (1) Elections... 210... and 90... Let us not give specific numbers in the constitution. This may change sooner than we want to go back and change the constitution.

Clause (5) (d) parties should not be forced to appoint. These positions reward party supporters and should not be used just to satisfy regional representation.

Article 108. (1) (e) It is impossible to be proficient in English with form four level of education. Why should we make way for sign language, which is spoken by only a few persons, and not for mother tongues, some of which are spoken by millions of citizens? Only about 10-20% of Kenyans speak proficient and competent English. Why do we alienate the 90-80%?

Article 109. (3) This affirmative action will remain effective for 10-15 years (time limit).

Article 111. (1) (b) this statement is not clear

Article 124. (2) (a) This advisory role could compromise the Supreme Court if an issue were later to arise and the Court's opinion were sought. The President should seek opinion from elsewhere, not sure where though! Attorney General? This is because the Supreme Court should only deal with the business of interpreting the law once established. An advisory role might bring about conflict of interest where the SC advises on a law and may later have to interpret it. If the Supreme Court had made a mistake when advising, it could try to cover up and therefore undermine the integrity of the Court.

Article 131. (1) (a) Is it really practicable to keep all our laws in Braille? Are the same going to be made available in local languages for the District and village councils? Local governments will not be effective if they will be conducted only in English and Kiswahili. We must introduce the local languages because that is the only way our country will have confidence and perhaps, even develop. No country has ever developed without its own language and

culture. And without a language there can be no culture. ;

Clause (3) At local level, laws should be in local languages so that the Wanjikus and the Atienos can read, in the language of the Bible!

Article 134. For the record, it is absurd that the sign language is given recognition, while African languages, spoken by more than 80% of our people are still sidelined, 40 years after independence! If they were used, suddenly, so many jobs would be created and millions of Kenyans would hear the affairs of their country in a language they understand. At the moment they have been turned into idiots, who hear but cannot understand.

Article 151. (5) (c) Since the Supreme Court will be the ultimate interpreter of law, seeking their advice on constitutional matters could compromise their action later, when citizens come to them over the same.

Article 152. (2) (b) as in 151.

Article 154. (2) (e) may not declare a state of emergency or declare a war (article 71).

Article 156. (1) (b) Not necessary to limit the upper age but subject candidate to a medical examination and make the results public.

Article 158. Any idea of seeking the opinion of the Supreme Courts, other than as a final resort is not good. 163. (3) (a) Chief justice should not be involved in the impeachment of the President because he is not elected. That is the matter for the Parliament.

7. Chapter 9: Judicial and Legal System

7.1 The Kadhis' Court

Article 199. The whole issue of Kadhis' Court contradicts the statement elsewhere that the republic will be secular and that all religions will be treated equally.

8. Chapter 10: Devolution of power

Article 213. (1) (a)self-governance... at all levels... participation of people and communities... is not possible unless people manage their affairs in their own language. Accepting own culture, the principle and the vehicle of which is language, gives the confidence needed to self-govern. No community is known to have empowered itself to development using a foreign language. But history is littered with great nations, which vanished when they were conquered and denied the right to practice their culture and especially speak their language.

Clause (f) If equitable, the constitution does not need to again refer to marginalized areas because equitable implies all areas are looked at with equal importance and value. In the past administration, even the largest of communities became marginalized and impoverished as their wealth and resources were looted by rulers from small (and therefore, presumed marginalized) communities.

Clause (4) The in their areas and "conservation" of the environment.

Article 215. (1) (a) use word "neighbourhood". Because some communities have been distanced from the traditional systems of self-governance due to colonial and provincial administration, there

is need for guidance on how to constitute a village or neighbourhood authority. Left alone, some will resort to the oppressive provincial administrative system, which they are used to. For the past 100 years, people have not shouldered responsibilities of governance. They have been governed through a very disempowering system!

Article 216. (2) The numbers of members of the authority should not be fixed in the constitution. However, as said elsewhere, this constitution is a reactionary document, highly influenced by our negative experience at the hands of an oppressive governance system. But we must be careful not to suggest ideals, which cannot be realized by the people we have at the moment and who will elect the administrators.

Article 218. Concern about political districts. They put financial burden to the taxpayer. If the citizens of those districts cannot sustain them, they are not viable and their burden should not be passed to other districts. Some are very small, even as little as one division (e.g. Sabot district). Why not adopt the original 42 districts?

Article 219. The provincial Council appears redundant. The need for both a district and a provincial government needs to be shown. Many people feel that the district government is enough to achieve the objective of being close to the people. The official languages at this level should be English, Kiswahili, local mother tongue and one other local language.

Article 224. The National... .major sources of revenue. It is important to define major in every district.

Article 225. (3) (c) The issue of marginalized areas and resources equalization for eternity should be addressed. All areas can focus on their resources and create wealth rather than be forever dependent on resources appropriated from other areas. Fairness is not taking from the rich to give to the poor, but rather enabling the poor to benefit from the opportunities created by the rich e.g. The poor taking up jobs created by the poor. Clause (3) delete this authority.

Article 226. (1) Define "substantial" to avoid the temptation of the past when district resources were deliberately siphoned out of the district. Especially when some districts are political.

9. Chapter 11-Land and Property

9.1 Land policy framework

Article 232. (1) Whereas we acknowledge the draft constitution provision for sustainable and productive management of land resources, we recommend that land tax should be provided as a means of incentive and disincentive against holding huge tracts of idle land (unproductive) for speculative purposes. This might replace the need for a ceiling on land owned by individual citizens. Clause (2) Kenya does not have any national policy on land in place. Therefore the draft should provide for the time frame within which the national land policy should be formulated in a national participatory manner and be adopted within a period of two years upon the enactment of the new constitution.

Clause (e) Here we need to specifically mention such areas as catchments, wetlands and agricultural land and especially that good agricultural land (e.g. Kiambu) are not

turned into a concrete jungle. Instead the city should grow towards drier areas.

Clause (f) What are "socially" acceptable management of land disputes.

Article 233. (3) The leasehold issue needs to be revisited. No automatic renewal of leases should be allowed and should not be allowed to own land under long leases. There is concern that certain areas (e.g. Karen, Laikipia etc, there should not be automatic renewal of leases) become land regulations going back to col... give city residents exclusive rights to residential areas. These are reserved and residents control who therein. Using such land laws, they discriminate against the locals. Also, with so much poverty among ...country could be bought by a few rich foreigners and held for ever under automatically renewable leaseholds...Laws need to be put in place to protect Kenyans against this type of possible displacement and creation of landless people who are referred to as squatters in their own country. Also, harmonize all the chapters to avoid contradiction between Chapter 5 Art. 54 and Chapter II Art. 233.

Art 234(1) All land in Kenya is community land. Some communities own it communally and some allow private ownership. Some community land has been declared public by the national government to be used for national affairs.

Clause (3): There is need to harmonise these land laws because the colonial government had a different agenda when it created these categories of land (a-d)

Clause (4) Same comment as in (3). The recommendations of the Njonjo Land Commission should be revisited.

9.2 Tenure of Land

Article 235(2)(a) and (b): the term community land and the special treatment given to the same is misleading because all land in Kenya is essentially community land and therefore no community should have special treatment with respect to any of its land. What the constitution should ensure is that all Kenyans have a basic right to the land and issue of land is guided by law.

Article 235 (4) (b) (iii): It is unacceptable that Parliament shall determine the cut-off date should be debated and determined by the National Constitutional Conference or better still, it should have been an issue of the National Referendum. Our reason for proposing so is that Kenya's colonial and post-colonial independent regimes enforced massive unjust exploitation of land in some areas (e.g. the Coast, Rift Valley provinces and elsewhere) leading to inequality and inadequate land access and tenure to support the privileges of the ruling elites. Redressing this injustice is at the heart of the development task that faces the new democratic nation under the new constitution. This cannot be left to the parliament, which shall still have the relics of the past regimes, many of who or whose parents were the beneficiaries of such land injustices.

Article 236. (2) (a) the list should include agriculture and food security, to protect land necessary for food production being converted into urban centers.

(b) the provision that acquisition or taking of property in land should apply upon prompt payment of full compensation prior to occupation of such land is inadequate. This connotes the view that compensation shall always be concluded with a cash payment rather than any other compensatory

means including the substitution of the lost land in some cases. Since there is no guarantee that cash payment compensates all interests and rights in land we suggest that this provision be revised to read as follows:

Provision is made by a law applicable to the protection of property in land that acquisition or taking of possession of any property in land for a public purpose or in the public interest shall be upon prompt payment of full compensation that must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including:

1. *the current use of property;*
2. *the history of the acquisition and use of property;*
3. *the market value of the property;*
4. *the extent of direct and indirect state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
5. *the purpose of the expropriation*

For the purposes of this section- the public interest includes the nation's commitment to the land reform, and to reforms to bring about equitable access to all Kenya's natural resources.

Accessibility to the utilization of land and natural resources is out of reach of many Kenyans because their prices are too high. Most Kenyans would contribute to food security if they had access to land, instead of their staying idle.

Sustainable utilization of resources needs to be stressed, contrary to the current method of protection whereby people are not even allowed to harvest medicine from the forest,

yet those with big money are allowed to clear and fell trees.

Article 236. (3) It is recommended that one of the divisions of High Court should be the Circuit Land Court to handle land disputes, which are many and slow.

Article 237. The institutions created such as the Land Commission should not operate within the government framework, they should be independent Commissions. Put a shorter time frame for enactment of the land laws. Two years is too long. Recognize customary law in land and let communities participate in enactment of relevant Land laws.

10. Chapter 12: Environment

This chapter and chapter 11 could be combined because land is a natural resource and a component of the environment. If there are not there must be a conscious reference to the fact that natural resource and very important in the field of environment.

The term environment is all embracing and includes both natural and man-made environment. The natural environment includes air, water, soil, food, geological goods, and biological diversity. All of them are natural resources. The man-made environment includes buildings and other constructions, roads, manufactured goods, cultural artifacts like paintings, music, sites of cultural interest, intellectual property and other creative works. The destruction of these resources can be done through pollution, degeneration, and extinction or through pirating. Therefore, once we provide in the Constitution that the environment should be conserved and

protected, we have covered most of the ground, the details of which will be elaborated in the laws which Parliament will enact subsequently.

Every Kenyan should have a right to a clean and healthy environment but also a responsibility to conserve and protect it through implementing sustainable development and living.

10.1 Environmental conservation

Article 239. (1) Every ... use "enhance, safeguard and conserve the environment" to strengthen language.

Clause (2) All ..., protection, "conservation", protection....etc.

(a) Public participation shall be "ensured (not encouraged)...."

(b) The cultural— avoid natural resources once the term environment is mentioned

Clause (3) say , All State... add "conserve", ... of the environment ... etc. and use the word throughout to strength and be all embracing.

(a) Conserve and protect the environment including the wildlife..... Kenya

(c) Remove the word "practicable" because it offers an excuse and end with "recycling and elimination"

(f) start with, "Conserve the environment...."

(g) (i) it is the "negative impact", that is to be avoided

(ii) public " active participation"

(iii) "an environmentally competent body (not any body).

(i) Remove the word "developing" in the document. Say the "best available methods internationally".

(j) Add "to protect intellectual property" and sites and artifacts of cultural significance.

Article 240. (2) (a) The commission should be independent, not "the principle instrument of the government".

(b) What is meant by "environmental resources"? Or do we mean "natural resources"

(c) say at the end, "resources, including land; and"

Article 241. (1) Replace word chapter with "constitution".

Clause (2) Why compel, "any public officer", rather than "order that measures be taken to prevent"

• Also, include article on :

(a) Equitable sharing of common resources

(b) Conflict management of environmental issues

(c) Mechanism of enforcement.

• Add implementation of international treaties and ratifications, so that they should be domesticated once

• Take environmental issues to the grassroots level i.e put penalties for all forms of pollution e.g smoking, spitting in public, uncontrolled use of plastic bags, dumping, urinating in public, polluting rivers, use of agrochemicals, e.t.c

• Give guidance on research and dissemination to our unsuspecting farmers and therefore incorporation into our • genetically engineered organisms (GMO)

11. Chapter 17: Constitutional Commissions

It is important that all independent commissions be answerable to Parliament.

THE KENYA LAND ALLIANCE COMMENTS AND RECOMMENDATIONS ON THE DRAFT CONSTITUTION

1. Introduction

The Alliance is pleased with the draft constitution is recognition of the place of land as Kenya's primary resource and it being a basis of livelihood for the people of Kenya, hence the draft constitution provision that it should be held, used and managed in an equitable, efficient, productive and sustainable manner. However, as a contribution to the national debate ahead of the National Constitutional Conference, KLA examines some of the shortcomings on the provisions on the land issue and points out ways in which they need to be revised.

2. Land Policy Framework

We appreciate the prominence given to the issue of land policy framework, and salient criteria upon which the state is assigned the duty of defining and constantly reviewing a national land policy, but we take exception to the fact that whereas Kenya does not have any national policy in place, the draft does not provide for the time frame within which the national land policy should be formulated. Thus, presuming that this was an oversight on the part of the drafters, we do hereby propose that a national land policy be formulated in a national participatory manner and be adopted within a period of two years upon the enactment of the new constitution.

3. Cut-off Date for Review of Unjust Exploitation

In recognition of the priority we are giving to poverty reduction in our national development strategy and bearing in mind what land has got to do with it, the draft constitution provision in chapter eleven in section 235 (4) (b) (iii) that the parliament shall determine the cut-off date with reference to redress of all claims to unjust historical expropriation of land is unacceptable. Simply, the task of determining the cut-off date should be debated and determined by the National Constitutional Conference or better still it should have been an issue of a national referendum. Our reason for proposing so is that Kenya's colonial and post independence regimes enforced massive unjust expropriation of land in the Coast, Rift Valley provinces and elsewhere leading to inequality and inequitable land access and tenure to support the privileges of the ruling elites. Redressing this injustice is at the heart of the development task that faces the new democratic nation under the new constitution and cannot be left to the parliament, which shall still have the relics of the past regimes.

4. Protection of Property

The provision under protection of property in land in section 236 (2) (b) that provides that acquisition or taking of property in land should apply upon prompt payment of full compensation prior to occupation of such land is inadequate. This connotes the view that compensation shall always be concluded with a cash payment rather than any other compensatory means including the

substitution of the lost land in some cases. Since there is no guarantee that cash payment compensates all interests and rights in land, we suggest that this provision be revised to read as follows:

Provision is made by a law applicable to the protection of property in land that acquisition or taking of possession of any property in land for a public purpose or in the public interest shall be upon prompt payment of full compensation that must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstance, including:

1. the current use of property;
2. the history of the acquisition and use of property;
3. the market value of the property;
4. the extent of direct and indirect state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
5. the purpose of the expropriation

For the purposes of this section- the public interest includes the nation's commitment to the land reform, and to

reforms to bring about equitable access to all Kenya's natural resources.

5. Entrenchment of Right to Land

There's concern that while property in general is entrenched in the draft constitution under the Bill of Rights, land despite the recognition of its significance to Kenyan Peoples' livelihood is not explicitly entrenched in the Bill of Rights as a fundamental issue of concern. We do recommend that just like property and environment are entrenched under Bill of Rights, land should equally be entrenched.

6. Management of Land

Last but not least whereas we acknowledge the draft constitution provision for sustainable and productive management of land resources we recommend that land tax should be provided as a means of incentive and disincentive against holding huge tracts of land unproductively for speculative purposes. Equally important, we recommend that one of the divisions of High Court should be the Circuit Land Court to expedient the handling of land disputes.

THE DRAFT BILL FOR A NEW CONSTITUTION OF KENYA: AN APPRAISAL

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1. Introduction

The purpose of this presentation is to consider the main characteristics of the Draft Bill for a new Constitution prepared by the Constitution of Kenya Reform Commission. The object is to bring under scrutiny such aspects, and to express views on strengths or weaknesses of this major reform initiative, to the intent that valid discussion points be identified.

2. The Draft Bill Versus The Current Constitution

2.1 Limitations of the Current Constitution

The current Constitution, in its present form, has not had much input from the people of Kenya as the custodians of political sovereignty. While this could be said too of the original Independence Constitution of 1963, there is the difference that the 1963 Constitution was the product not only of widespread popular support for a new political order, but, perhaps more significantly, of broad-based deliberations, consultations and negotiations among different interest-groups. This position fact is well reflected in the fact that the Independence Constitution was a highly detailed one, squarely addressing the very same persistent problems of constitutionalism, power-sharing and

governance that have so prominently featured in the CKRC's public hearings – problems that have been addressed, once again, in great deal in the Draft Bill for a new Constitution.

The current Constitution's substantial departure from the Independence dispensation was, over the years, occasioned by a new momentum in the Executive's dominance in the political and constitutional set-up, which had the effect of entirely excluding the people's role in the management of the constitutional order. The people's role had effectively been replaced by power-elite preferences, dictated and purveyed by one-partyism and by a power monolithicism built around the Presidency and an all-powerful bureaucracy.

This is the dominant profile in the current Constitution, which is roughly one-third the length of the Independence Constitution of 1963. The many safeguards for individuals and for sensitive interests that had been entrenched in the 1963 Constitution were opened up in the subsequent years, qualified, and subjected to discretionary decision-making by the Executive and by a Parliament in which the Executive was clearly dominant.

More than half of the current Constitution (from Section 1-69; 106-113) is devoted to institutions of power - describing them,

empowering them, and buttressing the central role of the Presidency in their coming-to-be and their operation.

The remainder of the current Constitution is largely in aid of the established power structures: it deals with issues such as public finance, and general provisions.

Only Chapters V and VI of the current Constitution are devoted to the individual - the one dealing with the fundamental rights of the individual, and the other with citizenship.

The current Constitution, in so far as it continues to extol the role of the Executive in the constitutional order, is, in effect, a document in the monolithicist spirit of one-partyism. It is limiting to the democratic framework; it is not facilitative of multi-partyism; it constrains the people's legitimate political activities; it protects pockets of power-elite privilege; it inhibits numbers of principles of good governance - such as checks-and-balances, accountability, transparency; it shifts the forum of critical decision-making, of consultations on matters of public interest, of open negotiations, to hidden and smoky rooms where only conspirators will carry the day. This is the fundamental reason why the clamour for political and constitutional change has now reached a crescendo, and why the people have so frankly expressed their views, hopes and emotions before the CKRC. In any good and meaningful Constitution, it is not possible to exclude those views, hopes and emotions.

Moreover, the current Constitution has clearly fallen behind the train of modern social, political and economic change. It is the embodiment of an uncompetitive power

structure that impedes effective, open and quality-driven choices on the economic front. It is the embodiment of corrupted politics that will not make this country of great potential, attractive and competitive at the sub-regional, regional and global level. It gives sanctity to outdated social values, especially in domains such as gender-rights, culture, etc.

The current Constitution is, thus, dated: it crystallizes obsolete social, economic and political values; it blocks legitimate opportunities for all people, and in particular for youth who seek to see greater openings for their endeavours. The current Constitution has not recognized modern trends in human rights, children's rights, rights to environment, service-delivery and consumer rights, etc.

2.2 The Draft Bill: Presenting a Modern Constitutional Framework

It is clear from the people's acclaim of the current constitution-making initiative, that this opportunity for reform has come belatedly. Clear sights on the current reform context show that the enactment of a new Constitution is mandatory, and that the Draft being presented by CKRC carries the critical values and choices most desired by the people. Of course, detailed discussion will show both the strengths and weaknesses of particular recommendations, and some are bound to be set aside.

2.2.1 Comprehensiveness

The Draft Bill is a comprehensive document in its identification of matters for regulation by the constitutional law. Apart from its clear provisions on the traditional organs of government - the Legislature, the Executive,

the Judiciary - the Draft has detailed provisions on the broader context and direction of governance. It sets off with an inspiring Preamble which indicates the cardinal values and beacons guiding the people of Kenya. It then states the fundamental principles of governance, built around the chain of political authority (Chapter 1). The critical issues here are: the Sovereignty of the People; the Supremacy of the Constitution; the enforcement of the Constitution; the place of the ordinary law of the land.

The logical connection between the Preamble and the chain of political authority, is followed by the identification of the Republic of Kenya, and its symbolic expressions -declaration of Republic; definition of territory; seat of government; languages; etc.

The basis of nationhood is further emphasized in Chapter 3, which deals with National Goals, Values and Principles. This chapter enhances the vision statements in the preamble, by stating clear commitments with a definite relevance to the enforcement process.

The Draft Constitution rightly gives eminence to the individual and the people - their rights and integrity - as a cardinal factor in the scheme of the Constitution. They come before the machinery of government and administration - machinery which, clearly, ought to be viewed as instruments in the service of the individual and the people.

Thus Chapter 4 is devoted to issues of citizenship. It makes comprehensive provisions on acquisition of citizenship, and will change the law to protect the rights of

marriage partners, as well as children, in relation to citizenship. This is logically followed by detailed provisions on the Bill of Rights (Chap. 5). This chapter is a substantial improvement on the current one on "Protection of Fundamental Rights and Freedoms of the Individual". Whereas the current chapter is confined to the traditional civil and political rights (and only twelve of them - right to life; right to personal liberty; protection from slavery and forced labour; protection from inhuman treatment; protection from deprivation of property; protection against arbitrary search and entry; protection of the law; freedom of conscience; freedom of expression; freedom of assembly and association; freedom of movement; and freedom from discrimination), the Draft Constitution has fully responded to the Kenyan people's demands for a change to their impoverished lives, through legal safeguards. The Draft Bill of Rights, apart from giving better protection for the traditional political and civil rights, makes provisions on matters such as: duty of the State to promote rights and freedoms; equality; gender rights; the aged; children; the family; persons with disability; publication of opinion; access to information; demonstration, picketing and petition; political rights; refugees and asylums; freedom of trade, occupation and profession; labour relations; social security; health; education; housing; food; water; sanitation; environment; language and culture; consumer rights; good administration; unlawful instructions; access to courts; fair trial; state of emergency; etc. Chapter 6, which deals with the representation of the people, may be regarded as a further mark of dedication to the rights of the individual and the people. It addressed the question of fairness in the conduct of elections, providing for the right

to vote, the operation of the Electoral Commission, the delimitation of constituencies, the right to form a political party, the establishment of a political parties' fund, supervision of political parties, etc.

The first six chapters set the stage for the provisions on the central institutions of governance - the Legislature, the Executive and the Judiciary. From the provisions of the Draft Bill, and from its order of the provisions, it is evident that the machinery of government is required to be imbued with and be guided by the values and principles set out earlier. Now the central reference in those values and principles is the people; the people carry sovereignty; and the people are the stake-holders of the entire process of government. The Constitution is, thus, to be managed and implemented in the name of the people.

The people's interests are served further, by Chapter 10 of the Draft Bill which provides for the devolution of powers. The general principles of devolution are found in Section 213: self-governance; recognition of diversity; democratic and accountable exercise of power; checks and balances; equitable social and economic development; equitable sharing of national and local resources; decentralization of central government powers; delivery of essential services to all people; protection of the rights of minorities; cooperation between the centre and the peripheries; etc.

The Draft Bill in Chapter 11 seeks to protect the public interest in relation to the most important economic resources - land. It defines a policy framework on land ownership, and gives safeguards for property in land.

The public interest is further protected in chapter 12, which provides for environment and natural resources. This chapter imposes a duty on every person to protect the environment. It also sets out guiding principles on environmental resources, for state officials.

The Draft Constitution has incorporated new subjects in Chapters 15 (Defence and National Security), 16 (Leadership and Integrity), 17 (Constitutional Commissions) and 18 (Amendment of the Constitution). Since the publication of the Draft Constitution, general discussion has shown that it may need to incorporate further provisions. But, on the whole, it is a comprehensive document which is destined to provide an excellent, modern framework for Kenya's governance. (It has been noted by staff of the Kenya Revenue Authority, for instance, that a suitable provision would keep away government interference in the discharge of the public duty to collect tax).

2.2.2 *Strengths and Weaknesses*

The Bill's comprehensiveness is a major source of strength, as are also the following aspects: holistic perception of governance issues, guided by certain visions and values; libertarian aspect, which opens new opportunities and capacities and promotes better social, economic and political performance in a competitive environment; focus upon the individual and the people, as the rightful beneficiaries of government services; provisions for economic, social and cultural rights; centrality of checks and balances in the exercise of governmental powers.

For best operation, any provision of the new Constitution that invites inordinate expenses

should be avoided. It is desirable that the Constitution, when enacted, should enter into force in every respect. The provisions of the new Constitution should also readily lend themselves to the people's understanding, and should quickly come to play a meaningful and practical role in their political perception.

On the basis of the foregoing principles, attention should be focused on the following provisions:-

(a) Elections (s.77)

Provision is made for Provincial Councils, District Councils, Locational Councils, Village Councils. In the first place, these Councils may, by their numbers, overwhelm the people as they may not fully appreciate the role of each other. Secondly, to so formalize these Councils in the Constitution is to create a mandatory budgetary commitment for their regular maintenance, on the part of the Exchequer. In the short term, before the greatest degree of probity is achieved in the national revenues and in public finance, it would prove extremely difficult to operationalise the several Councils. Were such to be the case, a recipe for dishonouring the Constitution would have been achieved; and this would be the floodgate leading to repeated violations of the Constitution.

(b) Parliament (s.101)

The same practical questions should be asked about the bi-cameral Parliament. Firstly, taking the numerical strength of the entire Parliament, and considering that there has been much wastage in state resources and no firm remedial measures are in operation as yet, wouldn't it prove too taxing

to the Exchequer, to properly fund operations? Were that to be the case, we would see the management of the Legislature failing - and that would readily descend into persistent breaches of the new Constitution. A basic principle for ensuring the sustainability of the Constitution must be the ability to pay for the required operations. Only from that foundation would the issue of observance become relevant.

Besides, we must ask the question whether the interests to be represented by the National Council have an important and sufficiently recognized life of their own. Only such a live identity of such interests would accord them a functional visibility for the people considered to be represented. Public institutions in Africa have sometimes developed a disturbing proliferatory potential. Once they are in place they become the theatre of vested interests competing for a place in the pecking order, and so they keep burgeoning even when there is no practical or rational basis for them. This test should be used to judge the National Council and, should it fail the test, then it should be excised. In that case, the functions attributed to the National Council should be re-formulated and assigned to the National Assembly.

(c) Membership of the National Assembly(s. 107)

The Mixed Member Proportional System is a new concept which may not be entirely clear to many Kenyans. In the first place the people need to understand it better and to

express their commitment to it. Even if they do, however, questions should be asked about the absolute numbers of Parliamentarians who would gain their

position without the choice of the people expressed by direct vote. Although the direct vote has its inequity, *vis-a-vis* political parties, it does give obvious satisfaction to those who cast their votes. Maybe the lesser of two evils, equity-to-parties, or equity-to-the voter, is the rule of thumb that should guide us. The provision requires further consideration. It should be considered, for instance, whether a smaller number of non-elected law-makers would be in order.

(d) Representation of Women (s. 109)

That Kenya ought to have many more women in Parliament cannot be gainsaid. The only issue left for consideration is how they should find their way into Parliament. Should they be legislated (by the Constitution) into Parliament, or should preliminary electoral procedures be placed upon political parties that obligate them to open the doors to more women, and accord them a chance to be elected? It may be recalled that Great Britain's current Labour Government, which is exceptionally strongly represented in the House of Commons, is remarkable by the large number of women who were elected. Quite clearly, it was the deliberate policies of the Labour Party (entirely unlegislated) that opened the doors to such an unprecedented number of women, and enabled them to be popularly elected into Parliament. These women were the beneficiaries of new Labour Party policies and of the people's preferences; they were not the beneficiaries of affirmative action at the legislative level. Kenya should take its own choice, consistent with the character and orientation of our people, and without perception of progressiveness in social development in women affairs.

(e) Recall of a Member of Parliament (s. 112)

The operational aspect of this provision may prove problematic. Clause 112 (2)(c) in particular could be applied vindictively, or without properly-defined conditions being satisfied. In that case, there could be litigation or prolonged wrangles about the recall decision. Whenever such a situation comes about, the authority of the Constitution unavoidably gets compromised, and this could become the entry-point into serious violations of the Constitution. Although the people may have demanded "recall", they perhaps did not address the technical demands of an accurate set of information that should provide the legal reference - point for the drastic measure.

(f) No-confidence Motion

A vote of no-confidence expresses no confidence in the Government - i.e. the Prime Minister and her or his Cabinet. Should not that whole Cabinet resign, so that the new Prime Minister will come in with an obligation to constitute a fresh Cabinet?

(g) Devolution of Powers (s.215)

The specification of the village, the location, the district and the province as the entities to exercise devolved power may have elaborate budgetary implications that may transcend the capacities of the Exchequer. This subject, therefore, requires more discussion.

(h) Taxation (ss.243 - 246)

The provisions in respect of the Consolidated Fund (which disburses money)

should be expanded to protect also the
autonomy and integrity of the Kenya

Revenue Authority (which collects money)

CHAPTER 17 – CONSTITUTIONAL COMMISSIONS

Prof. J. B. Ojwang

1. Introduction

The Constitution of Kenya Review Commission has apparently treated the question of a framework for giving implementation to the Constitution as a special one requiring the establishment of independent Commissions charged with specific tasks. Of course, the performance of the prescribed roles of the Legislature, the Executive and the Judiciary, by itself if properly conducted, goes towards the fulfilment of the terms of the Constitution. However, the whole context of the coming to life and functioning of, in particular, the Legislature and the Executive, is so integrally linked with partisan interests that additional guarantees, of a more autonomous nature, are essential.

2. Attributes of the Constitutional Commissions

The purpose of such Commissions is set out (S.279):

- a) to protect the sovereignty of the people;
- b) to secure the observance by all organs of government of democratic principles and values;
- c) to ensure the maintenance of constitutionality;

The Commissions are required to function independently, without seeking direction from any other person or authority. They are required also to be impartial, and to operate without fear or favour or prejudice. They are set up as bodies corporate, governed by rules as to membership that aim to achieve

independence. Members are required to comply with leadership codes, and their autonomy is protected by provisions of immunity.

The functions of the Constitutional Commissions include: creating awareness on their functions; conducting appropriate investigations; taking decisions such as awarding compensation in respect of complaints coming before them.

The Commissions are regulatory bodies in charge of matters of constitutional significance, and are required to submit annual reports on their operations to the President and to Parliament.

3. The Constitutional Commissions

The Constitutional Commissions include the following:

- The Electoral Commission (S. 83);
- the Parliamentary Service Commission (S. 147);
- The Judicial Service Commission (S. 204);
- The National Land Commission (S.237);
- The National Environmental Management Commission (S.240);
- The Public Service Commission (S.259);
- Commission on Human Rights and Administration of Justice (S.287);
- The Ethics and Integrity Commission (S.287);
- The Salaries and Remuneration Commission (S.287);
- The Teachers Service Commission (S. 287);

- The Constitution Commission (S.287);

3.1 *The Electoral Commission*

The role of this Commission is critical in the electoral process at all levels. It has responsibility for the continuous registration of voters, for the delimitation of electoral constituencies, for the conduct and supervision of elections and referenda, for the promotion of free and fair elections, for the supervision of political parties, for the management of the political parties fund, for the promotion of voter disputes, for the promotion of voter education and a democratic culture, and for the facilitation of the observation, monitoring and evaluation of elections.

Conferring upon the Electoral Commission the mandate to handle the entire docket of political parties is a major departure from the current state of the law, in which parties are dealt with entirely within the framework of associations law as contained in the Societies Act (Cap. 108). The current position fails to recognize political parties as the prime movers of political life and of the participation of the people in the constitutional process. The exercise of the people's sovereignty is thus purveyed through the medium of parties. Parties, to this extent, are a vital aspect of constitutional practice, and a proper performance of their role would require that their affairs be managed through the Electoral Commission. Given the partisan forces that will constantly have impacts on the fortunes of different parties, in the context of multipartism, it is essential that the democratic issues pertaining to party operations should be dealt with by an impartial and independent Commission created and protected by the Constitution.

This will obviate the need for a separate

political parties statute and this is as it should be, since the functioning of political parties is so integrally linked with the fundamental rights of the Constitution.

3.2 *The Parliamentary Service Commission*

Given the crucial law-making, governance-superintendency and financial control functions of the Legislature, it is most important that its internal management should be entrusted to an independent body. The Parliamentary Service Commission carries functions of:-

- Constituting and abolishing offices in the parliamentary service;
- Appointing office holders in the parliamentary service;
- Supervising and disciplining staff in the parliamentary service;
- Furnishing Parliament with provisions to facilitate its work;
- Exercising budgetary control over the provision of parliamentary services;
- Ensuring security for parliamentarians and for parliamentary work;
- Determining the terms and conditions of service for those in parliamentary service etc.

3.3 *The Judicial Service Commission*

It is the responsibility of the Judicial Service Commission to ensure and enhance the independence and accountability of the Judiciary. To this end, the Draft Constitution has enlarged the membership of this Commission, to render it a more effective body with a clear capacity to secure efficiency and effectiveness in the working of the Judiciary.

The functions of the Judicial Service

Commission have been broadened and stated more clearly, to include: -

- Encouraging gender equity in the administration of justice;
- Preparing and implementing programmes for the education and training of judges, magistrates and paralegal staff;
- Advising the Government on measures to improve the efficiency of the administration of justice, including legal aid.

3.4 *The National Land Commission*

This is a new Constitutional Commission conceived for the purpose of administering public land on behalf of the government and the local authorities, and holding such land in trust for the Kenyan people; defining and keeping under review the national laws relating to land; etc.

The merits of this new Constitution are obvious, given in particular the irresponsible mode of dealing with public land that has been known for many years. This Commission will be able to protect the public interest in public land.

However, the burdensome task of reviewing the land laws from time to time should perhaps have been reserved to the Kenya Law Reform Commission, established by law (Cap.3). (Incidentally, is the law reform responsibility, as a function facilitative to the Legislature in its role, not itself so replete with constitutional implications that it should also, like the collection of tax, have been guided by general constitutional principles?)

3.5 *The National Environmental Management Commission*

This is a new Commission carrying the principles of sustainable development and environmental management which have found a place in the Draft Constitution.

While all the detailed provisions regarding this Commission are highly meritorious, the question might be asked whether it would be possible to graft this Commission also into the scheme of operation of the National

Environmental Management Authority established by the 1999 Environmental Management and Coordination Act.

3.6 *The Public Service Commission*

The Draft Bill has set out the law on this Commission much more clearly than has been the case under Section 107 of the current Constitution. An ambiguous situation currently exists between s.107 on the one hand, and ss.23-25 of the same Constitution on the other hand, the effect of which has been that the President can nullify the authority of the Commission any time, with regard to appointments to and dismissals from public offices. Clause 261 clearly states: "Except where there is a contrary provision in this Constitution, the power to constitute offices for the Republic and the power to abolish any such offices shall vest in the Commission" (1). It is further provided: "Except where there is a contrary provision in this Constitution, the power to appoint persons to hold or to act in offices constituted for the Republic of Kenya, to confirm appointments, to exercise disciplinary control over persons holding or acting in such offices and to remove such person from office, shall vest in the

Commission"(2).

3.7 The Commission on Human Rights and Administrative Justice

This Commission, clearly, would take over the functions of the current National Commission on Human Rights, and would include also in its docket the traditional Ombudsman functions. Its functions include:

- to promote respect for human rights and develop a culture of human rights;
- to promote respect for gender equality and equity including the protection and development of gender equality and equity;
- to take steps to secure appropriate redress where human rights have been violated;
- to investigate any conduct in state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper or that could result in any impropriety or prejudice; etc.

Both violation of recognized human rights, and the burdens of maladministration, are clear evils in public life in respect of which members of the public are entitled to constitutional protection. The role of this Commission is, therefore, crucial to the enjoyment by the Kenyan people of their deserved liberties and protections.

3.8 The Ethics and Integrity Commission

This proposed Commission will receive and give custody to declarations made as required under the Leadership Code; ensure compliance with the Code; receive complaints about non-compliance with or breach of the Code; put in place measures aimed at the prevention of corruption;

investigate instances of corruption.

This Commission, clearly, provides the structure for combating corruption in public office. While the Constitution accords it the stature essential for working to investigate and endeavour to eradicate corruption, room is left for an ordinary statute to be enacted for the purpose of defining its operations in more detail.

3.9 The Salaries and Remuneration Commission

This is a new Commission whose mandate is to set the salaries, allowances and pensions and other benefits for all constitutional office-holders. This is a most appropriate provision, as it would regularize salaries and benefits, and would, in an impartial manner, determine these on the basis of relevant financial and budgetary considerations.

3.10 The Teachers Service Commission

The function of this Commission is to "keep under review the standards of education, training and fitness to teach appropriate to persons entering the teachers' service and the supply of teachers and to tender advice to Government on matters relating to the teaching profession".

3.11 The Constitution Commission

This is a new Commission whose concern is to present an independent basis for giving fulfillment to the provisions of the Constitution. The mandate of the Commission is to: -

- "ensure the implementation of the provisions of the Constitution which require new legislation and administrative action for full implementation";

- "report twice a year to Parliament on the progress on implementation of the Constitution";
- "outline the special difficulties that obstruct the timely implementation of the Constitution";
- "work closely with the chairpersons of the Constitutional Commissions and office-holders to ensure that the letter and the spirit of the particular provisions of the Constitution are respected".

4. Conclusion

The Draft Constitution has been guided by the principles of enhancing democratic space and cultivating the values of constitutionalism. These goals cannot be achieved unless an effective mechanism is put in place for the implementation of the Constitution itself. Thus the provision for the Constitution Commission, as an autonomous agency monitoring the due implementation of the Constitution, is a most important aspect of the Draft.

CHAPTER 18 – AMENDMENTS TO THE CONSTITUTION

Prof. J. B. Ojwang

1. Introduction

The legislative power, in theory, incorporates both the making and unmaking of the law; and thus the organ that makes the Constitution or the law would, in normal situations, be expected to be the repository of the power of amendment as well. In Kenya under the current Constitution, Parliament has been able to make and to amend all law including the Constitution, except that special majorities (65 per cent of all parliamentarians excluding the *ex-officio* ones) have been required in the case of the Constitution.

The 65 per cent limitation was no limitation at all, in the context of a one-party Parliament that used to be held together by the party whip and guided in one direction by the party leader who was the Head of State and Head of Government. This explains how the feat was achieved in the post-independence period, of enacting nearly three-dozen amendments that removed all the safeguards for constitutionalism in the 1963 Constitution, and brought about an entirely different Constitution the hallmark of which was executive power rampant.

Given its statutory mandate of incorporating a democratic and constitutionalist principle in a new Constitution, the Constitution of Kenya Review Commission has had, of necessity, to address the subject of constitutional amendment.

2. The Draft Constitution and The Amendment Process

The Draft restates the conventional position, that Parliament may amend the Constitution, though subject to specific limitations embodied in particular provisions of that document. A Bill to amend the Constitution is required to be passed at the second and third reading stages by at least *two-thirds* of the total membership of the House concerned. Thereafter the Bill is presented to the President for assent, and with this given, the Constitution will have been duly amended.

It is specified, however, that amendment Bills regarding certain matters shall, in addition to the parliamentary action, “require ratification by the people in a referendum before the Bill making the provision for such amendment is presented to, the President for assent”

The appropriateness of the approach to constitutional amendment described above has to be judged on the basis of the merits of the individual matters for which a referendum is required. What are these matters?

- (a) the territory of Kenya as set out in Article 7 (i) and described in the First Schedule to the Constitution;
- (b) the sovereignty of the people;
- (c) the principles and values of the Republic as set out in article 6(2) of the Constitution;

- (d) the Bill of Rights;
- (e) the structure, values and principles of devolution as set out in Chapter 10 of the Constitution;
- (f) citizenship; and
- (g) the provisions of the Article.

Before considering each of these limitations to constitutional amendment by Parliament, we need to ask questions about

- (i) the figure of *two-thirds majority*, and
- (ii) the *referendum*.

What is the magic about *two-thirds*. Suppose it was *three-fifths*, or *five-eighths* — what difference would it make? The important principle appears to be that a higher-than-normal majority is necessary for the protection of the provisions in question.

Let us accept that a higher-than-normal majority of *two-thirds* in Parliament is in no way unreasonable. However, we need to be convinced that the subject-matter rationally deserves a blockage to the law-making or unmaking freedom of the parliamentarians who have been duly elected by the people in exercise of their recognized sovereignty. Now let us look at each theme the subject of limitation, in turn.

2.1 Protection of Kenyan Territory - The Two-thirds Rule

Kenyan territory is no doubt absolutely important to all Kenyans. It is the home of Kenyans alive. The territory is the repository of natural resources, farms and essential commodities that keep the Kenyan territorial space. The two-thirds economy running and sustaining to Kenyans.

Therefore, on all rational considerations, there is full justification for limiting Parliament's freedom to amend the

Constitution in such a manner as to vary the present definition of Kenyan majority requirement in Parliament is therefore justified.

2.2 The Sovereignty of the Kenyan People - the Two-Thirds Rule

The custodians of Kenyan territory are the Kenyan people. All government putatively takes place in the name of this people. It makes sense, therefore, that Parliament may not take away or qualify this sovereignty, unless it first musters a two-thirds majority in its deliberations and voting.

2.3 The Principles and Values of the Republic - The Two-thirds Rule

The history of the Kenyan people is not one of monarchy; rather it is one of republicanism. Furthermore, at this moment in their perception and in their expectations, Kenyans look forward to realizing the fullest scope of democratic governance in conditions of constitutionalism. This can only be realized in the republican system.

Therefore, it makes sense that the Kenyan Parliament be required to comply with the two-thirds majority rule if it is to amend the republican aspect of the Constitution.

2.4 The Bill of Rights - The Two-Thirds Rule

From the foregoing position it is readily arguable that the Kenyan people, being so desirous of more democratic space and individual liberties, would wish that Parliament did comply with the two-thirds majority rule before amending the human rights provision of the Constitution.

2.5 The Principles of Devolution - The Two-Thirds Rule

What are the principles of devolution? They are set out in Chapter 10 and include -

- giving powers of self-governance to the people at all levels and enhancing the participation of communities in the exercise of the powers of the state;
- recognizing diversity and enhancing national unity;
- ensuring democratic and accountable exercise of power;
- promoting social and economic development throughout the country;
- providing essential services to the people.

Without multiplying examples, it is absolutely beyond doubt that such are the goals that Kenyans live by, live for and yearn for; without these goals fulfilled, Kenyans would be so much the poorer. Government has to make these ends the priorities of management of public affairs, if it is truly responding to the people's needs.

Therefore, it makes sense that these principles in the Constitution should not be taken away or qualified through amendments that do not comply with the two-thirds majority rule.

2.6 Citizenship - The Two-Thirds Rule

Every Kenyan has a moral and legal right to his or her identity and nationality. This, indeed, resolves into the crucial rights attached to the sovereignty of the people.

Therefore, it is only right that the two-thirds majority rule should apply, should Parliament want to amend this aspect of the Constitution.

Since it has been argued that all the limiting

conditions specified in Article 294(3) are fully justified, as a basis for the two-thirds majority rule, it follows that condition 294(3)(g) is similarly valid as a basis for compliance with this principle.

3. The Referendum as a Condition for Constitutional Amendment Under Article 294(3)

From the foregoing argument, one could have argued, without any hesitancy, that the referendum clause must apply, in addition to the two-thirds majority rule, before Parliament can effect any amendment. Whether such an argument is appropriate, however, depends on the logistics of the referendum. Do most Kenyans understand what a referendum is? Are they literate and educated enough to grasp the format in which the referendum might be expressed? How costly would such a referendum be, and what would its impacts be on the public purse?

My suggestion would be that the referendum be not mandatory, but available to all Kenyans *if demanded*. In all likelihood, the two-thirds majority rule will already have taken care of their interests, and thus there would be no need for a referendum. A mechanism should thus be put in place enabling a public demand to be made, to activate the referendum provision, in an appropriate case.

4. Amendment of other Articles of the Constitution

Article 295(1) provides that "A Bill for an Act of to amend any provisions of the Constitution, other than the Articles referred to in Article 294(3), shall not be taken as

passed unless it is supported by the votes of a two-thirds majority at the second and third reading".

This provision essentially reproduces the provision of the current Constitution on constitutional amendment. It is basically reasonable and may be retained.