

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

Controlling excessive power

The previous two articles described Parliament and the executive. But these two institutions need to work together. This article describes their relationship to one another and some of the controls that the Proposed Constitution puts on executive power.

The underlying idea is “separation of powers”. This means that the three main organs of government – the legislature (Parliament), executive and judiciary – must be separate, each doing their own jobs. Two reasons are usually given for separating their functions: (i) to protect individual liberty by ensuring no organ has excessive power; and (ii) to make each organ more efficient by allowing it to operate without too much interference. When the Constitution of Kenya Review Commission (the Ghai Commission) collected the views of Kenyans one of the strongest points made was that executive power needed to be controlled. So, the first reason is the one which concerns Kenyans most.

Separating the functions of Parliament and the executive means that neither Parliament nor the executive can act on its own. If the President wants to implement a particular policy, the agreement of Parliament is needed to pass the necessary law and to approve the budget for it. Similarly, if MPs have projects that they want implemented, they need the executive to implement them. And, Parliament can't simply get around resistance from the executive by passing a law instructing the executive to do something because the President can refuse to sign laws (exercising a “veto”). If the President does veto a law, Parliament needs the support of 2/3rds of its members to pass it.

How will the system work? Many laws are uncontroversial – Parliament and the executive will easily agree about them. But, when Parliament or the executive wants to do something that the other organ does not support, a great deal of negotiation will be required. This happened when President Obama tried to pass his health care programme this year. A long process of negotiation and compromise was necessary before a health care law satisfying both the executive and Congress was agreed. This is a good example of how separating power constrains power – neither the executive or Parliament can act on its own.

But, separating functions may not be enough to control excessive power. So, various “checks” secure the balance.

The judiciary provides a check because it can scrutinise the actions of the executive and any laws passed by Parliament to see that they are constitutional. If they aren't, the courts will declare them illegal.

Regular elections, term limits and devolved government are other checks. (Devolved government means that executive power is shared between the national and devolved governments.)

Requiring the National Assembly to approve senior government appointments and its power to dismiss Cabinet Secretaries is a check because if Cabinet members must have the support of the National Assembly and they face dismissal if they don't obey the law.

The Proposed Constitution also makes the National Assembly responsible for overseeing the executive. It must check that programmes have been properly implemented and money is spent as Parliament requires. It has the tools to do this effectively. First, the Proposed Constitution says that Cabinet Secretaries must provide Parliament with regular reports. The rules of Parliament can prescribe when these reports must be presented. Second, Cabinet Secretaries must attend parliamentary committees and answer any questions when asked to do so. Finally, if it is not satisfied by the explanations given by the executive, Parliament has the "power of the purse" – it can block funds to the executive.

Another way of controlling executive power is by removing some of its functions. One example of this in the Proposed Constitution concerns the Attorney-General (AG). Under the current Constitution, the AG is appointed by the President to be principal legal advisor to the government. This includes control of public prosecutions. He also is an MP and Cabinet member. The Proposed Constitution divides the functions of the AG between the AG and a newly-created Director of Public Prosecutions (DPP).

The DPP will be separate from the executive and in charge of prosecutions. He or she will be appointed by the President with the approval of the National Assembly but will not be a member of Cabinet and may not be controlled by anyone. The DPP serves for eight years only and can't be re-appointed so he or she will have no reason to try to please the President to get another term in office. The DPP can also not be removed from office merely because the executive or Parliament is displeased with his or her decisions about who to prosecute. The Proposed Constitution sets out limited reasons for removing the DPP and a strict procedure. These provisions ensure that decisions to prosecute are free of executive influence.

The AG will still be principal legal advisor to the government and will represent the government in legal proceedings.

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