

Constitutional Amendment and Governance....

Can the constitutional amendment that established the grand coalition put a stop to similar future threats?

The Serena Accord, the National Reconciliation Act and the Constitutional Amendment Bill, 2008 address the past not the future. By themselves, they do not prevent a recurrence of this problem, but a number of issues. One, Kenyans have learnt from the last elections and the post election crisis that everyone has a responsibility on the implications of either their omissions or commissions in the electoral process. Everything from the appointment of Commissioners to that of returning officers should be streamlined to ensure it is above board. The process and mode of communication should also be fool proof. Two, we need a new constitution as a way of ensuring the problem we experienced does not recur.

Do you think the grand coalition government will impede the constitutional reforms?

As a matter of fact, the grand coalition government should facilitate the constitutional reforms. This is because in theory, and if you look at it from the perspective of the last referendum, the draft constitution was rejected as there were two fundamental sides. There was one side which was saying you make changes to the constitution without consulting all Kenyans and which was not acceptable to many, while the other side was saying NO. One of the issues that were hotly contested was the office of the Prime Minister which has now come to pass. So, and hopefully, because all the chief protagonists are now in the same government, it should make it possible

to galvanize everybody to agree to a new constitution. The grand coalition government should therefore, facilitate rather than impede a new constitution. What I do not know is whether there is a genuine intention to have a new constitution.

To what extent did the National Accord and Reconciliation Act amend the constitution?

We amended the current constitution in a fundamental way. The creation of the office of a Prime Minister is a fundamental change. The negotiators at Serena had to amend the constitution as part of satisfying the terms of the accord. This has placed national reconciliation within the context of the constitutional agenda.

What are the implications in case of collapse of the coalition, does it still stand?

If the coalition was to collapse, there will be direct constitutional implications. But the real question that must arise is not whether the coalition collapses, rather, what would be the constitutional

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implication if either the Prime Minister or one of his two deputies resigned. As long as nobody has resigned, any collapse can only be theoretical. So, the question would be if one resigned, then that party with majority seats will have to pick someone to occupy the seat. And if again it picks on the same person who had resigned, what will happen? So, a collapse of the grand coalition government might cause unfathomable constitutional crisis. I will prefer to see a situation where we do not even contemplate that as it will bring immense constitutional confusion.

A new constitution will require another referendum; can such a process divide the country just after the post election crisis?

Another referendum will definitely divide the country. I have never been a proponent of a constitutional referendum and prefer a secretariat commission as the one that was chaired by Prof. Yash Pal Ghai. A referendum constitutes collecting the views of Kenyans, going back to the same Kenyans and asking the same people to vote. This is unnecessary and unfair. We were forced to go to referendum because of the ruling by the court, and such rulings have to be respected, but they were wrong in principle. Any time you go into a referendum it is a kind of political alignment which often goes tribal.

Does Kenya have the finances to plan for the realization of a new constitution?

As long as you remove the question of referendum from it, and put a team of people who genuinely want a new constitution, then what appears to

be the differences can be narrowed down. The Law Society of Kenya committee on Constitutional Reforms proposed that it might be better to start making incremental constitutional amendments.

Which institution should manage the process given that ECK has credibility misgiving from Kenyans?

A reconstituted ECK can serve present needs. I do not think ECK as it is presently is credible enough to even oversee a councillor's election. We are in a situation where we are making use of it because of lack of a better alternative. Entities like ECK survive on credibility and credibility alone. Once you have lost it, its gone, period! The ECK as currently constituted has lost that credibility. If they were gentlemen and ladies of honour, they should have resigned ages ago. ECK should be reconstituted, even without

constitutional amendments as the President has powers to appoint a probe committee.

Sections of the media reported that a constitutional referendum will be on issues that ODM and PNU disagree on. How much does this rob Kenyans of a Wanjiku driven process?

Most Kenyans did not know why they either voted Yes or No in the last referendum. Some understood basic issues to certain level, but most had not even read the constitution and instead voted with their regional blocks.

Is the Peking order of the PM and VP a Constitutional problem?

So far, it has not presented itself as a constitutional problem. And perhaps it is because holders of those offices have not yet entered into any power game. But you cannot rule it out. What

is for sure is that although the position of the Prime Minister is created in the constitution and the functions are broadly stated, they are not physically outlined.

Studies by International Peace Academy (IPA) reveal; that formal executive power sharing leads to a fragile peace often, without violence but also without reconciling the parties or addressing the underlying tension and that voluntary power sharing along non-ethnic lines achieve inclusive government and is often seen to lessen ethnic divisions. Does the current power sharing structure impede the achievement of a solid peaceful co-existence in the country?

Had we not gone through that formal executive power sharing, which is the Kofi Annan process, where would we be today? I think we may have been in a worse situation. 🇰🇪



THE CONSTITUTIONAL AMENDMENT ACT, 2008 by James Makori

Following the chaos that rocked Kenya after the disputed 27th December 2007 polls, the country was brought back from the brink of total anarchy by the signing of an agreement that culminated in the passing of the Constitutional Amendment Bill, 2008 [hereinafter "the Act"]. The main facets of this Act were the creation of a coalition government, which established the offices of Prime Minister and two Deputy Prime Ministers.

Of immediate concern was whether the passing of this Act spelled a death knell for multi party politics in Kenya. With all main political parties in government, it is difficult to conceive how checks and balances will be maintained. For instance, Parliamentary rules require that the Official Leader of the Opposition head the Public Accounts Committee (PAC), and an opposition Member of Parliament to head the Public Investments Committee (PIC).

Both committees are now headed by members of the ruling coalition.

We must remember that the Act was passed as a stop gap measure to avoid further deterioration in security and tranquillity. However, it is in place and must be complied with until it is repealed or amended. This Act does not, therefore, mean that multipartyism is dead. As a matter of fact, there is one positive aspect: none of the coalition partners has got an overwhelming parliamentary majority and voting on important matters will therefore be very closely-tied. There has, as a result, been marked improvement in attendance of sessions of the National Assembly by members of parliament who turn up to support their various party positions.

Working together or pulling apart?

A major failing of the Act is that it does not lay out the responsibilities of

the Prime Minister *in extenso*. It does not spell protocol matters in black and white terms of who is senior between the Prime Minister and the Vice President. It is interesting that the Prime Minister has authority to supervise and coordinate ministers including the Vice President, who is a minister, yet the Vice President remains the Official Leader of Government Business in Parliament.

These are nascent problems. A framework has not been created to accommodate the diverse views that reflect the diverse constituencies of the coalition partners. There is need to create a mechanism to manage all divergent views, so that decision making is not slow and ineffective. Some matters may need to be done quickly, such as procurement of medicine and drug supplies. If we have a situation of mistrust, then this can harm service delivery. In other situations, even persons without proper expertise may want to budge into issues which they ill understand, further compromising service delivery.

There are also positive aspects we must focus on. Ministers have been granted great latitude to control their dockets without interference. This should improve governance and service delivery. There have been some accusations that Ministers have appointed officials based on nepotism and tribalism, and there is therefore need to ensure that the appointment is done through the Public Service Commission.

Who controls the National Assembly and the Judiciary?

Kenya's parliament does not have control over its calendar or





timetable. The President wields grave Constitutional powers over it. He can summon parliament and prorogue it constitutionally without consulting anyone. Even if parliamentarians wanted to discuss a serious issue, they are at the mercy of the President. The Act therefore, fails as it does not require the President to consult the Prime Minister on this issue. There is, therefore, need to reform Parliament to manage its calendar and run its affairs independently.

The Act ought to have given the Prime Minister control over the budget process. As things stand now, he has no way of knowing what is in the budget until the Finance Minister reads the budget on the floor of the House.

There is also need for Parliament to create a session when the Prime Minister can answer questions from Members of Parliament. This will create greater

accountability. Situations have arisen in Parliament where assistant ministers have asked other assistant ministers questions in Parliament, forgetting that they are all in government. This may be a result of ignorance on the part of the assistant ministers, and competition between the various parties.

The responsibility for the appointment of judges remains with the President. The Act should have provided a requirement for the President to consult the Prime Minister on appointments to the judiciary. There is also serious need for constitutional amendments to cater for the following vital matters:

- a. Financial independence of the judiciary from the Exchequer. All funds collected by the Judiciary are banked with the Exchequer, and can be used for all sorts of government agendas.
- b. To ensure that all those appointed to the judiciary are competent, diligent and supervised by their superiors at all times. The judiciary must also create a strategic plan with clear expected outcomes and a schedule for completion of pending cases.
- c. To ensure the independence of the judicial officers from litigants. Litigants are the biggest source of bribery, which has weakened service delivery in this sector and compromised the quality of work done.

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The Constitutional Amendment Act, 2008 is a positive step

Whatever its shortcomings maybe, this Act is a positive step. One of the reforms that they had proposed, even through the failed Bomas draft of 2005, was the creation of the office of Prime Minister and a Parliamentary democracy. To some extent, this Act has achieved this dream despite some the aforementioned challenges. These challenges may be overcome by focusing on the following solutions:

- a. There is need to establish broad principles and a mandate within which the leadership of Kenya can function effectively. Decision making should be long-sighted. First, it must fulfil its mandate within this term, and lay a proper background for any future government.
- b. There is need to avoid interference with the civil service. The civil service should be allowed to work independent of the political parties in order to achieve governmental stability and continuity.
- c. We must focus on good financial management of the available resources and proper governance.
- d. We need to build independent and strong institutions, transform those that are not working effectively, and check on other vital sectors that are in charge of public governance and which control public resources.
- e. In the footsteps of South Africa, we must create a proper truth and reconciliation mechanisms.
- f. We must not lose sight of the fight for comprehensive Constitutional reforms. The reforms must cut through all sectors. They must result from public participation. This is our only reliable insurance against bad leadership. 🌐



International News Roundup

EU blocks Bulgaria aid over corruption, chides Romania

The European Union on Wednesday blocked nearly 500 million euros (800 million dollars) in aid to Bulgaria to force its government to stop corruption, the first funds cutoff imposed on a member country.

A European Commission report also listed shortcomings in anti-graft efforts in Romania, which joined the EU along with Bulgaria on January 1, 2007. Both nations were urged to take new measures to fight corruption. Authorities in Bulgaria, the EU's poorest nation, have shown little evidence that they are fighting corruption and organized crime 'properly,' the report said. 'The situation is serious,' it said. In Sofia, Bulgaria's opposition urged Socialist Prime Minister Sergei Stanishev's government to resign, charging it had brought 'moral and financial damage' upon the nation with its handling of EU relations.

Opposition parties called for a confidence vote on the government, the sixth such motion since it came to power in August 2005. The report cited evidence suggesting that senior Bulgarian officials diverted EU aid. But an earlier draft's allegation of ties between Stanishev's government and organized crime figures was omitted from the final report.

The cutoff involves yet-to-be-spent aid earmarked for Bulgaria's transition into the EU fold - 250 million euros from the so-called PHARE programme that helps new members build institutions, 121 million euros for rural development and 115 million euros from a fund for major infrastructure projects, mainly highways. 'After all, this is taxpayer money,' said a spokesman for the commission, the EU executive. Exempt from the cutoff is money from the so-called structural fund, which has set

aside some 7 billion euros for Bulgaria for 2007-2013. Stanishev called the report an 'encouragement to pursue reforms and bring them to a successful conclusion.' Bulgarian government ministries will come up with 'action plans' to address the problems raised by the EU, he said. 'Bulgaria is learning to handle EU funds,' he said in the Black Sea port of Varna. EU anti-graft investigators found serious weaknesses in the capabilities of Bulgarian administrative and judicial authorities, the report said. Despite some progress, 'very much remains to be done,' it said.

In Romania, the report found a 'fragile' judicial system and 'enormous' political influence over decisions related to fighting corruption. It urged Romania to prove its willingness that it is fighting corruption 'at high levels.'

Source: *Europe News Deutsche Welle*

Global: Could do Better - Tackling Corruption in Human Intervention

Humanitarian agencies should work harder and more closely together to minimise various forms of corruption that can affect the delivery of emergency aid and harm the reputation of agencies involved, according to a new report.

"The humanitarian community should step up efforts to address corruption and reduce corruptions risks," according to Preventing Corruption in Human Assistance, a report by Transparency International, the Feinstein International Center and Tufts University, and the Humanitarian Policy Group at the UK's Overseas Development Institute.

"There remains little knowledge about the extent or consequences of corruption in humanitarian assistance, little shared knowledge about preventing corruption under emergency circumstances beyond a few standard practices, and a degree of taboo about confronting it publicly," noted the report, which is based on research involving seven

major international non-governmental organisations (NGOs). The report explains that, contrary to widespread perception, corrupt practices extend well beyond financial misappropriation and include many forms of "abuse of power", such as cronyism, nepotism, "sexual exploitation and coercion and intimidation of humanitarian staff or aid recipients for personal, social or political gain, manipulation of assessments, targeting and registration to favour particular groups and diversion of assistance to non-target groups".

The report underlined that humanitarian action is particularly vulnerable to corruption, because of the unique nature and context of its delivery. A rapid "burn rate" of expenditure is often expected while "normal physical, administrative, legal and financial infrastructure and services have often been substantially or entirely damaged or destroyed."

"In many cases," the report noted, "there may be rapid turnover of

supervisory staff, so there is very little accumulated knowledge of the context and very few staff at the supervisory level remain long enough to develop deeper contextual knowledge that could mitigate some of the risk of corruption," it said. Based on the research behind the report, Transparency International plans to release a "good practice" handbook in 2009. The report itself recommended that humanitarian agencies take a number of steps to tackle corruption. These include: making it easier for staff to discuss and report corruption; incorporating the issue into training programmes and into emergency preparedness and disaster risk reduction strategies; ensuring any corruption policies are carried right down to the field and adapted to emergency contexts; increasing information transparency and programme monitoring; and encouraging inter-agency coordination.

Source *IRIN news Website*

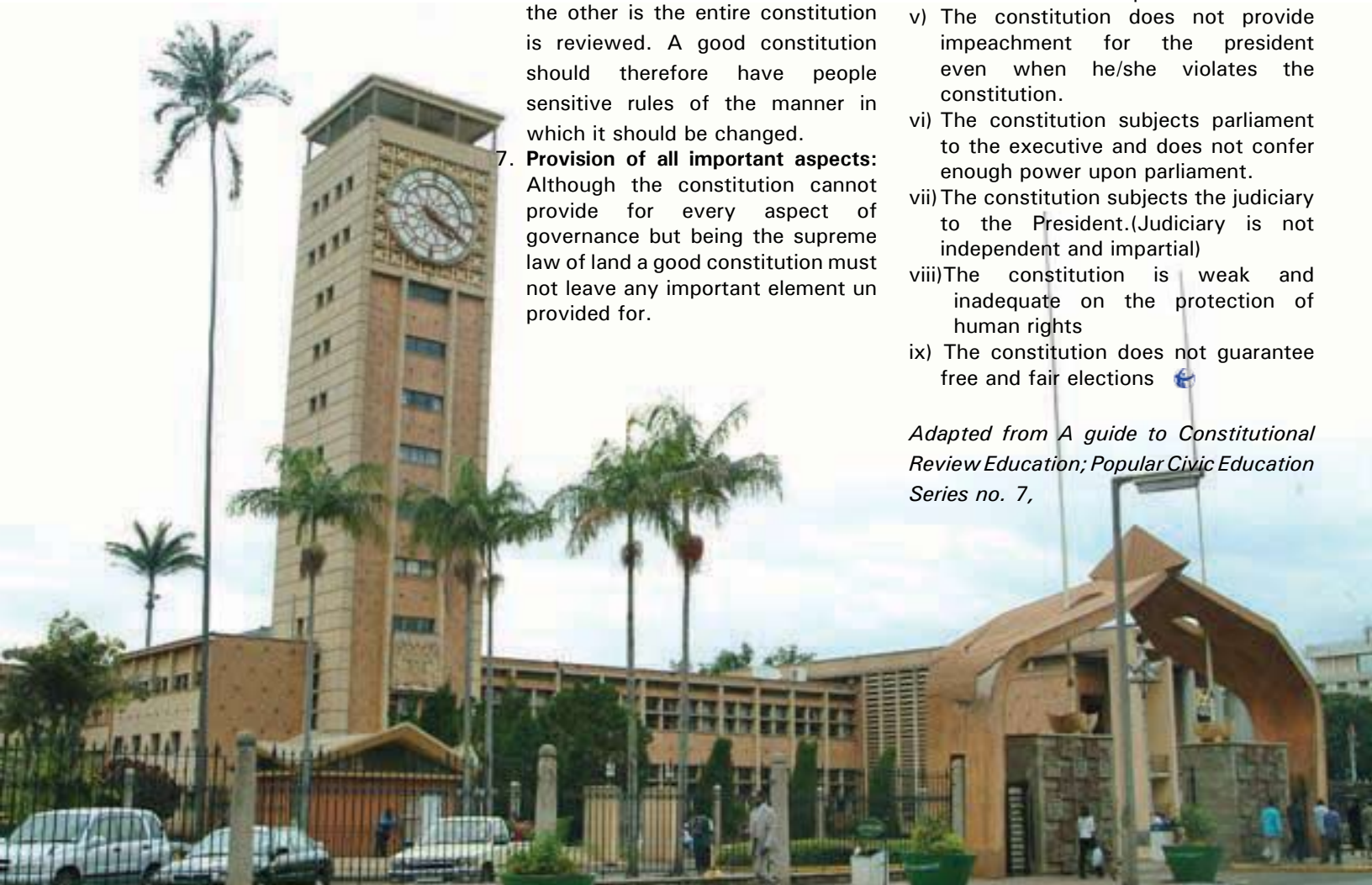
What Should a Good Constitution Contain?

1. **Supremacy of the people:** A good constitution must take the will of the people as the basis of government. The principle that a good constitution should emphasize is the supremacy of the people above everything else.
2. **Structure of power:** A constitution should not merely declare power without rationalizing that power. Power must be clearly defined because human beings have a tendency to assume a lot of authority over others. A good constitution must carefully and clearly define power, distribute power and limit that power.
3. **Human rights:** A good constitution must embody human rights and ensure that it safeguards all the rights of the people such as the freedom of thought, conscience, expression, movement, association, assembly etc
4. **Free and fair elections:** A good constitution must guarantee popular elections of the governors. The constitution should put in place proper and water tight rules and safeguards which will guarantee the holding of periodic competitive free and fair elections.
5. **National Wealth:** A good constitution must have clear guidelines and rules on how the country's wealth should be managed. This calls for strong safeguards for the management of natural resources, human resources, national buildings and equipments for the good of all.
6. **Changing the constitution:** There are two ways in which a constitution can be changed; few provisions in the constitution are amended and the other is the entire constitution is reviewed. A good constitution should therefore have people sensitive rules of the manner in which it should be changed.
7. **Provision of all important aspects:** Although the constitution cannot provide for every aspect of governance but being the supreme law of land a good constitution must not leave any important element un provided for.

Some Weaknesses of the Kenya Constitution

- i) The constitution does not state that it belongs to the people of Kenya.
- ii) It does not place the people above other organs of government
- i) It lacks objectives and visions and does not talk about democratic principles that Kenyans should be committed to.
- ii) The constitution does not provide clear checks and balances between the three arms of government
- iii) The constitution does not set adequate and relevant guidelines as to who qualifies to hold public office.
- iv) The constitution concentrates absolute power on the president to;
 - Appoint ministers, public officers, constitutional officers
 - Powers of dismissal
 - Powers to dissolve parliament
- v) The constitution does not provide impeachment for the president even when he/she violates the constitution.
- vi) The constitution subjects parliament to the executive and does not confer enough power upon parliament.
- vii) The constitution subjects the judiciary to the President.(Judiciary is not independent and impartial)
- viii) The constitution is weak and inadequate on the protection of human rights
- ix) The constitution does not guarantee free and fair elections

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EVENTS

Event: 2008 World Water Week in Stockholm

Organized by: Stockholm International Water Institute

Date: 17th to 23rd August 2008

Venue: Stockholm International Fairs and Congress Center

Event: International Public Works Congress & Exposition

Organized by: American Public Works Association (APWA),

Date: August 17th to 20th, 2008

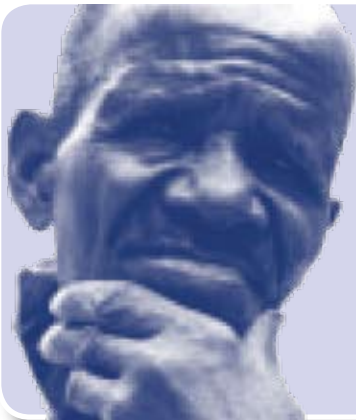
Venue: New Orleans, Louisiana

Event: HIV/AIDS in the Workplace: African Challenges, African Solutions

Organized by: Intervention Africa Consultants CC

Date: 28 to 29 August 2008

Venue: Johannesburg, Gauteng, South Africa



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