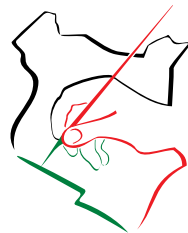


# Your guide to the Proposed Constitution

Simplified Version



## Committee of Experts on Constitutional Review

Katiba Mpya, Kenya Moja



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# Introduction

In 2008, the Parliament of Kenya passed a new law, the Constitution of Kenya Review Act, setting out a procedure for Kenya to adopt a new constitution. Four main organs are identified for the task:

- A Committee of Experts
- A Parliamentary Select Committee (PSC)
- The National Assembly
- The people of Kenya – through a referendum

The Act also sets out values which must be the basis of a new constitutional order. These values have been agreed to by Kenyans since 1998 when the process of writing a new constitution started. They include:

- A free and democratic system of government
- Human rights and gender equality
- People's participation in government
- Ensuring basic needs and well being of all Kenyans

The Committee of Experts was established in February 2009. The Committee released the first draft Constitution to the public on 17 November 2009 for comment. It received about a million submissions. After that, it revised the draft Constitution in light of the submissions and, following the procedure set out in the Review Act, it submitted the revised draft to the Parliamentary Select Committee.

The Parliamentary Select Committee consists of some of the most senior members of the political parties in Parliament. At a retreat in Naivasha, the Select Committee discussed the most difficult issues including devolution and whether or not Kenya should have a parliamentary or a presidential system of government. It reached agreement on these and other issues and, on 2 February 2010, presented the draft to the Committee of Experts with its recommendations.

The Committee revised the draft once again so that it reflected changes agreed to by the politicians. The Committee also made sure that the new draft did not depart from the views of the public and the values in the Review Act. On 23 February a new draft was sent to the third organ of review, the National Assembly. After 30 days of discussion, the National Assembly passed the draft without changing it.

Now the people of Kenya must vote in a referendum on whether the draft should be the new Constitution of Kenya.

This booklet explains what the Proposed Constitution says. When reading it, it is important to remember that many things in the Proposed Constitution are not new. It is built on the draft constitutions that were written by the Ghai Commission (the Constitution of Kenya Review Commission - CKRC), Bomas (the National Constitutional Conference) and Parliament in 2005 (the Proposed New Constitution - 'Wako' draft).

# *What is a constitution? What must it do?*

A constitution –

- Sets the rules for the way in which a country is governed
- Protects the rights of all people in the country

## *The Proposed Constitution*

### **Protecting the nation and its core values**

The Constitution will be the supreme law of Kenya. This means that all laws in Kenya must be in line with the Constitution. Nobody – no government official, no leader and no person – may disobey the Constitution. Everybody must protect the Constitution and the democracy that it creates.

### **The basics**

The Constitution says that there will be two levels of government in Kenya – national and county.

This is explained later. The official languages are Kiswahili and English. The State must protect other Kenyan languages including Kenyan Sign Language. It must also promote the use of Braille for persons who are visually challenged. The Constitution also sets out what the flag looks like, what the national anthem is and what Kenya's national days are. The national days are:

Madaraka Day (1 June)

Mashujaa Day (20 October)

Jamhuri Day (12 December)

## **National values, principles and goals**

The Proposed Constitution sets out values, principles and goals that bind everyone. They include:

- National unity and the devolution of powers
- Democracy and the participation of people in governance
- Human dignity, equity, inclusion, social justice, human rights and protection of marginalized people
- Good governance, integrity, openness and accountability
- Sustainable development

## **Culture**

The Proposed Constitution requires the State to protect and promote the many different communities of Kenya and their cultures.

## **Citizenship**

The citizenship of all Kenyans is protected. Kenyan citizens by birth may also be citizens of another country. This means that they can hold dual citizenship. A child born to a Kenyan mother or father is a Kenyan citizen.

The Constitution guarantees all adult citizens the right to vote and to stand for election.

# The Bill of Rights

The Bill of Rights sets out the rights of all people in Kenya. These are not rights given to people by the Constitution or the State. They are rights that people are born with and that are protected by the Proposed Constitution.

## To whom does the Bill of Rights apply?

Everyone is entitled to enjoy the rights in the Bill of Rights. And everyone is bound by the Bill of Rights. This means that all people in Kenya must respect the human rights of everyone else.

It binds all government institutions and all state officers while doing their work. They are required to respect human rights, and deal appropriately with the special needs of individuals and groups in our society.

## Where can I complain if my rights are denied?

You have a right to complain to a court or to the Kenya National Human Rights and Equality Commission if your human rights are denied or if someone threatens to deny you your rights. The court can declare that you have been denied your rights and give you a remedy. Courts will also have power to declare that an action taken by someone is unlawful and cannot be accepted or respected under the law.

### Rights of the family

Adults have the right to marry people of the opposite sex. People in marriages have equal rights. Law must recognize religious marriages.

### If you are held in custody:

You still will have all the rights that the Bill of Rights grants unless those rights cannot be enjoyed while you are in custody. A law must ensure that people held in custody are treated in a humane way.



# *Your rights in the Constitution include:*

The right to life

The right to equality & to be free from discrimination.

Rights of the family

Human dignity

Freedom of conscience, religion and belief

Freedom of expression and assembly

Freedom of the media and the right to information

Political rights

Freedom of association

The right to freedom and security of the person

Freedom from slavery

The right to privacy

Rights to food, water, health care, education,  
housing and social security

Freedom of movement

Right to property

Right to fair working conditions

The right to a fair trial



## Are there limits to the enjoyment of rights?

Sometimes rights may be limited. Often a right is limited to protect the rights of others. For instance, you are not allowed to use your right to free speech to tell lies about people or to publish the name of a woman who has been raped. Publishing her name would infringe that woman's rights to privacy and dignity. The right to freedom of speech may be limited to protect privacy or a person's dignity. Sometimes the State may limit a right so that it can govern properly. The State may say you may not hold a public meeting outside a hospital. This limits your right to hold meetings but it is necessary to ensure quiet around the hospital and access to the hospital. But the Constitution says that, with one exception, no right can be limited unless the limit is reasonable and acceptable in a democracy. The exception is for people serving in the defence forces or the police. These people do not enjoy all the rights in the Proposed Constitution.

## Does the Constitution allow a state of emergency?

A State of Emergency may be declared if the country—

- Has been attacked by another country
- Is under threat of war or a natural disaster, or
- Is facing some other very serious national problem.

But, the President cannot call a state of emergency at will — the Supreme Court can ensure that a State of Emergency is really necessary.

### Freedom of expression and assembly

People have a right to speak freely and to meet together and to demonstrate. But these rights do not allow people to promote war or to incite other people to commit violent acts.

### **What are the rights of an arrested person?**

An arrested person must be told the reason for the arrest. He or she must be allowed to speak with a lawyer or any other person who can assist. No one can force another person to confess to having committed an offence.

An arrested person must be taken to court as soon as possible. This must not be later than twenty-four hours from the moment of arrest. There is a right to be released on bond before trial, unless there is a good reason for not doing so. If the offence is one that can only be punished by a fine or less than six months' imprisonment, the suspect cannot be held in remand.

### **Right to fair trial**

If you are charged with a criminal offence, you have a right to a fair trial. This includes the right—

- to be considered innocent until proved guilty
- to be informed of the case against you and allowed enough time and facilities to prepare to answer it
- for the case to take the shortest time possible
- to be represented by an advocate you choose, or by an advocate paid by the government if it would be unjust not to have an advocate
- to appeal to a higher court

## What does the right to equality mean?

The right to equality includes the right to be free from discrimination.

It means that everyone must be treated fairly. You cannot discriminate against people because they belong to a certain tribe, are women, speak a particular language, are married, are pregnant or ill, dress a certain way, have a disability, are old or young or belong to a particular religion. Also, action must be taken to help people who are disadvantaged because they have been treated unequally in the past.

There are also special provisions in the Proposed Constitution for:

- Women
- Young people
- Children
- Older members of society
- Persons with disabilities
- Minorities and marginalized groups

These provisions require the State to take special care of these groups of people.

## What about land?

The Constitution contains principles which the government must follow when dealing with land.

It also:

- Classifies land as public, private and community land
- Establishes a National Land Commission to manage all public land
- Requires all people to have access to public land
- Says that the government must have a land policy that allows people to have equitable access to land and secure land rights
- Protects community land
- Does not allow foreigners to own land – foreigners can lease (rent) land but the lease may not be longer than 99 years

## And the environment?

The State and everyone in Kenya must protect the environment. People must have a say in the way that the environment is managed. Natural resources like forests, water and minerals must be managed carefully and in a way that ensures that future generations can also enjoy them.

## What the Proposed Constitution says about

# *Government in Kenya*

There will be two levels of government:

- The **national government** will be responsible for things that need to be done for the whole nation like the defence and security of Kenya, the courts, the environment, and land policy among other things.
- There will be 47 **counties**. The counties will be responsible for most services. For example, they will be responsible for some health services, agriculture and livestock sale yards, markets, water and sanitation.

Parliament will make laws for the national government and the President will be responsible for implementing them. Every county will also have an elected assembly to make laws and an executive body to implement those laws. All the laws of the national Parliament and county assemblies must be in line with the Constitution.

## **The National Government**

The work of the national government is done by three main bodies: Parliament, the Executive and the Judiciary.

- **Parliament** makes laws and ensures that they are properly implemented
- The **Executive**, headed by the President, implements laws
- The **Judiciary** ensures that Parliament and the **Executive** do not misuse their power and that everyone obeys the law.

Also, national independent commissions (like the Kenya National Human Rights and Equality Commission) and independent offices (like the Auditor-General) ensure that the government is doing what the Constitution requires.

## Parliament

All Kenyans are represented in Parliament. In Parliament, the MPs who represent Kenyans decide how the country should be governed and what laws should be made.

In the Proposed Constitution, Parliament has two houses: the National Assembly and the Senate.

The **National Assembly** consists of 349 people and a Speaker.

- 290 of the members are elected by you in your constituency
- 47 of the members are women, elected by you in your county
- 12 members are nominated by political parties to represent special interests like the youth, people with disabilities and workers.

The **Senate** consists of 67 people and a Speaker.

- 47 Senators are chosen by the voters in each county
- 16 of the members are women, nominated by the political parties

- Two members, a man and a woman, are nominated by political parties to represent the youth
- Two members, a man and a woman, are nominated by political parties to represent persons with disabilities

The number of people each political party may nominate is worked out according to how many seats the party has. A big party with many seats in the Senate or National Assembly may be able to nominate a number of people but a party with very few seats will not be able to nominate people.

### **Who can stand for election to Parliament?**

Adult Kenyan citizens can stand for election.

You are not allowed to be elected to Parliament if –

- you are bankrupt, of unsound mind or in prison for more than 6 months
- you are a judge, a member of a commission or employed by the government in any other way
- you were a member of the Independent Electoral and Boundaries Commission within the past five years
- you are a member of a county assembly.

Most MPs will be nominated as candidates by **political parties**. The Proposed Constitution controls political parties.

Some MPs will be **independent**. This means that they will not have been nominated as candidates by a political party. As an independent candidate, to stand as an MP for the National Assembly you must have the support of at least 1 000 registered voters in your constituency and to stand for the Senate you must have the support of 2 000 registered voters in your county.



## How does the Constitution make sure that the executive will not abuse power?

- Elections for the President, Parliament and county governors and assemblies must be held every five years.
- The President and Deputy President may not serve for more than 2 terms of 5 years each – that is no more than 10 years altogether.
- Parliament can remove the President, Deputy President and Cabinet Secretaries.
- Appointments to important offices cannot be made by the President acting on his or her own – they must be approved by Parliament.
- Courts can declare that actions and laws that infringe human rights or infringe other constitutional provisions are not valid and have no effect.
- Independent Commissions and offices monitor government.
- The government must get approval from Parliament before it spends any money and must explain in public every year what it has done with tax money.
- The police and military must obey the Constitution and must be controlled by Parliament.
- The State must give people any information that they ask for – the government may keep secrets only in very special circumstances.
- Politicians and senior state officials who are dishonest or use their offices to make themselves rich will be disciplined.

## Why are there two Houses in Parliament?

There are two main reasons for two Houses:

- Each House has a different focus: The main job of the National Assembly is to see that matters of concern to all Kenyans are looked after properly. The main job of the Senate is to see that counties are fairly treated.
- Two Houses help control government power. Some laws need to be passed by both Houses. In this case, the Executive needs to persuade both Houses that those laws are important.

Both the Senate and the National Assembly must agree to national laws that concern counties. If they disagree, Parliament will set up a committee to help reach agreement.

## People must be heard by Parliament

The Proposed Constitution says that Parliament must make sure that ordinary people are given a chance to be involved in law making and the other business in Parliament. This will usually happen through a parliamentary committee which will hold hearings on important laws before they are adopted by Parliament.

The Proposed Constitution also says that Parliament must pass a law that allows voters to recall their MPs if they are not performing well.

# *The Executive*

In the Proposed Constitution, the Executive consists of the President and Cabinet Secretaries. (Cabinet Secretary is the new name for Ministers.)

## **The President**

The President is elected by the people. To become President you must win at least half of all the votes in an election as well as at least  $\frac{1}{4}$  of the votes in at least 25 of the counties. If no one gets enough votes, a second election (run-off) must be held to choose between the candidates who came first and second in the first election.

The President is Head of State and Head of Government.

In particular, the President:

- Chooses Cabinet members (with the approval of the National Assembly)
- Chairs Cabinet meetings
- Is in charge of running the government
- Is Commander in Chief of the Defence Forces
- Assents to laws

The President is supported by a Deputy President. When a person stands for election as president, he or she will announce who will be deputy president if he or she wins the election. This means that when you vote for president, you will know who will be deputy president if your candidate wins. The President and the Deputy President may be removed from office by Parliament if they can't fulfill the functions of the office (perhaps because of illness) or if they do not do what the Constitution requires.

### **All about the Cabinet**

The Cabinet helps the President to govern the country. The Cabinet consists of the President, the Deputy President, between 14 and 22 Cabinet Secretaries and the Attorney-General.

The President chooses Cabinet Secretaries but the National Assembly must approve the choice of the President. The President will choose people who can do the work of government well. MPs and Senators may not be Cabinet Secretaries. The President must ensure that the Cabinet reflects the regional and ethnic diversity of Kenya. The Cabinet Secretaries will be in charge of different ministries like the ministries of Health, Land Affairs, Justice and Defence.

# The Judiciary

The judiciary consists of judges, magistrates and other judicial officers.

There are four types of courts in the Proposed Constitution.

- **Lower courts:** Most cases will go to magistrates' courts and cases involving people in the army will go to Courts Martial. A case involving Muslim personal law will go to Kadhis' Courts if the people involved in the cases are Muslims and choose this.
- Cases involving serious crimes or large amounts of money, or cases that are very complicated will go to the **High Court**
- If parties disagree with the decision of the High Court, they may appeal to the **Appeal Court**
- The top court is the **Supreme Court**. It will have the final word.

Judges, magistrates and Khadis must be honest, fair and well-trained. The Proposed Constitution requires this and sets up a special body called the Judicial Service Commission to choose judges. The Judicial Service Commission also has the power to investigate complaints against judges. If you think that a judge is not honest or is biased you can complain to the Commission.

## What happens to the judges when the new Constitution comes into effect?

Many people have said that the judiciary must be reformed.

All judges and magistrates will stay in office when the Proposed Constitution comes into effect.

But the Constitution says that Parliament must pass a law that sets out a process for vetting

judges and magistrates. This is to ensure that all judges and magistrates are honest and meet the standards of the Constitution.

The Chief Justice is the head of the judiciary. He or she is a judge on the Supreme Court. Before the Chief Justice or the Deputy Chief Justice can be appointed, the National Assembly must approve them.

### **What are Kadhis' Courts?**

Kadhis' courts are courts that Muslim people may use to settle family matters.

The Kadhis' Courts have operated in parts of Kenya for centuries. The coastal strip (which is now part of Coast Province) used to belong to the Sultan of Zanzibar. At independence, when the coastal strip became part of Kenya, the new government, represented by Mzee Jomo Kenyatta, signed an undertaking with the Sultan of Zanzibar agreeing that the Kadhis' Courts would continue to operate.

The Proposed Constitution keeps Kadhis' Courts as they are in Kenya's current Constitution.

This means that if you are Muslim you may go to a Kadhis' court if you have a dispute with another Muslim person concerning marriage, divorce, inheritance or property. Magistrates' courts or the High Court deal with these matters for people who are not Muslim. If a Muslim person does not want his or her case to be decided in a Kadhis' Court, the case must go to a magistrate's court.

Kadhis' courts cannot deal with criminal matters. They cannot impose punishments and they cannot handle a case if one of the parties is not a Muslim.

# *Devolved government*

Why devolved government?

- Devolved government allows people living in a particular area to make their own decisions on matters that concern them directly. So, devolved government makes democracy stronger – it gives people more say.

## **County governments**

Most services will be provided by 47 counties.

Your county will:

- Provide ambulance services
- Ensure that food that is sold is safe
- Manage the removal of waste
- Manage cinemas and other public places
- Provide street lighting
- Regulate harbours
- Run local health facilities
- Run markets
- Run pre-primary schools and childcare facilities
- And be responsible for other things that are most important to citizens

## Money and counties

One reason for having counties is to ensure that resources are distributed fairly across the entire country. The Proposed Constitution does this by:

- Giving every county a right to a fair share of the money that the State has. In the Proposed Constitution this is called an equitable share. Counties will not all get the same amount of money. In working out how much each county must get the following things are important:
  - The development needed in the county – the equitable share must help counties with very poor health facilities or roads or water services, to improve their services.
  - The responsibilities of the county – how many children it must educate, how many old people may need health care, how poor people in the county are.
- Setting up an independent Commission to protect the right of counties to a fair share of national funds. This is the Commission on Revenue Allocation.
- Giving Senate the power to decide how much money counties should receive.

County governments can also impose certain taxes: they may impose rates on property and entertainment taxes. The national Parliament may pass laws allowing counties to pass other taxes.

## How will your county be governed?

A **county assembly** will pass laws and oversee the way the county is governed. The county assembly will be the Parliament for a county.

A county **executive committee**, headed by a **governor**, will develop policy for the county, implement county laws, and manage the public service of the county.

For the **county assembly**:

- each ward in the county will elect one assembly member
- each party will nominate other members so that at least 1/3rd of the members of the assembly are women
- each party will also nominate members from marginalized groups including people with disabilities, minorities and youth

The number of people that a party may nominate depends on the number of seats that the party wins in the elections.

Every county assembly will elect a **speaker** but a member of the assembly may not be chosen as speaker.

The county governor will be elected by the voters in a county at the same time as an election for the county assembly. When a person stands for election as governor, he or she will announce who will be **deputy governor** if he or she wins the election. This means that when you vote for county governor, you will know who will be deputy governor if your candidate wins.

A county governor may not be in office for more than two terms so no one can be county governor for more than 10 years.

The governor chooses the other members of the executive committee –

- The governor may not choose members of the county assembly to be executive committee members
- The assembly must approve the choice of the governor. This means that if the assembly rejects a person that the governor chooses for the executive committee, the governor must choose another person.
- No county executive committee is allowed to have more than 12 members – the governor, the deputy governor and 10 other members. Small counties will have smaller executive committees.

## **Cities**

Special laws will set out the way in which cities and other urban areas must be governed.



## Can the boundaries of counties be changed?

Yes, boundaries can be changed but only –

- If a special, independent commission recommends that they should be changed
- If 2/3rds of the members of both Senate and the National Assembly support the change.

## What authority does the national government have over counties?

Counties will have their own governments which are accountable to the people. The Proposed Constitution says that the national government must respect county government. But, the national government has responsibilities over counties in 4 situations:

1. Parliament may pass laws that set standards for the whole country so that no county gives its people poor services. Counties must obey those laws. For example, Parliament may decide that every county must have a clinic for every 10 000 people. When counties decide how to spend their money, they must ensure that they have enough clinics. A county cannot decide to build an airport unless it has enough money for the clinics as required by the national law.
2. National laws can regulate the way counties look after public money.
3. If a county government can't provide proper services, the national government must support the county to ensure that services are provided to the people.
4. In situations of conflict or other exceptional circumstances, the President may suspend a county government but –
  - Senate must ensure that a county government is not suspended wrongly
  - A county government may not be suspended for more than 90 days.

# *The Public Service, the defence forces and the police*

The public service, the defence forces (the army, the navy and the air force) and the police must work for Kenyans. The Proposed Constitution says this.

## **The public service must:**

- Provide services in a fair way to all Kenyans
- Fulfill its responsibilities in time and efficiently
- Represent all Kenyans – in other words, members of all groups of Kenya must be employed in the public service

An independent Public Service Commission ensures that the national public service is run in a fair way. It is responsible for creating posts in the national public service, for ensuring that promotions are fair and for ensuring that members of the public service are properly disciplined in fair procedures when things go wrong. Counties are in charge of their own public services and must appoint and manage their own staff.

## **National Security**

All action by the police and defence forces to protect Kenya and people in Kenya from threats must comply with the law and respect human rights.

The President is chairperson of the National Security Council. The National Security Council supervises all national security.

### What about the rights of police and defence forces?

The Proposed Constitution does not protect all the rights of people serving in the police and defence forces. It allows Parliament through law to limit certain rights. The rights that are not protected are the right to privacy, freedom of association and assembly, the right to demonstrate, social and economic rights, rights when arrested and the right to be treated fairly as an employee, meaning that Parliament can prevent soldiers and police from going on strike.

### The Police

The Proposed Constitution establishes a single National Police Service which consists of the Kenya Police Service and the Administration Police Service. The National Police Service is to be headed by an Inspector-General. The Kenya Police Service and the Administration Police Service will each be headed by a Deputy Inspector-General.

The National Police Service must –

- Be professional
- Prevent corruption
- Observe everyone's human rights
- Be accountable
- Maintain law and order

# *Special commissions to protect your rights and the Constitution*

The Proposed Constitution sets up commissions to protect your rights and the Constitution.

These are:

## **The Kenya National Human Rights and Equality Commission**

This Commission protects your human rights. It will do this by promoting rights, monitoring the way rights are respected by government, private institutions and people, and investigating complaints about rights that are violated. You can complain to this Commission if any of your rights are infringed.

## **The National Land Commission**

This Commission guards public land and must ensure that the government develops a fair policy on land.

## **The Independent Electoral and Boundaries Commission**

This Commission must make sure that elections in Kenya are free and fair and that all adult Kenyans are able to vote.

## **The Parliamentary Service Commission**

The Parliamentary Service Commission ensures that Parliament has a good administration so that it can serve the people of Kenya well.

## **The Judicial Service Commission**

This Commission chooses Kenyan judges and makes sure that the judiciary operates properly.

## **The Commission on Revenue Allocation**

This Commission makes sure that every county gets a fair share of the resources of Kenya.

## **The Public Service Commission**

This Commission is in charge of appointments in the public service. It must ensure that all groups in Kenya are represented in the public service and must discipline public servants who are not honest or who do not do their jobs properly. However, it does not control appointments to county governments.

## **The Salaries and Remuneration Commission**

This Commission sets the salaries of the President, Deputy President, members of cabinet, MPs and Judges. It also makes recommendations on salaries in the public service.

## **The Teachers Service Commission**

This Commission is responsible for hiring teachers. It will ensure that the standards in schools are kept high.

## **The National Police Service Commission**

This Commission is responsible for employing members of the police and disciplining them if things go wrong.

## **The Commission on the Implementation of the Constitution**

This Commission has special responsibility for seeing that the new bodies that the Constitution sets up are put in place. It will be disbanded when the Constitution is working properly.

The Proposed Constitution also requires Parliament to set up an **ethics and anti-corruption commission** which must check that politicians and other leaders are honest and, if they are dishonest, that they are punished.

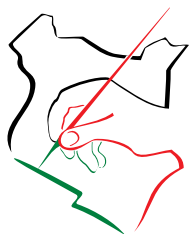
# *Bringing the new Constitution into effect*

**If Kenyans say 'Yes' in the referendum, the new Constitution will come into effect within 14 days.**

What happens to the government when the new Constitution comes into effect?

And what happens to MPs?

1. The government will not change immediately.
2. The President, the Vice President, the Prime Minister, Ministers and all MPs will stay in office until the next elections in 2012.
3. The coalition agreed to under the Accord will continue to govern the country until the 2012 elections. This will ensure stability in Kenya and give Parliament time to pass the laws that are needed to make the new Constitution work.



# **Committee of Experts on Constitutional Review**

Katiba Mpya, Kenya Moja

