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The Proposed Constitution states that the electorate can recall their respective Members of Parliament. This is a massive boost to the public because for once, electorates will not have to wait for five years before registering their displeasure with their elected leaders. Accordingly, there is a possibility of greater accountability from elected representatives in the proposed Constitution.

A COMPARATIVE ANALYSIS OF THE PROPOSED AND CURRENT CONSTITUTION OF KENYA

By *Jonhson Okello*

Introduction

Transparency and accountability are critical for the efficient functioning of any economy and for fostering social well-being. In most societies, many powers are delegated to public authorities. Some assurance must then be provided to the delegators i.e. the society at large that this transfer of power is not only effective but also not abused.

In Kenya, issues of transparency and accountability have been gaining ascendancy in the recent past. The Constitution of Kenya does not provide for sufficient and effective accountability

strategies. The question thus remains; to what extent does the Proposed Constitution provide for accountability strategies? Some insights from *Adili*.

Bill of Rights

The Bill of Rights is provided for in chapter four of the Proposed Constitution. It states that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. It further provides that the Bill of Rights applies to all and binds the state organs and all persons. The chapter then lists the specific rights and how they can be

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enforced. The Bill of Rights provides for fundamental rights and freedoms which are critical to enhancing transparency and accountability. These are

Rights and fundamental Freedoms

1. Right to life
2. Equality and freedom from discrimination
3. Human Dignity
4. Freedom and security of the person
5. Slavery, servitude and forced labour
6. Privacy
7. Freedom of conscience, religion, belief and opinion
8. Freedom of expression
9. Freedom of the media
10. Access to information
11. Freedom of association
12. Assembly, demonstration, picketing and petition
13. Political rights
14. Freedom of movement and residence
15. Protection of the right to property
16. Labour relations
17. Environmental
18. Economic and social rights
19. Language and culture
20. Family
21. Consumer rights
22. Fair administrative action
23. Access to justice
24. Right of arrested persons
25. Fair hearing
26. Rights of persons detained, held in custody or imprisoned

This provision empowers the public to seek and receive any information held by the state ranging from government spending, budgeting and any other critical information. .

The current Constitution provides for the Bill of rights under chapter five. The rights are guaranteed but again watered down by the clawback clauses. Section 79 of the current Constitution, merely provides for

the freedom of association and expression but negates it by not giving any procedure for a person to enforce them. Further, the current Constitution does not specifically provide for the freedom of the media and access to information. The Bill of Rights in the Proposed Constitution is different from the current Constitution in the sense that, the Proposed Constitution has a mechanism for realising these rights.

Leadership and Integrity

Chapter six of the Proposed Constitution provides a framework for leadership and integrity. It outlines the responsibilities of leadership, the guiding principles of leadership and integrity and further requires all state officers to subscribe to an oath of office before assuming office. Of importance in relation to transparency and accountability are;

- Provisions requiring State officers to avoid any conflict of interest between personal interest and official duties, avoid compromising any public or

official interest over personal interest and further avoid demeaning the office the officer holds. Article 75(3) then makes it clear that a person who has been dismissed or removed for contravening of the provisions above, is disqualified from holding any other public office;

- Article 76 of the proposed constitution provides for financial probity of State officers and stops a state officer from receiving or accepting gifts including personal loans or benefit in circumstances that compromise the integrity of the officer. It further forbids State officers from maintaining a bank account outside Kenya except in accordance with an Act of Parliament. These are issues of ethics which are central to enhancing accountability and transparency.

Article 77 then restricts state



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officers from engaging in gainful employment or being involved in a state corporation upon retirement.

To enhance accountability and transparency, the Proposed Constitution provides for a Constitutional basis for establishing an Ethics and Anti-Corruption Commission. This will buttress the outfit to fight corruption in the Constitution and will provide the much needed security of tenure and autonomy for the staff and the commission generally. Lastly, article 80 of the proposed draft requires parliament to enact legislation on leadership which among other things establishes procedures and mechanisms for effective administration, prescribing penalties for offences under Chapter six. The current Constitution does not contain such provisions and issues of ethics and anti-corruption are contained in statute only.

Representation

Chapter eight of the proposed constitution provides for representation and the electoral system by identifying the principles that inform the electoral system. It requires elections to be free and fair, conducted by an independent body and be transparent, administered in an impartial, neutral, efficient, accurate and accountable manner. It then provides for special representation for women and other disadvantaged members of the society.

Article 91 provides for political parties and requires parties to have democratically elected governing bodies and abide by the democratic principles of good governance, promote and practice democracy through regular, fair and free elections within the party. It highlights accountability and transparency in the electoral process. It is through the electoral process that Kenyans delegate the power to govern and it gives them a chance to hold their leaders

accountable. It is thus important that the electoral process and the vehicles for access state power i.e. political parties are open to public scrutiny, good governance and accountable processes. Other critical aspects of transparency provided for in the Proposed Constitution but are lacking in the Current Constitution include;

- The provision of independent candidates;
- The regulation of the financing of electoral campaigns;
- Opening up of the servicing of election petitions. Currently, there is an insistence on personal servicing, a process which has been abused to delay and

ultimately denying justice to election petitioners and the electorates generally;

- Restriction on the use of public resources to promote interests of political parties;
- Specific timeline for the conduct of general elections including presidential, parliamentary and county elections;
- Set timelines for the hearing and determination of election petitions; and
- Transition period before the president is sworn in.



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The current constitution does not provide for these details but gives general statement on how the elections can be held. Further, even where the public is dissatisfied with the leadership, they have to wait for a period of five years before deciding on their new leaders. This approach has made it impossible to hold Members of parliament accountable. The Proposed Constitution states that the electorate can recall their respective Members of Parliament. This is a massive boost to the public because for once, electorates will not have to wait for five years before registering their displeasure with their elected leaders. Accordingly, there is a possibility of greater accountability from elected representatives in the proposed Constitution.

Legislature

In the Proposed Constitution, Parliament is established as consisting of the National Assembly and the Senate. Parliament is given a very clear mandate to play its oversight role of the executive. It has the power to determine the allocation of national revenue between the two levels of government, appropriate funds for expenditure by the government and other national State organs and exercise oversight over national revenue and its expenditure. The National Assembly further reviews conduct in the office of the President, Deputy President and other State officers and initiate the process of removal. It is important to note that this oversight role aims at holding the executive arm accountable to the people of Kenya through Parliament. Since Parliament now has express powers to have State officers removed, it will contribute immensely to the performance of the government because of the enhanced accountability procedures.

The current Constitution merely gives the National Assembly the powers to pass a vote of no confidence and beyond that, the powers to appoint and remove a public officer squarely vest with the President. The effect is

that even where Parliament passed a vote of no confidence, the President was not obligated to take action.

Accordingly, the Proposed Constitution enhances accountability and transparency by making it expressly possible for Parliament to vet officers being hired, oversee their mandate and even have them removed for misconduct among other things.

The composition of Parliament also reflects an attempt in the Proposed Constitution to enhance accountability and transparency. There is room for increased representation of marginalised or vulnerable groups in Parliament. Further, the public is given power to access and participate in parliamentary business. Article 119 gives the citizens the right to petition parliament. All these are provisions which enhance accountability. Finally, the Members of Parliament will no longer serve in the Cabinet or the executive, this will enhance Parliament's oversight roles.

The Executive

Chapter nine deals with the executive and provides that the executive authority is derived from the people of Kenya and must be exercised in accordance with the Constitution. The national executive comprises of the President, Deputy President and the rest of the Cabinet. The functions of the President and the Deputy President are stated in the Constitution and so are the functions of the Cabinet. In terms of accountability and transparency, the Proposed Constitution makes it clear that the National Assembly can remove the President. Whereas this provision is also present in the current Constitution, the Proposed Constitution strengthens the procedure for the removal of the President and his Deputy. Further, it strengthens the process by ensuring that the removal of the President does not automatically trigger the dissolution of Parliament by the President. Parliament's calendar is completely delinked

from the Presidential powers and functions. In the current section 59, the President has the powers to dissolve Parliament anytime, these powers have always weakened Parliament's powers of checks and balances of the presidency through the 'no confidence motion' because Members of Parliament also fear the dissolution of Parliament prematurely which ultimately leads to fresh elections.

Another important provision is the appointment and removal of Cabinet Secretaries. The National Assembly has to vet all appointments and provide oversight roles. Further, Cabinet Secretaries are required to report regularly to the National Assembly concerning matters under their control. These checks and balances are critical in enhancing accountability and transparency.

The current Constitution has weak accountability requirements. Further there is no delinking of Parliament and the executive arm of the government and thus the oversight role of Parliament has always been compromised. The Proposed Constitution makes oversight and accountability a reality because the Executive and Parliament are clearly delinked. The President and Cabinet Secretaries are not Members of Parliament. Thus the issue of conflict of interest does not arise. The Proposed Constitution implements fully the doctrine of separation of power. This enhances individual responsibility and accountability.

Other requirements encapsulated in the Proposed Constitution and which enhance transparency and accountability include;

- The requirement under article 132 that the President report annually to parliament and The public;
- The removal of Presidential immunity under international law; and



International News Round up

Waziri Advocates Death Penalty On Corruption



It is not in doubt that Mrs. Farida Waziri, Chair of the Economic and Financial Crimes Commission (EFCC) has demonstrated commendable passion when it comes to fighting corruption in Nigeria.

The tested crime fighter had in the past made courageous statements that instantly proved that disposition. For instance, last year, she was so moved by the level of corruption in the country that she advocated for a psychiatric test on politicians aspiring for elective offices.

In her estimation, many Nigerian political leaders had graduated from the point of kleptomania to that of pure lunacy in handling public funds. It was for this reason that she advocated the unusual measure. According to her, "certificate of sanity" should be demanded and obtained before any politician should be allowed to hold political office.

Recently, she upped her quest, this time around, campaigning for death penalty for corrupt officials, to serve as antidote for corruption. In a statement she delivered at a forum, Waziri stated that "whatever action that it will take for Nigeria to move and make progress against corruption, let us do it, even if it is death penalty. Believe me, that is the only way to eradicate corruption in Nigeria. When you execute 20 people, it will

serve as deterrent to others."

Waziri, whose Commission is currently investigating top flight Nigerians fingered in the controversial, Siemens bribery scandal, said the commission was awaiting the certified true copy of a judgment that indicted some staff of the company in April this year, to swing into action.

However, in reaction to the prescription on death penalty, Waziri was faulted by many people in the vanguard for the abolition of death penalty in the country. Barrister Chino Obiagwu, National Coordinator to Legal Defence and Assistance Project (LEDAP), for instance argues that her recommendation runs contrary to the current thinking around the world that death penalty should be abolished from the statute books of nations.

Obiagwu explained that studies have shown that death penalty does not in any way deter people from committing crimes, but rather promotes violence.

His words: "All over the world, people are campaigning against death penalty because it is cruel and inhuman. Besides, people do not consider punishment before indulging in crimes, but the likelihood of their being caught... Death penalty only encourages violence, because the state is setting example on settling scores through violent means".

Waziri was appointed head of the anti-graft agency in 2008 to replace Nuhu Ribadu, the pioneer chairman. She immediately went to work to prove herself.

At a time, when criticism for her and her organisation became loud and strident, she berated her critics as armchair critics, describing them as people who "talk and talk all the grammar in the world" without doing anything tangible to lift the country out of the dump of corruption.

An author and a lawyer, Waziri obtained her law degree from University of Lagos; her masters degree from Lagos State University; and another Masters Degree from from University of Ibadan. She authored a book on Advance Fee Fraud, (known in local parlance as 419). The book is entitled :Advance Fee Fraud, National Security and the Law.

She enlisted in the Nigerian Police in 1965, and rose to the position of Assistant Inspector General of Police. In her ascent through the ranks, she held such positions as Assistant Commissioner of Police (Operations), screening and selection; Assistant/Deputy Commissioner of Police Force C.I.D Alagbon, Lagos; Commissioner of Police, General Investigation and Commissioner of Police in charge of X-Squad.

In her last position, she was responsible for handling cases of bribery and corruption within the Police. She also served as Commissioner of Police (Special Fraud Unit) in which role she was reported to have recorded the first conviction for Advance Fee Fraud in the country.

She led the West African delegation on Advance Fee Fraud to Lyons, France in 1996. She also led Nigerian delegation to Dallas, Texas for a seminar organized by the United States Secret Service in 1998.

Source: *Daily Independent (Lagos)*



LET'S MOVE FORWARD DESPITE ERRORS IN THE PROPOSED CONSTITUTION

By Michael Okelloh

Hot on the heels of the attempted, illegal insertion of the words 'national security' into the Proposed Constitution of Kenya (PCK), the Kenyans for Justice and Development (KEJUDE) Trust recently unearthed a string of embarrassing errors in the draft supreme law.

KEJUDE has declared its intention to petition the Independent Constitutional Dispute Resolution Court to, among others, nullify the planned August 4 YES-NO referendum on the PCK because the draft "fails the integrity test and must be redrafted to fix all errors..."

Many Kenyans and friends of Kenya are now asking: when will the many twists and turns in Kenya's long quest for a new constitutional dispensation end? Optimism was palpable among many Kenyans when Parliament unanimously approved the PCK, without any

amendments, on April 1. Earlier, in January, when the Parliamentary Select Committee (PSC) on Constitutional Review agreed on a pure presidential system of government at a Naivasha retreat, many Kenyans believed that the country had jumped over the biggest hurdle in the path to a new constitution—disagreement between politicians over the system of government that Kenya should adopt.

However, some influential opponents of the PCK have now identified other issues, mainly devolution, land, abortion and Kadhis' Court, in their efforts—mostly on the basis of misrepresentation—to rally their different constituents to reject the PCK at the referendum. While every Kenyan has a democratic right to reject the PCK on the basis of any of its contents that they may not agree with, it is very sad that some Kenyans are now invoking simple

errors in the PCK as the basis for derailing the constitutional review process.

While applauding KEJUDE's knack for paying attention to details, it is fair to say that sixteen out of KEJUDE's seventeen 'unacceptable errors' in the PCK are merely spelling, word-spacing and numbering mistakes. The misspelled words are:

- (1) fundamental
- (2) political
- (3) expediture
- (4) amendeds
- (5) judiciary
- (6) comission
- (7) indepenedent and
- (8) commission,

in Articles 24(2)(b), 92(i), 115(3), 173(4), 216(4), 250(8) and 254(3) respectively. Noteworthy, errors (1), (2), (3), (5), (6) and (8) are also found in the February 2010 draft by the Committee of Experts (CoE) that was submitted to the PSC and later approved by Parliament.



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- The requirement that the President's decisions must be in writing.

Judiciary

Chapter ten establishes the judicial arm of the government. Once again, it recognises the fact that judicial authority is derived from the people and must be exercised in accordance with the Constitution. The oversight and accountability of the Judiciary is exercised by the President, the National Assembly and the Judicial Service Commission. Thus before judicial officers including judges are appointed by the President, Parliament must vet the nominees. Whereas the security of tenure is assured, the draft Constitution makes it possible for any person including members of the public to petition for the removal of a judge or judicial officer. This new procedure ensures that judges and judicial officers in general undertake their duties professionally, ethically and with competence.

The current Constitution does not provide an effective avenue for the oversight of judges and other judicial officers. The removal procedure is dependent on the President and thus the inability of the general public and National Assembly to play effective oversight over the Judiciary. This has led to incompetence, corruption and at worst impunity by judges and the judiciary in general.

Finally, the composition of the Judicial Service Commission creates room for lay persons and other members of the public to participate in the appointment and removal process of judges and judicial officers. Article 171(2) (h) provides for the appointment of one man and one woman to represent the public to serve in the Judicial Service Commission.

Read more comparative analysis in the next Adili

(d); clause 2; clause 27; and clause 27(2), in Article 41(3), Article 103(1)(e)(i), Part 1 of the Fourth Schedule, and Part 6 of the Sixth Schedule respectively. With a little attention to detail, the Attorney-General could have corrected both his own numbering mistakes and those he inherited from the CoE's draft.

The only substantive concern raised by KEJUDE relates to the meaning of Article 20(3)(a), which states: "In applying a provision of the Bill of Rights, a court shall – develop the law to the extent that it does not give effect to a right or fundamental freedom." KEJUDE's seemingly genuine concern is that the words 'does not' should be replaced with 'gives' lest they undermine the mandate of the judiciary of developing human rights jurisprudence. However, this is a question of interpretation that should be left to litigation before the law courts, preferably after adoption of the PCK, which has many progressive provisions, such as the right to access state-held information, and standards for leadership and integrity, among others.

It is regrettable that the CoE and the Attorney-General failed to professionally proof-read and edit the PCK, when the document was in their hands at different stages of the constitutional review process. The resultant negligence by these two offices has sadly shifted the debate on the PCK from the merits or demerits of its provisions to sideshows such as spelling mistakes.

The words of Benjamin Franklin —a Pennsylvania delegate at the American Constitutional Convention— stated in 1787, may perhaps console many Kenyans, who are confused by the shenanigans sprouting at the tail-end of the constitutional review process: "Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure, that it is not the best. The opinions I have had of its errors, I sacrifice to the public good...If every one of us in returning to our Constituents were to report the objections he has had to it, and endeavor to gain partisans in support of them, we might prevent its being generally received, and thereby lose all the salutary effects and great advantages resulting naturally in our favour..."

The writer is the Programme Officer, Governance and Policy, Transparency International – Kenya and an advocate of the High Court of Kenya. The views expressed here do not necessarily reflect the views of TI-Kenya.

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Further, in the Oath for a Cabinet Secretary (Third Schedule), 'Presidentfor' should have been correctly spaced as 'President for.' This error is again in CoE's February draft. Finally, upon reading CoE's February draft, it appears numbering mistakes can answer KEJUDE's concern about the published PCK's missing sub-clauses (a),(b),(c) and





Events

Event: Community forums

Date: 1st June - 31st July 2010

Location: Rift valley, Western, Coast & Nairobi

Event: Transparency International

Summer School on Integrity

Date: 5th -9th July 2010

Location: Vilnius, Lithuania

ELIMIKA!

Katiba Yako, Haki Yako

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