

KENYA PROMULGATES A NEW CONSTITUTION

BY

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KENYA PROMULGATES A NEW CONSTITUTION

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ABSTRACT

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On August 4, 2010 Kenyans overwhelmingly voted for a new constitution, forty seven years after the country's independence from the United Kingdom. The new constitution has been praised as being among the most progressive constitutions in the world. This Strategic Research Paper will analyze the reasons for changing the constitution; the differences between the new and the old constitution; the impact of the new constitution on the country and especially the military and other security organs of the state in the attainment of better peace; and finally it's influence in the East African region within the wider context of the proposed East African Community's (EAC) political federation.

KENYA PROMULGATES A NEW CONSTITUTION

I congratulate Kenya on the promulgation of the new constitutionWith this new constitution, the people of Kenya have set a positive example for all of Africa and the world.

—President Barrack Obama¹

Kenya's 2010 Constitution

The constitution establishes the rules governing the activities of the country (including the rulers and the subjects), has to be agreed to by the majority of citizens, and all citizens need to comply with the constitution. It should be noted that even if all appropriate political structures are established, democracy is not a machine that runs by itself even when the proper principles and procedures are in place. A democratic society needs the commitment of citizens (ECJP, 2003: 46)² and this call for the establishment of a democratic culture.

Kenya attained its independence from the British Colonial Government in 1963 with a negotiated constitution which was later amended by successive acts of the Kenyan parliament to suit the needs of the country. These amendments undertaken by parliament later became sources of friction in the country. This friction grew because the envisaged separation of powers between the three arms of government was slowly lost and power became concentrated in the Executive. The Legislative and Judicial arms did not have the powers to check the Executive.

Similarly the rights of the citizens were slowly encroached as the country moved from being a single party country in practice (*de facto*) and became a single party democracy by law (*de jure*). Detention without trial for long periods for those with different political opinion became common. All these issues gave rise to the agitation for

a new constitution which would address the issues of governance, rights and individual freedoms.

Subsequently a process to write a new constitution started in 2003. It was all inclusive and culminated in a referendum on August 4, 2010 where 67% of Kenya's citizens voted for the new constitution. The 2010 constitution was promulgated by the President of the Republic of Kenya, on August 27, 2010. The overall objective of this Strategic Research Paper is to examine Kenya's 2010 constitution. To do this, the paper will seek to provide answers to the following questions which will give insight to the research. These are:

- a) What was wrong with the old constitution and what were the driving factors for the demand for the new constitution?
- b) What was the process that was followed in coming up with the new constitution and how does the process compare with other processes?
- c) How does the new constitution guarantee democratic freedoms, equitable distribution of resources and human rights which in turn can be a catalyst for democracy in the East African region?
- d) How does the new constitution affect the security forces?
- e) Does the enactment of the new constitution guarantee better peace and good governance for the country?

Historical Background

Between 1944 and 1953, the Kenya African Union, a political organization formed to champion the African agenda against the British colonial administration, engaged in a futile exercise of achieving political, economic and social reforms. The key

issues that necessitated this demand were the cases of landlessness in the Kenya highlands as white settlers owned most of the land. This landlessness, especially among the Kikuyu, had led to urban migration, rising cost of living and discrimination (Olewe- Nyunya, 1997).³ The violence generated by the landless is what culminated into the Mau-Mau rebellion, forcing the colonial government to declare a state of emergency and to crack the whip on the Mau- Mau and their sympathizers. To create a cadre of Africans loyal to the crown, the British rewarded the loyalists with the loot and livestock captured from those who opposed British occupation. The colonial government also created opportunities whereby Africans loyal to the Crown could accumulate wealth and hence economic power supporting the needs of the colonial state (Maina, 1996a).⁴

It is important to note that just before the attainment of independence, the British Colonial government introduced the Littleton constitution which sought among other things to allow for the participation of Africans in the management of the economy and to regulate and control African political consciousness and growth. This made the Africans begin to demand equality with the colonial masters and the unconditional release of political detainees. This pressure led to the enactment of the Lenox Boyd constitution of 1958, which increased the representation of Africans in the Colonial-led Legislative Council.

In 1962, the British Colonial administration held the Lancaster Conference on Kenya's constitution and proposed a federal system of government for Kenya for the post colonial period. Subsequently in 1963, Kenya attained independence with the federal constitutional settlement coming out of the Lancaster House Conference. "Kenya not only got a new constitution, but failed to identify a sensible theory of

government.”⁵ Without a philosophy of government, a shared system of values and norms, Kenyans did not have standards for judging the repressive laws included in their new constitution that had been inherited from the colonialists. The events that followed in the attempt to fight for constitutional reforms were therefore, in a way, part of the fight to dismantle the colonial legacy.

Kenyans fought the colonial administration and lost their lives so as to regain their land and dignity. In the minds of many Kenyans, independence was supposed to result in the eradication of poverty, disease and ignorance, and Kenya was supposed to be a nation united in its diversity. Yet, although this was an ideal picture at independence, the post colonial state did not reform the Colonial structures that it had inherited. Rather, these colonial structures were retained in many cases, or re-defined to suit the purposes of the new elite. The highly centralized public bureaucracy that was inherited at independence played a key role in the socio-economic and political process throughout the post-colonial period.⁶

The independence constitution also referred to as the “Lancaster House Constitution” was federal in its orientation and provided for the division of state power between the central government and the regional governments. Even then, there was to be an independent Executive who owed allegiance to the nation and not to any political party. Despite this claim to independence, candidates could only hope to get elected on respective party tickets. There was the provision for a division of executive power between the President and the Prime Minister, while the independence of the judiciary was guaranteed. There were provisions for the altering or amending of the constitution, made through a consultative process involving all the citizens. This process was initially

intended to make it difficult to pass constitutional amendments, but this was not to be the case. The political powers of the two chambers of the House were also carefully restricted, especially with regard to powers to alter the constitution.

The Lancaster Constitution provided for the security of tenure for key offices such as the Inspector-General of the Police, the Police Service Commission, and the Attorney General, the Controller and Auditor General and the members of the Public Service Commission to enable them to serve the nation and not serve a particular political party.

From the Lancaster days, it was clear that the colonial masters helped to midwife a constitution that would ensure that their interests were well taken care of, even when they granted the colony's autonomy. This clearly explains why the independent constitution had provided for a federal system of government which would perpetuate the colonial policy of "divide and rule". However, when political leaders after independence saw that it was not possible for them to be all powerful without consolidating power at the centre, they decided to slowly and strategically, dismantle the elements of federalism, concentrating power at the centre.

There were crucial constitutional amendments made by the government, first and foremost to dismantle federalism and thereby increase power at the central government. The process began in earnest in 1964 when Amendment Act No. 28 of 1964 was tabled, which aimed at providing Kenya with a Republican status through the establishment of the Office of the President, who was to become Head of State and Government (Katumanga, 1998:15).⁷ This was hastily followed by Amendment Act No.38 of 1964 which took away from the regions the power to alter the boundaries and

transferred these powers to Parliament. The regions also lost the independent sources to revenue. The final blow came with the dissolution of the opposition party Kenya African Democratic Union (KADU) on 10 November 1964, making the Kenya African National Union (KANU) the only political party. This made Kenya a *de facto* one party state. There was also the amendment to widen the powers of the President on detention without trial under the Preservation of Public Security Act.

The government philosophy at independence was revolutionized in the Sessional Paper No. 10 of 1965⁸. This focus on African socialism was based on the assumption that the Government had an active role to play in the market, by direct investment and management of corporations, and also that the Government is not limited in terms of its powers to intervene in the lives of its citizens.⁹ One thread that runs through the history of independent Kenya is that the central government made little effort to dismantle many of the vestiges of the colonial legacy.

In 1968, the government amended the Preservation of Public Security Act empowering the president to implement preventive detention at any time without reference to any institution such as parliament. Other amendments included the Constitutional (Amendment) Act No. 7 of 1982, which made KANU the only political party hence making Kenya a *de jure* one party state, the Constitutional (Amendment) Act No. 14 of 1986, which removed the security of tenure given to the Attorney General and Controller and Auditor General that had previously been in the constitution. The Constitutional (Amendment) Act No. 4 of 1988 removed the security of tenure of High Court and Court of Appeal judges and the members of the Public Service Commission

that had previously been in the constitution. These amendments were at the core of the call for a new constitutional order.

Kenya's search for a new Constitution

The demand for constitutional reforms started in earnest in 1992, with demands for the re-introduction of multiparty democracy. The main driving force was the need for political liberalization. No fundamental ideological differences existed between the different parties that were formed in the wake of the repeal of Section 2A of the constitution which made Kenya a *de jure* one party state. However, the common denominator for all these fragmented parties was that they addressed the excessive size of the local administration and the personalization of state institutions. This return to multiparty, rather than consolidate democratic gains and political liberalization tended to erode the basis of democracy; political parties were formed along ethnic lines instead of shared political ideologies and the state became more repressive dealing with them while trying to fight the negative impacts of ethnicity (Kanyinga, 2007:90).¹⁰

In 1997, the National Convention Executive Council (NCEC) and the alliance of opposition parties came together in what became known as the Inter-Parties Parliamentary Group (IPPG) to negotiate for minimum reforms to pave way for the 1997 general elections. Among the achievements of the IPPG negotiations was the involvement of the opposition parties in the nomination of Commissioners to the Electoral Commission of Kenya (ECK). Be as it may this was still a gentleman's agreement by the government and was not enshrined in any law of the land.

In early 1998, mainstream opposition parties, together with civil society groups led by the NCEC renewed demands for constitutional reforms. The starting point for any

constitutional discourse in Kenya is to appreciate the role played by the post-independence governments in Africa, who failed to reinforce the role of unity of the differing ethnicities in their diversity. This has been considered the ghost that haunted the Kenyan Republic which could only be exorcised through a new constitutional order.¹¹

There are various reasons as to why Kenyan's have all along yearned for an all-inclusive constitution that reflects the wishes and aspirations of the majority. Tensions have been generated by politically-instigated ethnic violence whenever there are elections in Kenya. This has been the tradition when the tempo for the demand for a new constitutional order were high, and the politicians thought that by inciting violence, it could be justifiable to refuse to grant Kenyans a new constitution. This culture of violence continued to such an extent that it was considered routine for violence to precede elections or to be its aftermath.

Another catalyst in the demand for constitutional reforms has been the World Bank and IMF economic Structural Adjustment Program (SAP) and the pegging of donor aid on political reforms, which included supporting good governance structures, democracy and the rule of law. With these tensions, political temperatures were raised in the country and the fight for genuine democracy intensified.

In discussing political reforms in Kenya, it is important to stress on the role of key institutions that were a microcosm of an ailing society that needed radical surgery. These actors or institutions are the three arms of government namely, the Executive, the Legislature, the Judiciary.

For a long time the Presidency had remained the most powerful institution over all the other constitutional institutions namely the Judiciary, the Legislature and the Executive. The Presidency literally controlled the operations of all the other institutions. The Presidency also appointed all Judges of the high court who were not subject to vetting by the Parliament and so ended up being stooges of the Presidency. The Presidency also appointed all the persons who were to serve on important constitutional commissions like the Electoral Commission, the Public Service Commission and the Judicial Service Commission.

The Presidency also had powers to suspend certain provisions of the constitution by simply invoking part 3 of the Preservation of Public Security Act which makes provisions to register, restrict movement (into, out of or within Kenya), and compulsory movement of persons including imposition of curfews; the control of aliens, including the removal of diplomatic privileges; censorship, control or prohibition of communication of any information, or of any means of communicating or of recording ideas or information, including any publication or document, and the prevention of dissemination of false reports; the control or prohibition of any procession, assembly, meeting, association or society ¹².

During the fight for the re-introduction of multiparty politics in Kenya, some of the difficulties that obstructed the successful management of multiparty politics originated from the Parliament. Some of these included the right to participate in elections being pegged to party membership; parliamentary privileges and immunity; the inability to form coalitions within parliament and the inability of parliament to have the powers to check on the Executive. However, with the new 2010 constitution in place, these issues

have been addressed appropriately, and now there are provisions for independent candidates; Parliament now has powers to check on the excesses of the Executive; and also the parliamentary privileges and immunities have been restored. The only issues that remains controversial and may disadvantage politicians without national following is that there is no provision for coalition formation in Parliament and consequently legislative elections remain a clear case of the winner-take-all.

The major change that ever took place in the Judiciary was in 1990 with the amendment to restore the security of tenure of judges. However, since then, little has been implemented to strengthen the capacity of the judiciary to redress grievances and to check on the Executive. The judges still owed their allegiance to the President who was the sole authority with powers to hire and fire; the Chief Justice remained the presiding judge of both the High court and the court of appeal, and with a politically-partisan Chief Justice, the wheels of justice would remain clogged. There were also no official law reports, making it difficult to refer to judgments based on precedents, and the shortage of legal staff and the backlog of cases opened up the judiciary to avenues of corruption.

The public service and the police force had been politicized to such an extent that they were no longer politically neutral as demanded by the constitution. The police was used to intimidate those that the government perceived as being in the opposition. The provincial administration also remained the most obstructive organ to enjoyment of freedom at the local level. From the colonial period, the provincial administration was largely insensitive to the needs of the local people, a trait that was wholly followed by subsequent governments since independence.

The 2002 general elections were a mini revolution. KANU the party that fought for independence from the colonialists was ousted from power. A new party, the National Rainbow Coalition (NARC), was overwhelmingly voted in with high expectations of change in both political and economic reform. The pledged reforms included a new constitution with dispersed executive powers, redressing historical injustices, and the introduction of a new political culture that was all inclusive and participatory in decision-making.

The process for reviewing the constitution was reactivated in earnest and delegates drawn from the entire country were assembled in Nairobi, at the Bomas cultural centre, to deliberate on the new Constitution. The process went on for three years culminating with a Referendum in 2005 for the people of Kenya to either accept or reject the proposed constitution. The people voted against the constitution claiming it was not the same document that had been agreed to at the Bomas conference. The tensions created during the campaigns for and against the proposed document polarized the country along ethnic lines. These tensions continued up to the campaigns and elections of 2007 which were closely contested and generated significant post election violence. The International Community and the African Union intervened and established the committee of Eminent Persons chaired by Former United Nations Secretary General Kofi Annan to resolve the crisis. This culminated into various issues being agreed upon among them the review of the constitution and power sharing arrangement between the President and the Prime Minister.

Success in 2010

Learning from the elections in 2007, a Committee of Experts (CoE) was established, and went around the country collecting views of Kenyans with the purpose of drafting a new constitution which took into consideration the wishes and aspirations of the majority of Kenyans. Also established was the Parliamentary Select Committee which was to spearhead the debate in Parliament on the draft constitution that was worked on by the CoE.

The process was as participatory as possible, after collecting all the views of Kenyans, the CoE drafted a document which proposed among other things, a hybrid system of government combining the parliamentary and the presidential systems. The proposal also incorporated the sharing of power between the President and the Prime Minister just along the lines of the National Accord and Reconciliation Act. After thorough scrutiny of this document by the Parliamentary Select Committee, their comments and recommendations were again submitted to the CoE who harmonized the contentious issues.

Also considered were matters of religion, where the Christians thought that the inclusion of Kadhis Courts in the constitution was like officially recognizing Islam as a state religion. This position which, though unfounded and ungrounded in fact, led faith based organizations to campaign against the constitution. Another religious bone of contention was the provision for allowing abortion in cases where the health of the mother was in danger. This also provoked the ire of Christian leaders who saw this as an open avenue through which immorality was being legalized through an underhanded process.

The political leadership was also uncomfortable with some provisions of the document, especially the ones touching on devolution of governance, land reforms and the need for unearthing the roots of historical injustices that have been with the people of Kenya since independence. It was against this background that political leaders, especially from the Rift Valley and Eastern provinces, campaigned against the constitution. However after the referendum these populations supported the will of the majority and also took oath to protect the constitution during the promulgation ceremony. It is also important to note that when the Parliamentary Select Committee on Constitutional Review returned the document to the CoE, it had settled on a pure Presidential system, and not the combination of parliamentary and presidential systems that were originally considered.

The draft constitution was subsequently subjected to a referendum on August 4, 2010 and was approved by 67% of Kenyan voters. The constitution was promulgated by the President of the Republic of Kenya on August 27, 2010 at a colorful ceremony attended by dignitaries and Head of States of African countries.

The new constitution will be implemented in accordance with the time table set out in the constitution and sets the deadline of five years by which all legislation should comply with the new constitution. The new constitution is different from the old constitution with major changes in the separation of powers between the three arms of government, major matters of citizenship, the Bill of Rights, the devolution of government to two levels namely National and County government, and Land and Environment.

Equally important is the fact that unlike the old constitution, the 2010 constitution is not easy to amend and sets out very elaborate procedure in Articles 255, 256 and 257. These procedures include the need for a referendum before amendment. This therefore means that no single group of individuals can make any amendments to the constitution.

Kenya's New Government Structure

The Executive arm of government comprises the President, the Deputy President and the rest of the Cabinet. The President and the Deputy President shall be elected directly by the people in a general election. To be declared the winner one has to garner "more than 50% of the votes cast nationally and at least 25 % of the votes cast in each of more than half of the counties."¹³ This clause ensures that whoever wants to be elected President will have to reach out to all communities in the country and therefore making it difficult for those who would use only two or a few communities to win the Presidency. It is going to be extremely difficult for a tribal chief to clinch the top seat all the more so in the first round of voting. This requirement will enable the electorate to scrutinize leaders more carefully before casting their ballots.

The President shall be Head of State and Government and shall not hold office for more than two terms of five year each. The Deputy President shall be the running mate of the President in the general election and shall be the principle assistant to the President and shall deputize the President in the execution of the President's functions.¹⁴ This constrict of the Executive Branch is radically different from the old system where the Vice President was appointed by the President and could be removed from office by the President, a system which denied the people their right to choose a

Vice President. Neither the President nor the Deputy President are Members of the National Assembly but they are members of the Cabinet.

The Cabinet consists of the President, the Deputy President, the Attorney-General and not fewer than fourteen and not more than twenty two Cabinet Secretaries. The Cabinet Secretaries shall be nominated by the President and with the approval of the National Assembly the President shall appoint them.¹⁵ The Cabinet Secretaries shall not be elected members but professionals in their dockets. This is a major change from the current system where the Ministers are members of Parliament and hence their roles overlap responsibilities in the Executive and Legislative bodies. This new system will make Cabinet Secretaries accountable to the people of Kenya in their performance as through the various committees, the National Assembly will be able to scrutinize what the Cabinet Secretaries are doing. Therefore it is envisaged that there will be more transparency in the way government business will be done.

Governance in the whole is in two levels, National and County each with distinct responsibilities. At the National level there shall be the National assembly and the Senate. The role of the National assembly is to represent the people at the constituencies and special interests in the House. To do this the National assembly deliberates on and resolves issues of concern to the people.

It enacts legislation in accordance with Part 4 of Chapter 95 which states that; “the National assembly determines the allocation of national revenue between the levels of government and other national State organs; and exercises oversight over national revenue and its expenditure; reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from

office; exercises oversight of State organs and approves declarations of war and extensions of states of emergency”¹⁶.

The National assembly shall consist of two hundred and ninety members, each elected by the registered voters of single member constituencies, forty seven women each elected by registered voters of the counties, each county constituting a single member constituency, twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90 to represent special interests including the youth, persons with disabilities and workers and the Speaker who is an ex officio member¹⁷.

The role of the Senate is to represent the counties, and serves to protect the interests of the counties and their governments; participates in law-making function of parliament by considering, debating and approving bills concerning counties; determines allocation of national revenue among counties and exercises oversight over national revenue allocated to the county governments; participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.

The Senate consists of forty seven members each elected by the registered voters of the counties, each county constituting a single member constituency; sixteen women members shall be nominated by political parties according to their proportion of members of the Senate elected; two members, being one man and one woman, representing the youth; two members, being one man and one woman representing persons with disabilities and the Speaker who shall be an ex officio member¹⁸.

The devolved government or governments in each county shall have an assembly consisting of members elected by the registered voters of the wards, each ward consists a single member constituency. The county government shall promote democratic and accountable exercise of power and foster national unity by recognizing diversity. It gives powers of self-governance to the people and enhances the participation of the people in the exercise of the powers of the state in making decisions affecting them.¹⁹

As is the case for many African countries, Kenya is a nation comprising many ethnic communities and therefore politics and resource allocation can be skewed to favor certain regions. Having learned the ugly lessons of negative ethnicity during the last general election, the country opted to once and for all address this monster and in essence acknowledge the diversity and how to have unity within the diversity. The CoE in its wisdom recommended that the devolved government have 47 counties²⁰ which previously were Districts and generally covered most communities. This alignment guarantees participation of all communities in the management of state affairs and thereby reduces ethnic friction.

Resource allocation was another area where the nation was failing; most regions within the country felt that they were not getting what was due to them in terms of development funding. The new Constitution has addressed this shortcoming by ensuring that the national government will allocate fifteen percent of total national revenue equally to the counties. County governments may be allocated additional funds from the national government's share of the revenue either conditionally or unconditionally.²¹ This revenue sharing will go a long way in stabilizing the country while

at the same time ensure that those areas that were hitherto left behind in terms of development will now get special preference. The net effect of all this is that the entire country will benefit from increased economic activities, reducing the competition from scarce resources, and therefore diminishing conflicts between tribes hence creating a more peaceful and prosperous nation.

Devolution of government is from the National government to the County government. The devolved system still maintains unitary political concept and therefore the system of government is not federal. It is a mixture of Parliamentary and Presidential systems.

The United States could provide a useful model on which Kenya might structure its system of county governments. In the U.S, each of the States has its own system of administration, largely independent of the federal government. The state government has the power to legislate on matters not granted to the federal government or denied to the states by the U.S constitution. Each state has the three arms of government, Executive, Legislative and Judiciary.

Closer to home, in South Africa, the role of coordinating and supervising the implementation of policies and projects of the central government at the grassroots is undertaken by the National Council of Provinces which represents the interests of the nine provinces at the national level.²²

The CoE ensured that the Constitution gave counties leeway within their constitutional mandate to form county governments. The fourth schedule of the constitution lists the mandates of national and county governments but does not instruct

how they must carry out these duties.²³ This is good as the counties can be innovative and create systems that will work for them without relying on the national government.

The national government can use history to help determine how it will carry out its duties even though the structure of the ministries will change, although the functions will remain the same. County governments lack such a foundation and must devise fresh ways to deliver their mandates. The new Constitution only mandates each county to decentralize its functions and the provision of its services to the extent that it is efficient and practicable to do so.

This legislative arrangement will hopefully address the issues of ethnicity, gender, and other special interests which were at the centre of creating an unstable society because of competing interests. At the same time it will make the ordinary people gain more interest in the development issues in their respective counties as resources will be channeled directly to the counties. The ever growing youth population will have its issues and interests articulated in both Houses by its representatives.

The Judiciary consists of the Supreme Court, the Court of Appeal, the High Court and Subordinate Courts. The new constitution recognizes the centrality of the rule of law in the enhancement of democracy and hence the creation of the Supreme Court which was not included under the old constitution. The new Constitution limits the term of office of the Chief Justice to a maximum of ten years or upon attaining the age of seventy whichever is earlier. However, if the term of the Chief Justice expires before attaining the retirement age he or she may continue to serve as a judge of the Supreme Court.

Citizenship

On matters of citizenship, the new Constitution makes one major change allowing for dual citizenship. A Kenyan by birth who acquires a foreign citizenship does not lose his/her Kenyan citizenship.²⁴ It further recognizes citizenship through marriage which is a great improvement from the old constitution. This removes the ambiguity regarding the Kenyan woman married to a foreigner and who wanted to settle in Kenya with her spouse; the latter could not automatically become a citizen.

Under the old system, on the other hand, when a Kenyan man married a foreigner the spouse was accorded citizenship status. In the new Constitution Chapter 3, Article 15, Clause (1) states that “a person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen”.²⁵ This is progress, as it treats both genders equally and does not discriminate.

Bill of Rights

The Bill of Rights is one of the major achievements on which the new Constitution has scored very highly. This achievement was made against a background of Kenya's history of detention without trial and at times the interference of the freedom of the media both print and electronic. The many articles of the Bill of Rights include; the right to life, privacy, freedom of association, assembly, demonstration, picketing and petition, labor relations, economic and social rights, rights of arrested persons, freedom of expression, freedom of the media, access to information, right to property, access to justice, children rights, persons with disabilities, youth and minorities, marginalized groups and older members of the society²⁶.

Land Ownership

Land tenure has been a major source of conflict among communities and families has for the first time been given the required attention to ensure that it will no longer be a source of ethnic and tribal conflict. This has been done mindful that land is a limited resource and that the government has a limit in trying to address all the land needs by individuals. In this regard the new Constitution sets out a land policy that all land shall be held, used and managed in a way that is equitable, efficient, productive and sustainable.

Similarly land is classified as belonging to the people of Kenya collectively as a nation, as communities and as individuals. It is either public land, community land or private land. Private land has been the primary source of conflict and the new Constitution attempts to address this by first identifying what private land constitutes and goes further to provide what landholding a non-citizen can hold.

For the first time, the constitution creates a National Land Commission to among other things manage public land on behalf of national and county governments and recommend a national land policy to the National government.²⁷ The National Land Commission will handle land-related matters unlike the previous system where the office of the Commissioner of Lands would single handedly allocate state land to individuals without consideration to the wishes of the local populations.

With this constitutional chapter on land established, the confidence of owning land anywhere in the republic irrespective of one's ethnic or tribal background is increased. It also gives law enforcement authorities the required muscle to deal with those who would in the future interfere with private property as used to happen every

time there was an election. Certain communities had used the excuse of land grievances during campaign periods to coerce the electorates to vote in a certain way and hence generated a repeated cycle of violence every five years. This will no longer be the case as the new Constitution has recognized the various categories of land and established the framework for dealing with each according to the legislation to be enacted by the National Assembly.

Kenya's Security Organs and the new Constitution

The new Constitution outlines the role of national security which includes *inter alia*, protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity as well as other national security interests. The Constitution also establishes the national security organs namely: the Kenya Defense Forces; the National Intelligence Service and the National Police Service; whose primary function is to promote and guarantee national security. It is clearly delineated that the national security organs are subordinate to civilian authority. Parliament is granted the mandate to enact legislation to provide for the functions, organization and administration of the national security organs. Of special importance is the performance of the functions, which Section 239 (3)37 clearly states:

(3) In performing their functions and exercising their powers, the national security Organs and every member of the national security organs shall not –

(a) act in a partisan manner;

(b) Further any interests of a political party or cause; or

(c) Prejudice a political interest or a political cause that is legitimate under this constitution.

The new Constitution makes it clear that the control of the Kenya Defense Forces is under civil control. Chapter nine Article 131 (1) C. declares that the President “is the Commander-in-Chief of the Kenya Defense Forces and Article 241(5) and (6) establishes the Defense Council and its members who include the Cabinet Secretary responsible for Defense as the chairperson and the Principle Secretary in the Ministry responsible for Defense as a member. This ensures that the control of the Military in the hands of civil authority is constitutional. This therefore means for the integration of security services to work regional militaries have to be under civil control. This will ensure that when the summit of Heads of State in the region passes a resolution all the member states will implement those decisions. The model that Kenya has adopted will indeed help not only the region but the entire continent and hence enhance peace and security for all.

For the first time the Bill of Rights will ensure that members of the military if not otherwise restricted will have the right of assembly, association, picketing and demonstration, as long as when exercising these rights they are not armed.

Although the Constitution stipulates that “a provision in legislation may limit the application of the rights or fundamental freedoms to persons serving in the Kenya Defense Forces or the National Police Service”²⁸, this provision could in future create problems if the National Assembly fails to pass legislation to limit the rights. There is also potential for litigation against such limitation and it would have been much better for the Constitution to directly limit the rights of members of the security forces. Anyone

who enlists into the security forces does so knowing that he /she forfeits certain amount of freedom by opting to join the security forces.

The South African constitution has similar clauses in Chapter 2, Articles 14, 17, 18, and 23 with limitations envisaged in Article 36 of Kenya's new Constitution.²⁹ However, in 2009, military officers went on strike demanding better terms and South African Police were called in to disperse the demonstrating officers. Although the outcome was not ugly because the military was not armed and were easily dispersed, they however vowed that in future they will face the Police strength to strength.³⁰ These are scenarios that Africa does not need and constitutions should be categorical in the limitations of certain rights for the members of the security forces.

Although it might be argued that soldiers have rights when in their roles as civilians it must be understood that the profession of soldiering has a higher calling and therefore has sacrifices embedded in it. The motivations of the soldier are the love of his profession and his/her sense of social obligation to utilize his skills for the benefit of society.³¹ These are the ideals that can help to strengthen peace and security. This is one issue that will require careful analysis as it might become a major source of instability of the nation if appropriate legislation is not put in place.

Other provisions that have been controversial concerning the military are freedom of association and freedom of movement. The new Constitution provides that every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind [Article 36 (1)]. It also provides in Article 39 (2)³⁸ that every person has a right to leave Kenya.

However, with the special circumstances of the military, their movement may be restricted in the line of duty and they may not be permitted (unless with a justifiable cause) to leave the country without the consent of the Chief of the General Staff or at a lower level, the commanding officer.

Another section that may lead to the non-implementation of the Bill of Rights is Section 58 (1) (a) which provides for the declaration of a state of emergency when a state is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency. This further provides in Section 58 (6) that any legislation enacted in consequence of a declaration of a state of emergency may limit a right or fundamental freedom in the Bill of Rights.

This may affect not only the military, but also ordinary citizens alike. In his role as Commander-in-Chief, the President is also empowered by Section 132 (4) to declare a state of emergency and, subject to the approval of Parliament, declare war. This in turn means that the military, which constitutionally is subordinate to the civilian authority, will have to be governed by the decisions of civilian authority. The constitution, which the military has sworn to protect, firmly puts the control of the military in the hands of civil authority and therefore ensures national stability.

Conclusion

Kenya's constitutional journey, which involved monumental struggles for over two decades, is over. The harder part which involves ensuring politicians, public officials and citizens do their part to give effect to the Constitution and uphold the rule of law has now begun. The supremacy of the document is protected by the Constitution itself which states that the validity or legality of the Constitution is not subject to challenge by or

before any court or other state organ³²; and that any law including customary law, that is inconsistent with this constitution is void to the extent of the inconsistency³³, and any act or omission in contravention of this constitution is invalid.

It is evident that the new Constitution guarantees democratic freedoms and human rights, especially as outlined in the Bill of Rights, and also ensures equitable distribution of resources. The document which will take five years for full implementation due to the huge task of legislation required, which will without doubt make Kenya a modern democracy governed by the rule of law. This will have major impact in the region as it will reinforce Kenya's status as a sub-regional power and therefore influence all the neighboring countries to emulate the successful structure of government which guarantees peace, stability and prosperity.

Kenya has the strongest economy in the sub-region and has created a more predictable political environment will become a destination of choice for foreign investment. With the East African Customs Union in place, this will improve the standards of living of the country and the rest of the region will eventually adopt the model so that they can also attract the same benefits. The 2010 Constitution guarantees better peace and democratic governance for the country, enhances regional stability and therefore provides for better peace.

Endnotes

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¹³ The Proposed Constitution of Kenya 6th May, 2010 Published by the Attorney-General in accordance with section 34 of the Constitution of Kenya Review Act, 2008 (No. 9 of 2008) First Schedule article 6 (1), article 183 (4) a and b.

¹⁴ Ibid. First Schedule article 6 (1).

¹⁵ Ibid. Article 154.

¹⁶ Ibid. Article 95.

¹⁷ Ibid. Article 97.

¹⁸ Ibid. Articles 96, and 98.

¹⁹ Ibid. Articles 174-177.

²⁰ Ibid. First Schedule as read together with Article 6 (1).

²¹ Ibid. Chapter twelve.

²² Saturday Nation Daily September 11, 2010

²³ The Proposed Constitution of Kenya 6th May, 2010 Published by the Attorney-General in accordance with section 34 of the Constitution of Kenya Review Act, 2008 (No. 9 of 2008).

²⁴ Ibid. Chapter 16.

²⁵ Ibid. Chapter 4, article 24.

²⁶ Ibid. Articles 26-57.

²⁷ Ibid. Chapter 5.

²⁸ Ibid. Article 24, Clause 5.

²⁹ The Constitution of the Republic of South Africa, 1996.

³⁰ Interviewed Lt. Col Thuthuzelekani Ngcingwana of the Republic of South Africa on November 6, 2010.

³¹ The Soldier and the State by Samuel P. Huntington page 15.

³² Ibid. Article 2, Clause 3.

³³ Ibid. Article 2, Clause 4.