

## **Beginner's guide to the Proposed Constitution: Chapter by chapter**

### **The background**

On 4 August, Kenyans will vote 'Yes' or 'No' to the question: "Do you approve the proposed constitution?" This is the introductory article in a series explaining, chapter by chapter, what the Proposed Constitution says. This article provides the background.

The Proposed Constitution was drafted following a process set out in the 2008 Constitution of Kenya Review Act. The Act established four organs of review – the Committee of Experts (CoE), the Parliamentary Select Committee on the Review of the Constitution (PSC), the National Assembly, and the Referendum. The first three have completed their tasks. The referendum is the last step.

But, the process did not start in February 2009 when the CoE assumed office. The 2008 Review Act states that it is "intended to facilitate the completion of the review of the Constitution". Some say constitutional review started in 1997 when the first Constitution of Kenya Review Act was passed, others claim it started much earlier – perhaps in 1992 when multiparty democracy was restored or even in 1963 when the independence constitution was brought to Kenya from Lancaster House.

Whatever the date, no one disputes that constitutional change has been on Kenya's agenda for a long time. So, the Proposed Constitution was not created from scratch by the CoE, PSC and National Assembly. Its foundations lie in Kenya's history of constitutional review. This is most obvious in the instructions to the CoE and other organs of review in the 2008 Act.

First, the Review Act instructed the CoE to build on the work of its predecessors – the Constitution of Kenya Review Commission (the Ghai Commission) and the National Constitutional Conference (Bomas) and, especially, the draft constitutions that emerged from those processes.

Secondly, the Act set out principles for the new constitution including democratic governance, constitutionalism, rule of law, human rights, gender equity, separation of powers, participation of the people, respect for diversity, and equitable access to resources. These are the same principles that Kenyans put in the 1998 Review Act.

Thirdly, the 2008 Review Act did not open everything for reconsideration. The CoE was instructed to identify the agreed issues and those that are contentious. Only the contentious issues were to be reviewed. The CoE was to produce a constitution which harmonised the previous drafts, carrying earlier agreements forward, and making proposals for settlement of the outstanding, contentious issues.

Thus, the Proposed Constitution is firmly based on a long process of constitutional review. Most of its provisions are the same as those of the National Constitutional Conference draft of 2005 (the Bomas draft) and the 2005 referendum draft (the Wako draft). And, those drafts were the outcome of the thoughtful and consultative process initiated in 2000 by the Ghai Commission.

The Ghai Commission travelled to every constituency and collected a vast number of submissions. This was probably the most comprehensive process of public participation in constitution making ever. Drawing on those submissions, the Commission wrote a draft constitution. That draft was debated and revised by the participants at the Bomas who represented Kenyans from all sectors of society.

In 2009, the CoE embarked on a further process of consultation, this time with limited objectives – first to see which issues were contentious and needed further consideration, then to ascertain the views of Kenyans on the contentious issues, and finally, after it produced the first Harmonised Draft, to hear the response of Kenyans to its proposals. Overall the CoE received over 60 000 substantive submissions.

The CoE identified three contentious issues: the system of government (should it be presidential, parliamentary or draw elements from both?); devolution (how many levels of government should there be with what powers?); and transition (how should a new constitution be introduced and, particularly, what should happen to existing office holders like politicians and judges). In November, 2008, the CoE published the Harmonised Draft, in which it proposed solutions to the contentious issues, and, in January 2009, after reviewing public submissions, it presented a revised Harmonised Draft to the PSC. The PSC retreated to Naivasha and thrashed out a political agreement on the contentious issues. The CoE then revised the draft once again and, on 1 April, the National Assembly agreed to it.

The referendum is the last stage. It is required by the current Constitution which says–

- The people of Kenya have the sovereign right to replace the Constitution.
- This right must be exercised through a referendum.
- A new Constitution will be adopted if more than 50% of the overall votes and at least 25% of the votes in five of the provinces support it.

Although the question Kenyans are asked to answer is short, the Proposed Constitution is long. It is long because it has learnt from the lessons of the past and also intends to capture aspirations. It protects rights and the needs of the diverse communities in Kenya, it establishes accountable political systems with devolved government, and it provides for the equitable distribution of resources. Each of these will be considered in this series of articles.

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### **The Preamble and Chapters 1 and 2**

A constitution has two main roles: (1) It provides a framework for government to prevent power from being misused. (2) It protects people’s rights. But a constitution should also capture the spirit of a nation and should reflect the aspirations of a country.

The Preamble to the Proposed Constitution and its first two chapters set the scene – they capture the aspirations that underlie the Constitution, secure the sovereignty of the people and set out the principles on which government under the Constitution will be based.

The Preamble comes before the formal, numbered provisions in the Constitution. It does not contain rules or establish institutions. It is introductory. Lawyers may say to you that a Preamble is not a binding part of the Constitution. In some ways they are right. Usually a person can’t go to court and demand that a promise in the Preamble must be enforced. And, certainly, the purpose of a preamble is not to give people rights or to establish government institutions and so on. It captures broad ideas rather than setting out specific rights and obligations.

But, this does not mean that the Preamble is meaningless. A preamble has a special role in the Constitution. It declares what the people who adopted the Constitution sought to achieve. It is, perhaps, the soul of the Constitution and it guides the application of the Constitution.

The Preamble of the Proposed Constitution records the memories and aspirations that underlie the decision of Kenyans to adopt the Constitution and sketches the type of society and government Kenyans seek:

We, the people of Kenya—

**ACKNOWLEDGING** the supremacy of the Almighty God of all creation—

**HONOURING** those who heroically struggled to bring freedom and justice to our land—

**PROUD** of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation—

**RESPECTFUL** of the environment, which is our heritage, and determined to sustain it for the benefit of future generations—

**COMMITTED** to nurturing and protecting the well-being of the individual, the family, communities and the nation—

**RECOGNISING** the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law—

**EXERCISING** our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution—

**ADOPT**, enact and give this Constitution to ourselves and to our future generations.

### **GOD BLESS KENYA**

Chapters 1 and 2 of the Proposed Constitution lay the foundation for the new dispensation that the Preamble promises. They secure the sovereignty of the people of Kenya and the supremacy of the Constitution and set out the essential features of the system.

Chapter 1 states that sovereign power belongs to the people and may only be exercised in accordance with the Constitution. It will be exercised by Parliament and the county assemblies, the national executive, headed by the President, and county executives, and the judiciary.

State officials, like the President, members of Cabinet, and judges, as well as others employed by the State, including members of the civil service, police and defence forces, have no authority to act unless they are authorised to do so by the Constitution. Any action taken outside the framework of the Constitution is illegal and invalid. This also means that all law must conform with the standards in the Constitution and, in particular, must not infringe the rights in the Bill of Rights.

Chapter 2 establishes Kenya as a “multiparty democratic state”. It contains some basic provisions: It declares that Kenya is a sovereign Republic. It defines its territory. It identifies 47 counties.

But it also lists the values on which Kenya is founded including –

- patriotism, national unity, sharing and devolution of powers, rule of law and public participation in government
- human rights, equality, social justice and inclusiveness including protection of the marginalised
- good governance, integrity, transparency and accountability
- sustainable development.

Chapter 2 captures the character of the Republic of Kenya: The national language is Kiswahili (English and Kiswahili are the official languages) but all other languages of the Kenyan people must be protected and promoted, including Sign Language. Kenya is a secular state: there is no state religion. Culture, which is the “foundation of the nation”, must be promoted and protected. The symbols of the country, the flag, anthem, coat of arms and public seal, and the national days are identified here too.

So, the Preamble and the two opening Chapters of the Proposed Constitution introduce a constitution that is firmly committed to good governance but that is not a cold, technical document listing rules which clever lawyers and bureaucrats can find ways to dodge. It lays down the principles on which the country must be governed and the values which must inform all actions.

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### **Chapter 3 Citizenship**

Citizenship marks our relationship to a country in a special way. As the famous philosopher, Hannah Arendt wrote, citizenship gives us the right to a place where our opinions can matter. Citizenship gives us the fundamental right to vote and so it entitles us to participate in decisions about how we are governed and the shape of our society. For these reasons a separate chapter near the beginning of the Proposed Constitution is dedicated to citizenship.

Citizenship is also often the basis for rights. Of course, most rights in the Proposed Constitution are for everyone in the country. For example, foreigners have the right to a fair trial in Kenya and the right to be protected from torture. But some rights, like the right to vote, are restricted to citizens. Only citizens have a right to form political parties, to campaign for political causes, and to compete for office in public elections. The right to access information held by the state or other bodies is limited to citizens, and so is the right to enter Kenya.

In addition, you must be a citizen to be appointed to most 'State offices' in Kenya. This means that the President, deputy President and members of the Cabinet must be citizens, as must MPs and members of county assemblies and magistrates, among others. Only judges and members of commissions are excluded from this requirement. Moreover, to be an MP or a member of a county assembly, you must have been a citizen for at least 10 years.

Chapter 3 also changes the relationship between Kenyan citizens and the State because it gives citizens a right to a passport and ID document. At the moment getting a passport is a privilege so the State can refuse to give you one and there are often bureaucratic obstacles in the way of getting ID documents.

So, who are citizens of Kenya under the Proposed Constitution?

- You are a citizen by birth if –
  - Either of your parents is Kenyan, wherever you are born
  - You are under eight years of age and are found in Kenya and your nationality and parents are not known
- You have a right to be registered as a citizen if –
  - You have been married to a Kenyan for at least seven years
  - You are a child adopted by a Kenyan
- You can apply for citizenship if you have lived in Kenya for seven years.

- A citizen by birth does not lose citizenship on acquiring citizenship of another country and there is no prohibition on citizens of other countries also getting Kenyan citizenship.

A number of anomalies in the current Constitution are corrected in these provisions and Proposed Constitution also responds to the view of many Kenyans that the current Constitution sometimes makes citizenship too easy to acquire.

Many people complained to the Constitution of Kenya Review Commission (the Ghai Commission) that the current Constitution discriminates against women in relation to citizenship. This is because, if you are born outside Kenya, you become a Kenyan citizen only if your father is Kenyan. If your mother is Kenyan but your father is a foreigner, you are not a Kenyan citizen. And there is discrimination against men too: under the current Constitution, a woman married to a Kenyan is immediately entitled to citizenship but a man married to a Kenyan woman is not. **Because these provisions suggest men are more valued as citizens than women, they have also provided an excuse to bureaucrats to impose requirements on women that men don't have.**

The Proposed Constitution fixes all this. It says that you are a Kenyan citizen if either of your parents is a citizen, wherever you are born. This provision works retrospectively. So, even if you were born in another country to a Kenyan mother before the Proposed Constitution took effect, you will be a Kenyan citizen.

And, whether you are a foreign man married to a Kenyan woman or a foreign woman married to a Kenyan man, under the Proposed Constitution you will be entitled to citizenship. However, your entitlement is no longer immediate. The Proposed Constitution slows down the acquisition of citizenship by foreign spouses and says that they are entitled to citizenship only after being married to a citizen for seven years.

The provision on dual citizenship addresses another concern of many Kenyans. Under the Proposed Constitution, citizens by birth do not automatically lose Kenyan citizenship if they acquire the citizenship of another country. So Kenyans will not have to cut ties with the country when they move elsewhere and the links between Kenya and the many Kenyans living in other countries will remain strong. There is a restriction in the Proposed Constitution on people with dual citizenship. People appointed to State offices and members of the defence forces may not hold dual citizenship: they must owe allegiance to Kenya alone.

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### **Chapter 10 The Judiciary**

A strong, independent judiciary has a special role in a constitutional democracy. Courts must be able to decide disputes between people honestly and fairly so build trust in the legal system. But courts are also the ultimate protectors of the Constitution and its values because they can overturn (set aside) laws that do not comply with the Constitution and declare action that is contrary to the Constitution unconstitutional (invalid).

The Proposed Constitution protects the ability of judges to perform these roles. First, there are provisions that protect judges and the judiciary. These provisions:

- Declare that judges may not be controlled by anyone when they decide cases.
- Secure the tenure of judges: Judges can be removed from office only if they are not performing their functions properly, or are dishonest or bankrupt, and only after an elaborate process is followed.
- Prohibit the abolition of a judge's position so that the executive cannot get rid of judges that decide against it by disestablishing their posts.
- Secure judges' pay and pensions: The independent Salaries and Remuneration Commission will set judges' salaries. They may not be reduced. This prevents the executive or Parliament from undermining judges by threatening to reduce their salaries.
- Establish a Judiciary Fund which will be managed by the Chief Registrar of the judiciary so that the executive can't undermine or manipulate the judiciary by depriving it of money.

Second, judges will be chosen by a newly-composed Judicial Service Commission (JSC) which includes people from the judiciary, the profession, government, and the public. Its members will be the Chief Justice, three other judges and a magistrate, the Attorney-General, two advocates, two members of the public appointed by the President with the approval of the National Assembly and a nominee of the Public Service Commission.

The National Assembly must approve the JSC's choice of Chief Justice and Deputy Chief Justice but all other judges chosen by the JSC must be appointed by the President. When choosing judges, the JSC must take gender equity into account.

Third, the Proposed Constitution sets the qualifications of judges: they must have "a high moral character, integrity and impartiality," a legal qualification and experience. Judges of the Supreme Court must have at least 15 years legal experience and other judges must have at least 10 years experience.

These provisions focus on judges but other judicial officers are not forgotten. The JSC appoints magistrates, registrars and other judicial officers and is responsible for their discipline.

Chapter 10 also improves the ability of the judiciary to do its job by setting up a new top court, the Supreme Court. It will be headed by the Chief Justice and will have six other judges. It will hear appeals from the Appeal Court and it also has two special roles:

- a dispute about the election of the President goes straight to the Supreme Court (and must be resolved within 14 days)
- it can give advisory opinions on matters concerning county governments (so if there is uncertainty about whether the national or county government is responsible for a particular function or about funding counties, for example, the Supreme Court could be asked for an opinion)

And, although usually the Supreme Court will be able to decide what cases to hear, people have a *right* to appeal to the Supreme Court if their case involves the Constitution. So, if your rights are infringed and you are unhappy with the Appeal Court's decision, your case must be heard by the Supreme Court.

Under the Proposed Constitution, the superior courts consist of the High Court, the Appeal Court and the Supreme Court as well as special courts to deal with employment and labour, and the environment and land. The lower courts remain the same – they are the magistrates' courts, the Kadhis' courts, Courts Martial (special courts for the army) and any other tribunals Parliament establishes.

As in the current Constitution, the Proposed Constitution sets out how many Kadhis there must be and the power of the Kadhis' courts. There must be a Chief Kadhi and at least three other Kadhis. To be appointed a Kadhi a person must be Muslim and the JSC must be satisfied that he has adequate knowledge of Muslim law.

The PC copies the current Constitution and says that the authority of a Kadhis' court is "limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance." It does not extend to commercial matters or criminal law. Also, the Kadhis' courts have authority over a case only if both parties are Muslim *and* both agree that the case should be heard by a Kadhis' court.

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### **Chapter 11 Devolved government**

The Proposed Constitution allocates various government functions to the 47 counties listed at the end of the Constitution in Schedule 1. The reasons for devolving power are set out in Chapter 11 and, in essence, are to:

- promote people's participation in governance;
- promote equitable development and the sharing of resources throughout the country;
- take services closer to the people;
- enhance the system of checks and balances; and
- foster unity by recognising diversity.

County governments will be responsible for many things that are important to Kenyans. Schedule 4 lists them including agriculture; basic health services and facilities (like pharmacies, ambulances, and refuse removal); air and noise pollution; county roads; water services; local tourism and county planning. Counties can pass laws on these matters and must administer them.

Each county will have an elected assembly and elected governor and deputy governor. The governor will choose up to 10 members for the county's executive committee. Just as members of the national Cabinet may not be MPs, members of a county executive committee may not be members of the county assembly.

Although the county governments will be separate from the national government, with their own responsibilities, counties and the national government will need to work together. So, Article 6 of the Proposed Constitution says that the national government and county governments must consult and cooperate with each other.

The requirement that the national and county governments cooperate is particularly important in three situations:

- First, some things that counties are responsible for can't be governed by counties acting on their own – they have national implications. Controlling animal disease is an example. Animals will not respect county borders and sick animals may wander from county to county, spreading disease. A national policy is needed. For this reason the Proposed Constitution says that the national Parliament can pass laws that set standards for the whole country on such things. But this must be done in consultation with counties. And the Senate will represent the interests of counties when these laws are passed.
- Second, sometimes a county will struggle to fulfil its functions. For instance, an outbreak of cholera may overwhelm county health services. The Proposed Constitution says that the national executive can intervene to help but there are strict limits on the national

government's power. When it intervenes, it may do only what is necessary and must assist the county to build the capacity to fulfil all its functions on its own. Close cooperation between the county and national government is needed in such circumstances.

- Third, counties will not be able to pass all the laws they need immediately. Until they do, national laws will apply. County governments must be consulted when the national government develops laws that counties must implement.

But, what happens if a national and a county law say opposite things? This is called a 'conflict of laws'. If the conflict concerns a matter that counties are responsible for usually the county law will be binding, pushing the national law aside. But, if the national law sets essential standards for the whole country (say for controlling animal disease or drugs), the national law will be binding and will override the county law.

Some things relating to devolved government are not finalised in the Proposed Constitution. Most importantly, local authorities remain as they are for the time being. Within a year after the Proposed Constitution comes into effect, new laws relating to urban areas and cities must be adopted. These laws are likely to ensure that the functions of local authorities and the new county governments are properly lined up.

Also, although initially county boundaries will be the same as those of the districts created by the 1992 District and Provinces Act, they can be changed by a resolution passed by a 2/3rds majority in both Houses of Parliament.

And the Proposed Constitution anticipates that the needs of government might change over time so it allows functions to be transferred from the national government to counties or from counties to the national government to make administration more effective. For instance, as counties develop capacity, it may be sensible to give them the responsibility for running primary schools or aspects of nature conservation to them. But, if such a shift does take place, proper funding for the function must also be transferred.

Finally, the national government's system of provincial administration will need to be reorganised so that its functions do not overlap with those of the county governments. In the spirit of the Proposed Constitution, there will have to be proper coordination between the national government's administration across the country and the county governments.

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### **Chapter 12 Public Finance**

Government needs money but money is easily misused. This makes Chapter 12, which deals with public money, very important. But who has read it? Most people skip it because they think it will be too technical. In fact it deals with two issues we all know about: controlling the use of public money and funding devolved governments.

Public money is the money that governments have to run the country. Chapter 12 opens with general principles that apply to all public money including: government must be accountable for the use of public money; the public must participate in decisions about how it is used; its use must promote an equitable society; and it must be used in a responsible way.

On controlling public money Chapter 12 says:

- No taxes can be imposed except by law.
- All money received by the national government or county governments must be paid into a public fund.
- No spending is allowed unless it is authorised by law.
- All spending must be accounted for properly through professional audits.
- Parliament must check the accounts of the national government every year and county assemblies must check the accounts of the county every year.

To help control public money the office of the Controller and Auditor-General has been split into two. The Controller of the Budget must approve every withdrawal of money from a public account. This is an early warning system and ensures that the government does not spend in a way that has not been authorised by law. Then the Auditor-General does a post mortem. He or she audits the account of every government department every year to see that all public money is properly accounted for.

There are also three special provisions on spending in this Chapter:

- (i) An Equalisation Fund: Every year 0.5% of the government's money must go into this Fund for services like water and health facilities in marginalised areas. The national government may develop projects on which to spend this money or it may allocate money from the Fund to counties for specific projects.
- (ii) The independent Salaries Commission will set all the salaries of senior State officials. This means that MPs can't set their own salaries and government can't undermine officials (like judges, the Director of Public Prosecutions and Commissioners) by reducing their salaries.

- (iii) MPs must pay taxes (and, Chapter 8 of the Proposed Constitution says they can't raise their own salaries during their term in office).

What about funding for counties? This is important because not all counties will be the same. Some will be rich, others poor. Some will be densely populated and others will be very sparsely populated. And so on. Clearly not all counties will be able to fund all their needs and responsibilities fully from their own taxes.

So, as in all countries with devolved governments, the Proposed Constitution makes arrangements to ensure all counties get a fair share of the national kitty, according to their needs.

First it says that counties will be entitled to at least 15% of the budget. This slice of the budget (which may be more than 15%) will be divided equitably amongst the 47 counties.

A new expert commission, the Commission on Revenue Allocation, will make proposals about how to work out each county's equitable share. Then the Senate will consult the county governors and the public and pass a resolution setting out how the share of money set aside for the counties should be divided amongst them. The Senate is likely to prescribe a formula which takes into account how many people there are in each county, how many are very young and how many old, whether the county has good facilities or has been neglected, and so on. Counties with greater needs will get more money. The formula will not be revised every year but will usually apply for five years before being reviewed.

The main source of funding for many counties may be their equitable share. But counties will also have the power to collect property rates, to impose taxes on entertainment and to raise any other tax that Parliament permits them to raise.

What happens if the national government doesn't set aside the 15% for counties that the Constitution says it must? Or if it fails to transfer the agreed money to the counties? Because counties have a constitutional right to an equitable share, this action would be a breach of the Constitution. Counties could go to court to claim it and, in extreme cases, they might even attach assets of the national government to secure their funding.

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### **Chapter 15 Commissions and Independent Offices**

“Too many commissions” people said of the Bomas and Wako draft constitutions. They each established sixteen commissions. But few people asked “Why put commissions in the constitution?” After all, commissions can be established by ordinary law.

The answer is that a constitution protects institutions which protect democracy. Sometimes the work of institutions that protect democracy angers government. A constitution can insulate such institutions from being undermined by government. So, modern constitutions usually include a human rights commission whose job it is to point out human rights abuses by the government and an electoral commission so the government can’t interfere in elections, among others.

The Proposed Constitution establishes 11 commissions and requires Parliament to establish another one: an independent ethics and anti-corruption commission. Each of these commissions protects the constitution and democracy. Two other independent offices – the Controller of Budget and the Auditor-General – do the same.

A description of each commission is found in the particular Chapter of the Proposed Constitution linked most closely to its work. The Kenya National Human Rights and Equality Commission is in Chapter 4 with the Bill of Rights. The Independent Electoral and Boundaries Commission is in Chapter 7 which deals with elections. And so on.

Chapter 15 contains the provisions that protect all of the commissions and the Controller of Budget and Auditor-General. It declares their independence, ensures that appointment of their members is open and accountable, protects their members from arbitrary removal, and sets out their powers. And, reinforcing the gender-sensitivity of the Proposed Constitution, it says that the chairperson and vice-chairperson of a commission can’t both be men or both be women – a woman must hold down one position and a man the other.

The commissions in the Proposed Constitution are:

*The Kenya National Human Rights and Equality Commission.* It protects human rights and can investigate complaints. Anybody can complain to the Human Rights Commission if their rights are violated. This Commission will also act as an ‘ombudsman’ or public protector. This means that it can investigate complaints that a public official has treated someone unfairly, refused to give them a benefit to which they are entitled or delayed too much in performing a function.



*The National Land Commission.* Among other things, it will manage public land, recommend land policies to the national government, suggest a programme for registering title in land and investigate historical land injustices.

*The Independent Electoral and Boundaries Commission.* It is responsible for elections and for demarcating constituency and ward boundaries. It must register voters, run free and fair elections and declare election results. A person who in the past five years has been a member of Parliament or of a county assembly or stood for election may not be a member of the IEBC.

*The Parliamentary Service Commission.* It is responsible for the administration of Parliament.

*The Judicial Service Commission.* It selects the judges that must be appointed by the President, deals with complaints against magistrates, judicial officers on other subordinate courts and the administrative staff of the judiciary, and can start proceedings for removing a judge.

*The Commission on Revenue Allocation.* This is the expert commission that makes recommendations to Senate about how the county share of funding should be divided among the counties each year. It must also make recommendations on other financial matters concerning counties.

*The Salaries and Remuneration Commission.* It meets the overwhelming demand of the public for an independent body to set the salaries of State officers including the President and other members of Cabinet, MPs, members of county assemblies, county governors, judges and magistrates, members of commissions and principal secretaries. It also makes recommendations on the remuneration of other public officials (including employees in all government departments).

*The Public Service Commission.* It appoints people to the public service. Its most important function is to ensure that appointments are competitive and that the public service represents all Kenya's communities. People must not be appointed on the basis of their party membership, for instance. This Commission also deals with the discipline of members of the public service. But, it does not have authority over employees of Parliament, judges, magistrates and other judicial officers, teachers or the police. Nor does it control county administrations.

*The Teachers Service Commission.* This Commission registers and recruits teachers, manages their promotion and transfers and runs disciplinary enquiries.

*The National Police Service Commission.* It appoints people to the police service must ensure that the composition of the police reflects the diversity of Kenya. It also deals with disciplinary matters in the police.

*Commission for the Implementation of the Constitution.* This is a temporary commission intended to exist for only five years. It must oversee the implementation of the Proposed Constitution. It will do this by working with other institutions on new laws and administrative procedures. It will report regularly to a parliamentary committee.

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### **Chapter 18 Transition**

The last thing most people worry about when writing a new constitution is the transition from the old to the new. The big questions – the structure of government, the Bill of Rights, elections, devolution – understandably preoccupy constitution makers. But if the transition is not properly managed, the whole show could fall apart.

So, Chapter 18 and Schedules 5 and 6 of the Proposed Constitution set out how the transition is to be managed. Most of the transitional provisions are in schedules attached to the end of the Constitution because they deal with temporary matters. The rest of the Constitution is intended to have a long life.

Two special bodies are established in Schedule 6 to oversee the transition: a parliamentary select committee, called the Constitutional Implementation Oversight Committee, and an independent Commission for the Implementation of the Constitution. They are likely to be very busy.

If the Proposed Constitution is approved in the referendum, it comes into effect in 14 days. Parliament will need to swing into gear immediately. Schedule 6 says that the Implementation Commission and the Commission on Revenue Allocation must be established within 90 days; the new Supreme Court must be set up within a year; and county governments come into being at the 2012 elections. These and many other provisions of the Proposed Constitution require new laws.

But, the first question is “What will happen to the coalition government and the current MPs if the Proposed Constitution is approved?” The answer is that the coalition government continues as it is now and MPs retain their seats until the 2012 elections. Until then, the executive and Parliament will operate under the provisions of the current Constitution and the National Accord. The provisions of the Proposed Constitution relating to the executive and Parliament only come into effect on election day.

Implementing the system of devolved government is also delayed until 2012. County governors and assembly members will be elected at the same time as the next President and Parliament. This delay leaves enough time to make the arrangements necessary to establish the new county governments. For example, a law transferring functions to the counties must be passed, infrastructure for the county governments set up and staff identified.

The new counties won't necessarily be able to fulfil all their functions immediately. The Proposed Constitution says that the law transferring functions to them must provide for a phased transfer of functions over three years from their election (but not longer). Although the new

county governments might be impatient, the phased transfer of functions is important to ensure that counties are not given responsibilities that they can't fulfil – service delivery to citizens should not be interrupted by the creation of counties.

But the phased transfer of powers is not to be used as a way of blocking the devolution of powers. The Proposed Constitution also says that the law must set out the ways in which the national government will help county governments to build their capacity to govern properly.

The judiciary will also be affected by the Proposed Constitution. The new Supreme Court must be established. The present Chief Justice vacates office within six months and a new Chief Justice must be appointed. And Parliament must pass a law establishing a procedure for vetting all judges and magistrates to determine their “suitability ... to serve in accordance with the values and principles” of the Proposed Constitution.

What happens if Parliament does not pass the laws that the Proposed Constitution requires?

Chapter 18 and Schedule 5 deal with this. Schedule 5 sets out a timetable for passing the laws. It is tough. Urgently needed laws, like those for elections, must be passed within a year. Those on devolved government must be passed within 18 months so that they are in place before county governments are established in 2012. Parliament is given a longer time to pass less urgent laws, but they must all be done within five years.

Chapter 18 allows the National Assembly to extend the time given in Schedule 5 once, up to a maximum of a year, and only if the Speaker of the National Assembly certifies that exceptional circumstances justify the extension and at least 2/3rds of the members of the National Assembly agree to it.

If Parliament fails to pass a law in time, anyone can complain to the High Court. The Court can give Parliament one more chance and may stipulate a time within which the law must be passed. If Parliament fails once again, the Chief Justice will advise the President and the President must dissolve Parliament. Of course, this means that MPs will lose their jobs. It is a strong incentive to comply with the timetable in Schedule 5.

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## **Beginner’s guide to the Proposed Constitution: Chapter by chapter**

### **Chapter 4 Bill of Rights – Social, economic and cultural rights**

Most older constitutions, like the US Constitution, protect only negative rights – rights that take power away from the State by imposing duties on the State not to do certain things: not to torture people; not to restrict the right freedom of speech; not to discriminate against people; and so on. But, more recent constitutions recognise that these rights don’t mean much if people are starving, have no access to shelter, or have no education. So new constitutions usually also include what are called social and economic rights.

The Proposed Constitution follows suit and Article 43 of the Bill of Rights protects the rights to:

- Health care
- Housing
- Reasonable sanitation
- Freedom from hunger and adequate food
- Clean and safe water
- Social security
- Education

The rights in Article 43 cover the most basic needs of Kenyans, but people may ask in disbelief: “Do those rights mean that when the Constitution comes into effect we will get food, a house and running water?” And the government may ask: “How can we be obliged to provide Kenyans with all those things? We don’t have the resources. We can’t do it immediately.”

The Proposed Constitution acknowledges that a constitution can’t suddenly provide all the social and economic needs of people. It does not expect the government to deliver social justice to all Kenyans instantly. But Article 43 is not merely a wish list. The Bill of Rights says that the State must take measures to achieve the “progressive realisation” of the social and economic rights listed in it.

The obligation to realise rights progressively has a widely accepted meaning, developed since it was introduced by the 1966 International Covenant on Social, Economic and Cultural Rights. It means that the State must have a programme for implementing the rights. The programme must take account of the most needy people (like women and children). The implementation of the programme may not be delayed and must be properly monitored. Moreover, “backsliding,” that is, dropping standards, is permissible only in the most pressing circumstances. So, if housing gets worse, the water supply deteriorates or clinics close down, the principle of progressive realisation will be violated.

Usually courts take a back seat with regard to social and economic rights because their implementation involves policy decisions by legislators and administrators. But if social and economic rights are not fulfilled people can take their complaints to the Kenyan Human Rights and Equality Commission or to court.

Courts in other countries have shown that social and economic rights have real meaning. So, faced with people who were living in “intolerable or crisis conditions,” the South African Constitutional Court decided that the state housing plan did not comply with the South African government’s obligations under its Bill of Rights. The State was ordered to implement a housing programme to remedy this. In Latvia, the Constitutional Court declared that a law reducing pensions infringed the right to social security. This was ‘backsliding’ and the fact that the IMF had required pensions to be reduced was not enough to justify it. In Argentina, Costa Rica and Colombia courts have enforced the right to health care by ordering the State to make certain drugs and treatment available. In India court action has led to over 118 million children receiving school lunches. The most far reaching of these cases is the Indonesian Constitutional Court’s decision declaring the national budget unconstitutional because it did not accommodate education expenditure targets.

Of course, implementing a right like the right to housing or food always requires a careful balancing of many needs. It is no good providing a school but leaving no money to repair the bridge on the road leading to it. So, in Article 20, the Proposed Constitution provides guidelines on how to manage the implementation of the social and economic rights: when the State allocates resources, it must give priority to the implementation of social and economic rights; and, if it does not implement a right properly, it must actually demonstrate that it doesn’t have the resources. Courts must also be cautious about interfering with spending decisions made by the government. A court may not overturn a decision simply because it thinks, say, that money should have been spent on a clinic rather than a school.

Kenya agreed to protect the rights in Article 43 of the Proposed Constitution when it signed the International Covenant on Social, Economic and Cultural Rights in 1972. But these rights are not in the current Constitution and so people have not been able to insist that the State implements them. The Proposed Constitution would change this, and although it will not mean that Kenyans can immediately queue up at the State House kitchens and insist on a plate of food, experience in other countries suggests that including social and economic rights in the constitution is a good foundation for social justice.

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## **Beginner's guide to the Proposed Constitution: Chapter by chapter**

### **Chapter 4 Bill of Rights – Equality**

The Preamble to the Proposed Constitution recognises the aspiration of Kenyans for a government based on equality. This commitment to equality permeates the entire Constitution.

The equality clause in the Bill of Rights is the key provision. It says that “every person is equal before the law;” that “equality includes the full and equal enjoyment of all the rights and fundamental freedoms;” and that the State, private institutions and individuals may not discriminate against people on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

This is a strong equality clause. But, in the late 19<sup>th</sup> century, Anatole France observed wryly that “the French law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.” How, then, does the Proposed Constitution ensure that equality has meaning not only for the rich but also for the poor and marginalised?

Worldwide the struggle for equality has been tough. Often, equality merely ensured that people in a similar situation were treated in the same way. If both a black person and a white person applied for a job as a doctor and both had the right qualifications, the black person could not be rejected merely because he or she was black. But women might be rejected even if they had the qualifications because they were different – they could become pregnant.

Soon it was obvious that this idea of equality was not doing the work it needed to. It could not tackle the real, deep inequality in most societies. It did not help marginalised people or the poor. It could secure equal treatment for qualified doctors, but what about people who had no opportunity to attend school?

Part of the answer lies in what seems to be a paradox: that sometimes equality requires different treatment. This is the approach in the Proposed Constitution. Like other modern constitutions, it recognises that equality may require special treatment. Women must be allowed maternity leave if they are to have an equal opportunity to work. People with disabilities may need special access ramps. And, marginalised groups may need special programmes to redress that disadvantage and enable them to participate in the social, political and economic life of Kenya as equal citizens.



So, the equality clause says that the State must take special measures, including affirmative action, to redress disadvantage. What these measures should be is left to the State to decide. They will differ from place to place and group to group.

The Proposed Constitution does give the State one particularly important tool for fulfilling its obligation to implement special measures to redress disadvantage. It establishes an Equalisation Fund and requires 0.5% of government money to go into this Fund each year. The Fund is to provide basic services to marginalised areas to bring them to the standard of the rest of the country.

Some affirmative action programmes will be more controversial than others, of course. It may be easy to agree to special programmes to ensure everyone access to hospitals and schools, but is it fair to reserve places at training colleges for students from educationally disadvantaged backgrounds? How many places can be reserved? And so on. The Proposed Constitution settles one aspect of such debates. It says that measures taken to redress disadvantage must be based on real need. Even if a student belongs to a marginalised community, if he or she comes from a wealthy family or went to an excellent school, there is not genuine need and affirmative action is not justified.

Some groups have very special needs or have struggled unsuccessfully against disadvantage for many, many years. In a special part of the Bill of Rights, the Proposed Constitution spells out what the Bill of Rights and, particularly the right to equality, means to them. The groups are children, persons with disabilities, the youth, minorities and marginalised groups, and older members of society.

Different things are important to members of each of these groups. So, for example, the Proposed Constitution protects the right of children to a name and nationality. It protects the right of persons with disabilities to access educational institutions. It recognises the youths' need for training and to be free from exploitation. Marginalised people must be properly represented in public life. Older people must receive reasonable care from their families and the State.

Finally, the Proposed Constitution's commitment to fixing inequality does not end in the Bill of Rights. For instance, Chapter Two entrenches equality as a value that must underpin all government officers. Chapter Seven says that no more than two-thirds of the members of elected bodies may be of the same gender – today this means that at least one-third must be women. And, Chapter Thirteen requires equal appointment, training and promotion opportunities for men and women in the public service.

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## **Beginner's guide to the Proposed Constitution: Chapter by chapter**

### **Chapter 4 Bill of Rights – In general**

Chapter 4, the Bill of Rights, is the longest chapter in the Proposed Constitution. It does a lot of work: it sets out the rights of all people; it provides a framework for implementing the rights so that all Kenyans benefit from them; and it establishes the Kenya National Human Rights and Equality Commission.

The Bill of Rights protects all the rights in the current Constitution, like the rights to life, a fair trial, freedom of expression and to be free from torture, and the rights of people in custody.

It also expands on some existing rights. So, it states expressly that life begins at conception and that abortion is prohibited. It sets out limited, exceptional circumstances in which abortions may be procured (when the life or health of the mother is in danger, for instance). It says that the right to freedom of expression does not give anyone a right to use hate speech. The right to freedom and security of the person includes the right to be protected from domestic violence. People in custody have a right to humane treatment. And, as part of the right to a fair hearing, Parliament must pass a law to protect the rights of victims of offences.

The Bill protects many new rights too including:

- a right to access information so that the government can't keep secrets from citizens
- the right to vote and stand for election (this is not a right now)
- a right to fair labour practices
- social and economic rights like health care services, housing, freedom from hunger, and social security
- a right to freedom of the media so that the state cannot interfere with broadcasting or publishing

Reading Chapter 4 you will see that most of these rights are brief. There are no long qualifications as in the current Constitution. So, you may ask, aren't they unrealistic? Can everyone suddenly have a house? Where is the money? Can freedom of expression be uncontrolled? And can citizens demand all information that the State has? What about State security?

The answer is that the Proposed Constitution deals with limits on rights in a new way. First, special provisions deal with social and economic rights, like the right to housing. These will be considered in the next article in this series.

For the other rights, following Canada, Uganda, South Africa and other countries, the Proposed Constitution uses a “general limitation clause” which allows laws to limit rights. The limitation clause says that, with only four exceptions, all rights may be limited by law. But it sets a test that laws limiting rights must pass. The limitation must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.

So, freedom of expression cannot be used to insult people. A law that prohibits defamation is reasonable in a democratic society and its limit on freedom of expression would pass the limitation clause test and be constitutional. And a law saying that people may not have access to information about defence force manoeuvres would also be constitutional.

In fact, there will be some limits on most rights. The right to gender equality might be limited by a prison regulation saying that female prisoners may not be searched by male guards. The right to assembly may be limited by a law prohibiting gatherings outside hospitals where patients need peace. Your right to privacy will be limited when the police reasonably believe you have evidence needed in a criminal trial.

The important thing is that in most cases limits on rights must pass the limitation-clause test. Moreover, the Bill of Rights says, laws limiting rights must specify what right they limit. Rights can't be limited accidentally.

One category of people is treated differently: people serving in the Defence Forces and the police. Parliament may limit their rights to privacy, freedom of association, assembly and fair labour practices, among others, as it wishes. So, these people can be prohibited from joining trade unions, striking or protesting when their property is searched.

Of course, the long list of rights in Chapter 4 must be implemented. To ensure this the Proposed Constitution does three things –

- it requires the State to act, including passing laws, to implement the rights
- it allows people to go to court if their rights are infringed and gives courts the power to declare laws and actions invalid if they infringe rights
- it establishes the Kenya National Human Rights and Equality Commission to promote respect for human rights and to protect them

Giving all people access to court is particularly important. Courts have been strict about who could complain about the abuse of rights. People complaining about a rights abuse have to prove that they are directly affected by the abuse. Under the Proposed Constitution, all Kenyans can monitor the implementation of rights and anyone can go to court to protect a right.

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## **Beginner's guide to the Proposed Constitution: Chapter by chapter**

### **Chapter 5 Land and the Environment**

Chapter 5 is about land and the environment. It sets out principles for the use of land and for the management of the environment. The overarching goal is to protect land and the environment for the benefit of all Kenyans.

The first part of the Chapter deals with land. It requires the use of land to be 'equitable, efficient, productive and sustainable'. This means, it tells us, that, among other things, access to land must be equitable; land rights must be secure; land must be administered in a transparent and cost effective way, and ecologically sensitive areas must be protected. A national land policy backed up by legislation must put these principles into practice.

Chapter 5 also establishes an independent National Land Commission. The Commission has a special responsibility to manage public land but its mandate is broader than that. Among other things, it must advise the government on land policy, the registration of title deeds and the use of natural resources.

A legal framework for securing the principles of land policy is set out in the Chapter. First, land is declared a national resource. It belongs to the nation, to its communities and to its citizens. And so, there are three categories of land: public land, community land and private land.

Under the Proposed Constitution, public land will be held either by county governments or the national government. County governments hold land that is identified as government land in an Act of Parliament, land that is transferred back to the State in a sale or other transaction, and land that has no other owner. Minerals, government forests, water catchment areas, national parks, rivers and lakes, beaches etc are vested in the national government. But, all public land will be administered by the National Land Commission.

The Proposed Constitution is particularly clear on one important point in relation to public land: "Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament." This means that neither the national government nor county executives can make decisions about land without Parliament's blessing.

The second category of land is community land. This is land held by ethnic or cultural communities. It is land registered in the name of representatives of the group or land held by the community some other way. It includes shrines and community forests and land held as trust

land for communities by county governments. Communal land can't be disposed of or used except as allowed in a national or county law.

The third category of land is private land. This is land owned or leased by individuals or corporations.

The provisions on land in Chapter 5 must be read together with the right to property in the Bill of Rights. This right gives teeth to the principle of secure tenure. It prohibits laws that allow people's land to be taken away arbitrarily. Laws may permit the State to take away land or other property for a public purpose but, if this is done, fair compensation must be paid promptly.

Land held by foreigners is treated differently from land held by Kenyan citizens. The Proposed Constitution says that foreigners may not hold more than a 99-year lease in land. Foreigners may not own land and may not, for instance, hold a 999-year lease. (Foreigners include companies that have any non-Kenyan shareholders and trusts which benefit a non-Kenyan.) When the Proposed Constitution comes into effect, land owned by a foreigner or held on a lease that is greater than 99 years will revert to the relevant county government and the foreigner will retain a 99-year lease. Foreigners will also not be able to acquire full ownership of land through inheritance.

Parliament is given a list of tasks in this chapter to complete within 18 months after the Proposed Constitution comes into effect. It must, among other things –

- Rationalise all existing land laws
- Prescribe minimum and maximum land holdings for private land
- Protect matrimonial property when marriages terminate
- Make provision for a review of all grants of public land so that their legality can be established

The second part of Chapter 5 focuses on the environment and fleshes out the right to a clean and healthy environment in the Bill of Rights. Together the right and this part of Chapter 5 respond directly to the concerns of Kenyans about the devastation of the environment over the past few decades and place firm obligations on national and county governments to protect the environment for the benefit of all Kenyans including future generations.

Among other things, the State must –

- Ensure that sustainable exploitation and use of the environment
- Work towards covering at least 10% of Kenya in trees
- Protect the indigenous knowledge and resources of all communities in Kenya
- Protect biodiversity
- Stop activities that may endanger the environment

And, Parliament must oversee concessions to exploit Kenya's natural resources such as minerals, fossil fuels and forests.

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### **Chapter 6 Leadership and Integrity**

Chapter 6, on Leadership and Integrity, is the last of the Chapters in the Proposed Constitution that lay down the principles on which the new constitutional order is based. The rest of the Constitution deals with more practical matters. Chapter 6 establishes the institutions and procedures that will secure the values in the six introductory chapters and provides the tools to fight corruption.

The Chapter is concerned with State officers – the President and Deputy President, other members of the Cabinet, MPs and members of the new county governments, judges and magistrates, members of commissions and so on. It recognises the huge honour and responsibilities vested in the holders of these offices and demands that they perform their functions to a high standard. But although Chapter 6 focuses on State officers, it also requires Parliament to pass a law that applies the principles in it (with any necessary modifications) to other public servants.

The Chapter explains the role of State officers. The authority that they exercise is a public trust. It gives them the responsibility to serve people, not the power to rule them. So, under the Proposed Constitution, State officers must, among other things –

- Demonstrate respect for the people of Kenya
- Make decisions objectively and impartially. They must not be influenced by favouritism or corruption
- Serve selflessly, with discipline and commitment, and in the interests of the public
- Be accountable for their actions

These standards have implications for the conduct of State officers. They may not ever behave in a way that creates a conflict between their personal interests and that of the public. If, for example, an MP has a private interest in a matatu company, he or she may not participate in deliberations and decision making about how matatus should be regulated. The fact that he or she may be knowledgeable about the way the sector operates is not a good enough reason for allowing him or her to contribute to the discussion. Similarly, if an MP or Cabinet member owns a shoe factory, he or she can't be part of decisions to restrict importing shoes. Judges should not socialise with people who are appearing before them in a case. And neither State officers nor members of their families can rush to buy land in an area that they have heard is to be the site of a government development.

In some countries the issue of conflict of interests is dealt with by requiring State officers to put all their personal investments into what is known as a ‘blind trust’ to be managed by professionals without their involvement while they hold office. Parliament must pass a law setting out how the danger of conflicts of interests is to be managed in Kenya but, whatever method it chooses must ensure that State officers are not improperly influenced when they make decisions.

Chapter 6 deals with some aspects of the life of State officers very specifically: They may not accept gifts unless an Act of Parliament allows them to. If, for instance, the President is given a gift by another head of state on an official visit, that gift is considered to be a gift to Kenya. Also, State officers are not allowed to hold foreign bank accounts except in accordance with an Act of Parliament. And a State officer may not ‘moonlight’. In other words, they may not have other jobs – the Attorney-General can’t practice law on the side, an MP can’t run a business, and a full-time member of a Commission may not run a private consultancy. There are also restrictions on retired State officers who are receiving State pensions. They may be members of boards of State corporations, for instance, but, if they are paid, they may hold only two such offices.

The provisions of this Chapter are not merely nice words. People who breach them will be subject to disciplinary procedures and, if they are dismissed from office, they may not hold State office again. MPs and members of county assemblies are disqualified from holding their seats if they have contravened Chapter 6 in any way whatsoever. And, no one who has contravened the provisions of the Chapter may be elected President.

Application of the provisions of the Chapter could have very serious consequences for State officials and so a strong mechanism is needed to implement it. This will be an independent ethics and anti-corruption commission.

This is a short Chapter but it enshrines principles essential to establishing a new democratic order in Kenya. It says that the authority of a State officer must be exercised in a manner that “brings honour to the nation and dignity to the office” and it makes people in leadership positions accountable for their actions.

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### **Chapter 7 Representation of the People**

Everyone knows that the right to vote in free and fair elections is a cornerstone of democracy. But, we also know that this right is difficult to implement. Elections and voting, the essence of democracy, can present huge dangers to democracy. This was tragically obvious to Kenyans after the 2007 elections. Problems in the management of the elections and the electoral system itself (how Kenyans are represented in Parliament including the size of constituencies) contributed to the post-election violence. The Independent Review Commission on the elections (IREC) found that weaknesses in the Constitution contributed to the problem. The Proposed Constitution fixes these.

First, Chapter 7 establishes an Independent Electoral and Boundaries Commission (IEBC) designed to command the respect of all Kenyans and to be non-partisan. An Act of Parliament will determine how its members are appointed and the National Assembly must approve appointments. Unlike the old ECK, IEBC commissioners will not be chosen by the President alone.

Also, so that IEBC commissioners are not closely connected to a political party, no one who has stood for election to Parliament or held office in a party in the past five years may be appointed to the IEBC. And, the days of a bloated and inefficient electoral commission will be over if the Proposed Constitution is adopted. Following IREC's recommendations, the IEBC may have no more than nine members.

The Proposed Constitution also provides a framework for managing elections:

- Voter registration must be continuous.
- Voting must be in secret and simple, the method of counting votes must be secure and results must be verifiable.
- Violence and intimidation must be eliminated.
- Votes must be counted at the polling station where they are cast and results announced promptly at each polling station. (This will help avoid counting errors.)
- Election materials (like ballot papers) must be kept safely.
- The process must be transparent – citizens must be able to understand how votes are counted and verified and have access to information on voting.
- Independent candidates can stand for election

The IEBC will not be responsible only for elections of the President, the National Parliament and county assemblies and governors. It will also be responsible for tackling problems with party

nominations like a failure by parties to follow their procedures, vote buying, the replacement of winners by others and the violence these practices cause.

In Chapter 8, the Proposed Constitution also changes how people are represented in the National Assembly. First it secures for Kenyans the right to ‘equality of vote’ by changing the basis for delineating constituencies and increasing the number of constituencies to 290.

These changes correct the deepest problem with the current system of representation. Under the current system, the votes of some people are worth much more than those of others. This is because there are far more people in some constituencies than others yet each constituency elects just one person to the National Assembly. In fact, votes in some constituencies weigh 19 times more than in others. The Proposed Constitution says that the number of inhabitants in each constituency must be equal as far as possible. But it recognises that, if this were done everywhere, constituencies in the sparsely populated areas like the northern would be vast. So, it allows deviation. But, unlike now, it limits how much the population size of constituencies may differ. In rural areas or cities, constituencies can have up to 40 percent more or less people than the norm. This deviation remains large. Nonetheless, it is much fairer than the present system.

The second change in National Assembly representation is to ensure all groups are represented: 47 women will be elected to the Assembly, one from each county. And 12 people, chosen by political parties according to the proportion of their seats, will represent special interests like those of people with disabilities. So that you know who your party will nominate for the ‘special interest’ seats, parties must submit lists of their candidates for these seats to the IEBC before the election. Also, these lists must include equal numbers of women and men.

The last part of Chapter 7 sets out basic requirements for political parties. They must –

- Have a national character and not be based on religion, ethnicity or gender .
- Have a democratically elected governing body
- Respect human rights
- Promote the Constitution
- Observe the electoral code of conduct.

The IREC report presents a devastating analysis of the 2007 elections. It reveals biases in voter registration (and the inclusion of about 1.2 million ghosts); distortions in the delineation of constituencies; abuse of polling including bribery, ballot-stuffing etc; “grossly defective data collection” and so on. It concluded that the results were “irretrievably polluted”.

This must not happen again. Of course, a constitution cannot produce perfect elections. Only people can. But the Proposed Constitution sets out the rules of the game very clearly and gives

Parliament, the IEBC and, ultimately, the courts, a foundation for a system that is legitimate, fair and peaceful.

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### **Chapter 8 The legislature**

In a 1867 study of English politics, Walter Bagehot (pronounced 'Bajit') distinguished between the 'dignified' and the 'effective' parts of a political system. Legislatures, he thought, generally fall on the 'dignified' side of the divide, because their main role is to confer legitimacy on politics. The Proposed Constitution challenges that view of legislatures. Chapter 8 establishes a Parliament quite different from the current Kenyan Parliament, with a set of responsibilities that seek to ensure that the power of the state is not concentrated in the executive but is properly balanced between the executive, Parliament, the judiciary and various independent commissions. This article describes the main features of Parliament. Saturday's article will describe the way power is balanced between Parliament and the executive.

The most obvious change between the current Parliament and Parliament in the Proposed Constitution is from one chamber, the National Assembly, to a Parliament with two chambers, the National Assembly and a Senate.

Under the Proposed Constitution the National Assembly will have 350 members. Their election was described yesterday. The Assembly will have the main responsibility for passing laws but it will share this responsibility with the Senate when laws concern counties.

The Senate will represent the new counties. So, it is comprised of one person elected from each county as well as sixteen women, two members representing the youth (a woman and a man), two people representing persons with disabilities (again a woman and a man), and a Speaker. The Senators who are not elected from counties will be chosen by parties in proportion to the number of seats they have won in the elections.

The only law making role of the Senate is over Bills that –

- say how county elections must be run;
- affect the finances of counties; or
- affect the functions of counties (like a Bill setting standards for abattoirs or setting maximum limits on air pollution because counties are responsible for abattoirs and air pollution).

The Senate has a special role in passing two types of Bill: those concerning county elections and the annual Bill giving counties revenue. Once the Senate passes these Bills, the National Assembly needs a 2/3rds majority to reject them – here the Senate is the dominant law maker.

Usually, however, when the Senate has a law-making role it cannot override the wishes of the National Assembly. But the National Assembly can't override the Senate either. These Bills must be passed by both the National Assembly and the Senate. If there is a deadlock (when, say, the National Assembly passes one of these Bills but the Senate rejects it), Parliament must set up a mediation committee to try to work out a compromise that both Houses will agree to. If that fails, the Bill fails and will not become law.

The way the Senate votes also reflects its role as a House representing counties. When the Senate votes on laws and other matters affecting counties, all Senators are clustered into county delegations and each county has just one vote cast by the Senator elected from the county.

But not all the changes involve the Senate. Under the current constitution, the Executive has total control over the annual budget, tax law and other "money bills" and so Parliament can't adjust the way the executive decides to spend or prioritise. The Proposed Constitution puts the National Assembly in control of money bills, provided that it consults the relevant Cabinet member about them.

This Chapter also sets out the qualifications needed to be a member of Parliament; when general elections are to be held (2<sup>nd</sup> Tuesday in August every fifth year – it can't be dissolved by the President); the official languages of Parliament (English, Kiswahili and Kenyan Sign Language); and the National Assembly's oversight role (this is the subject of Saturday's article). It says that, if the President simply ignores a Bill that is properly passed by Parliament, it is assumed that he or she has assented; and, it establishes a Parliamentary Service Commission to run the affairs of Parliament.

Finally, there are three very special provisions which could be used to make this a "People's Parliament". First, meetings of Parliament – including committee meetings – must be open to the public unless there is a very good reason to exclude the public. Second, Parliament must facilitate the involvement of ordinary people in its business. The same clause in the South African constitution led to an Act being declared unconstitutional because Parliament had not given people a proper opportunity to comment on it. Finally, the Proposed Constitution requires a law which allows people to recall their MPs. This will mean that MPs cannot win an election and then sit back until the next election. They will have to pay attention to their voters.

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### **Chapter 9 The Executive**

The Proposed Constitution establishes a presidential system – the President is Head of State and Government as well as Commander-in-Chief. He or she is elected at the same time as Parliament – on the 2<sup>nd</sup> Tuesday in August every fifth year. To win a candidate must secure more than half the votes cast as well as at least 25% of the votes in at least 24 counties. If no one secures this number of votes, a second election will be held but this time there will be two candidates only: the two who came top in the first round. The person who gets the most votes in the second round will be sworn in as President. A President may not serve for more than two terms.

As in the United States, each presidential candidate will have a “running mate” who will become Deputy President if they win the election.

The President's most important job is to run the government. To do this, the President chooses no more than 22 members for the Cabinet. Cabinet members will not be called Ministers but Cabinet Secretaries. The National Assembly must approve the President's proposals for the Cabinet Secretaries before they are appointed. Cabinet Secretaries may not be members of Parliament and if the President chooses an MP to be a Cabinet Secretary, that person must resign his or her parliamentary seat before taking up the Cabinet position. The Deputy President and Attorney-General are also members of Cabinet.

The administrative arrangements of the Cabinet will be the responsibility of the Secretary to the Cabinet. Each government department will be headed by a Principal Secretary. All these appointments need National Assembly approval.

The President can be removed from office by Parliament under strictly defined circumstances (removal for misconduct requires the support of 2/3rds of the members of the National Assembly and 2/3rds of the Senate; removal for incapacity caused by illness etc follows a slightly different but equally demanding process). The Proposed Constitution also sets out a process for the National Assembly to remove Cabinet members. This is easier than removing the President.

These provisions provide the framework but Chapter 9 does more than this.

There are provisions in the Chapter which link the work of the executive to the national aspirations in the Preamble and the national goals and values in Chapter 2. Chapter 9 opens with provisions that remind us that “executive authority derives from the people”, and that it must be “exercised in accordance with this Constitution” and “in a manner compatible with the principle of service to the people of Kenya and their well-being and benefit”. In particular, the President



must respect the Constitution, promote unity, respect the diversity of Kenya and ensure that human rights are protected. And, Cabinet cannot be drawn from one or two tribes only. It must be composed in a way that “reflects the regional and ethnic diversity of the people of Kenya”.

Chapter 9 also answers some questions:

Who can stand for election as President? *Answer:* A citizen by birth who is qualified to stand for Parliament and who is either nominated by a political party or by at least 2 000 voters in each of 24 counties. But, you cannot stand for election as President if you are a civil servant, a judge, a member of a county assembly, a commissioner etc.

Can a presidential candidate contest a parliamentary seat at the same time? *Answer:* Yes. This means that if the leader of the party you support loses the presidential election, he or she can still represent you in Parliament if he or she wins the parliamentary seat.

What about swearing in the new President? *Answer:* It must be in public and, unless there are legal challenges to the election results, it must be on the first Tuesday two weeks after the results are announced.

Who runs the country when the President is away or ill? *Answer:* The Deputy President but under these circumstances the jobs the Deputy President can do are restricted. He or she may not nominate, appoint or dismiss Cabinet Secretaries, judges or people to fill other constitutional positions, exercise the power of mercy, or confer honours.

Can the President pardon people who have been convicted for crimes? *Answer:* Yes, but only if an Advisory Committee recommends this. The Committee must take account of the views of victims of the offence when advising the President.

Chapter 9 also closes any loopholes in the election process. What happens if a presidential candidate dies before the election or if the person elected as president dies before being sworn into office? The Proposed Constitution deals with these situations: new elections must be held.

Finally, Chapter 9 contains various provisions which provide checks on presidential power. These will be discussed in the next article.

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## **Beginner's guide to the Proposed Constitution: Chapter by chapter**

### **Chapters 13 and 14 The Public Service and National Security**

These chapters deal with the public service – that is all government offices including provincial administration, local government administration and the disciplined forces. They concern the men and women who deliver public services and who will bear much of the responsibility for making the Proposed Constitution work.

To function properly, a public service must be impartial and independent. Officials must not be under political pressure and appointments must not serve party politics. Article 10 of the Proposed Constitution sets out the main principles including participation of the people, inclusiveness, integrity, accountability and rule of law. Chapter 13 adds the detail.

To insulate the public service from day-to-day politics, a new, independent Public Service Commission (PSC) is responsible for making most appointments in the national public service. The President can't establish public service positions without the agreement of the PSC. A separate independent Teachers Service Commission employs teachers.

Counties will be responsible for their own public services but, of course, the principles of public service also apply to them. It is likely that initially national public servants will be deployed to counties. The equitable share of national revenue that a county receives will cover the costs of such positions.

Appointments in the public service must be based on fair competition and merit. They must also take account of the need for inclusiveness: the public service must “represent Kenya's diverse communities” and provide opportunities for training and promotion for “men and women; the members of all ethnic groups; and persons with disabilities.”

Chapter 13 also protects public officers like “whistle blowers,” from victimisation. So, a public officer may not be fired for reporting corruption. And all disciplinary procedures against public officers must follow the law.

Other provisions in the Proposed Constitution supplement Chapter 12. For example, the Chapter on Leadership requires a law on ethical behaviour in all public offices. The Bill of Rights protects the right to access to information to help people hold public officials accountable. Chapters 8 and 9 prohibit members of the public service from being MPs or Cabinet members.

A separate chapter, Chapter 14, is dedicated to the national security organs (the Kenya Defence Forces, the National Intelligence Service and the National Police Service) because of the nature of their work – they are critical for peace and stability – and because of their huge power.

Special principles apply to them:

- they must follow the law and respect democracy and human rights
- they must respect the diversity of Kenyans
- all communities in Kenya must be represented equitably in their ranks
- they must be subject to civilian control (that is by the President and Parliament)
- they must not support a particular political party

The role of the police and members of the defence forces also means that their rights are restricted. The Bill of Rights says that Parliament can pass laws limiting their rights to privacy, association, assembly, a fair process after arrest and fair labour practices, and their social and economic rights. The most important of these laws already exist.

The National Security Council has overall supervisory control of the security organs. It consists of the President and Deputy President, the Cabinet Secretaries responsible for defence, foreign affairs and internal security, the AG and the heads of the security forces.

Parliament also plays a role in controlling the security organs. Its main method of control is through passing laws which regulate them. In addition, approval of both the Senate and the National Assembly is necessary for –

- the use of Kenya's security forces outside Kenya for support operations like peace-keeping
- the deployment of foreign troops in Kenya
- the use of the army, air force or navy to restore peace in Kenya if there is unrest.

Chapter 14 reorganises the police. It establishes a single National Police Service consisting of the Kenya Police and the Administration Police. It will be headed by an Inspector-General appointed by the President with the approval of both the Senate and the National Assembly. The Kenya Police and the Administration Police will remain separate under the Inspector-General, each headed by a Deputy Inspector-General.

To avoid abuse of the police for political purposes and to strengthen their professionalism, control of the police by the executive is restricted. Cabinet sets policing policy but no one, not even the President, can instruct the police to investigate a particular offence or to drop a particular investigation. And, to protect him or her from executive interference, the Inspector-General serves one 4-year term and can be removed only for misconduct or breaking the law.

The National Police Service Commission also protects the professionalism of the police because it, and not the executive, is responsible for police appointments. And, it must ensure that the police reflect the diversity of Kenya's people.

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## **Beginner's guide to the Proposed Constitution: Chapter by chapter**

### **Chapters 16 and 17 Amendment and General Provisions**

Amending a constitution should not be easy. This is because a constitution is a country's basic law which provides the framework for all laws and government acts. If a constitution is too easy to amend, the politicians in power could change it to stay in power or for other partisan political purposes. The Proposed Constitution protects itself against such mischievous amendment by requiring wide support for all amendments and by requiring citizens to endorse more fundamental changes through a referendum. And, in contrast to the current Constitution, it also allows citizens to initiate constitutional change.

There are three ways to change the Proposed Constitution.

First, is the ordinary process: Most provisions in the Proposed Constitution can be changed if both the Senate and the National Assembly support the change with a 2/3rds majority. Changes cannot be made in a hurry. The Proposed Constitution requires the process to extend over at least 90 days. And, Parliament has an obligation to publicise any proposed changes and to have public discussion about them.

Secondly, some provisions in the Proposed Constitution have special protection. They can only be changed if the people agree to their change in a referendum. These provisions are the ones that:

- Establish the supremacy of the constitution and the sovereignty of the people
- Define Kenya's territory
- Set out Kenya's national values
- Protect rights (the Bill of Rights)
- Set the term of office of the President
- Protect the independence of the judiciary and constitutional commissions
- Set out the functions of Parliament
- Set out the objects, principles and structure of devolved government
- Set out the process for amending the constitution

To amend any of these provisions, at least 2/3rds of the members of both the Senate and the National Assembly must approve the amendment and it must be approved in a referendum. For approval, at least 20% of the registered voters in at least 24 counties must vote in the referendum and over 50% of the votes must support the amendment.

The third way of amending the constitution is by 'popular initiative'. This might be used if neither the Senate nor the National Assembly wants to support a change.

The steps in a popular initiative:

Step One: A proposal for amendment is supported by the signatures of at least one million registered voters.

Step Two: The Independent Electoral and Boundaries Commission verifies that there are enough true signatures.

Step Three: The proposed amendment is submitted to the county assemblies.

Step Four: At least 24 county assemblies approve the proposed amendment.

Step Five: The proposed amendment is introduced in Parliament.

Step Six: More than 50% of the members of both the Senate and the National Assembly approve the amendment.

When Step Six is completed the amendment will be successful if it concerns an ordinary provision of the Proposed Constitution. But, if it concerns one of the specially protected provisions, there must also be a referendum. And, there will be a referendum if Steps One – Five are successfully completed but Parliament refuses to pass the proposed amendment.

Chapter 17 contains “General Provisions”. It covers three things necessary to make the Proposed Constitution work properly. First, it says who can enforce the Constitution: Anyone who believes that the Constitution is being contravened can go to court to ensure it is properly enforced.

Secondly, it gives guidance about reading the Constitution. Most important here is that the Constitution must be read in a way that promotes democracy, the rule of law, human rights and fundamental freedoms and contributes to good governance. No one should interpret the Constitution in a way that undermines these values. This provision also explains how work out when periods of time set out in the Constitution start and end. For example, if the President has seven days in which to do something, Sundays and public holidays must be counted in as part of the seven days.

Thirdly, Chapter 17 provides a “dictionary” for the Constitution. It explains what various phrases mean when they are used in the Proposed Constitution. For instance, “child” means someone under 18 years of age and the “youth” are people between 18 and 35 years. When the Proposed Constitution talks about “marginalised communities” it means communities that are not properly integrated into the social and economic life of Kenya. In the Proposed Constitution the word “land” includes water and natural resources above and below ground, the sea, and air space etc. And so on. It is important to remember that these definitions apply only to the way the words are used in the Proposed Constitution itself. They do not apply to other laws.

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