

Chapter II

The Draft Constitution: Values, Principles, Rights and Policies

1. The Preamble

Many submissions to the Commission urged that the new Constitution should have a preamble. Constitutional preambles are usually used to establish a few of the most fundamental principles of the state, and to affirm the fact that the Constitution is rooted in the people and owes its very existence and legal force to the people. It is common to refer, if briefly, to elements of history. It should emphasise what unites the country. Its appeal should be in its inclusiveness. It should strike the notes of emotional commitment, acknowledgement of the past and aspiration for the future, in a style, which is direct, signalling the style of the entire document. It does not need to be long – especially as there is to be a statement of values and aspirations of the Constitution shortly thereafter.

The submissions suggest that the following should be mentioned:

- the people in all their diversity, ethnic, religious and cultural
- the sovereignty of the people as the foundation of the state
- the history of the nation including the struggle for independence and the role of the freedom fighters, and the wounds of the post-independence period
- moving forward into the future
- national unity and social justice
- the values of democracy, constitutionalism and the rule of law
- a reference to God

2. National Values and Aspirations

Many recently drafted constitutions have what are described as “directive principles of state policy”. Very often these have been used to introduce a level of protection for economic social and cultural rights – but that protection is less than if given to the more familiar civil and political rights such as freedom of expression. The Kenyan draft constitution, however, does not draw a distinction between civil and political and economic social and cultural rights in this way.

Rights such as education, health and food (typical economic rights) are proposed to be integrated into the general Human Rights provisions.

However, this does not mean that there is no room for a statement of the fundamental values of the state and the constitution (but these should not be called “Directive Principles of State Policy” because this phrase has a fairly clear meaning to lawyers). This is an appropriate place in the Constitution to set down the fundamental principles which have guided the preparation of the Constitution and which should guide the government and the nation in the implementation of the Constitution. This should not try to restrict political parties in their development of policies and ideologies. But it is the closest that one would find to a national ideology. In the nature of things it will also have a universal quality: Kenya does not exist in a vacuum, and looking into the future it is inevitable that links with other countries will increase, and specifically the East African Community and the African Union will – Kenyans hope – grow in strength.

More specifically, it would be to this part of the Constitution that one would look in order to understand references later to the values of the Constitution: for example, political parties should commit themselves to those values and should not be registered if their objects are to overthrow those values. A President, or others, taking office, will undertake to respect the Constitution – and this is not just a commitment to uphold a set of rules, but a set of values, too.

Another related aspect is that of aspirations or goals of the nation. These reflect the sort of society towards which the nation under the constitution is aiming.

The Values will be more specific than those in the Preamble, but less so than those in the Human Rights provisions. The proposed draft refers to the following:

- The Sovereignty of the People
- National Unity and specifically a reference to Kiswahili and to other languages
- The equal value of all communities
- Democracy good governance and the rule of law
- Human Rights
- Equality and equity for all: including men and women

- Striving to fulfil basic needs
- Participation, openness and transparency in public life
- Personal and national integrity
- Toleration and respect for others' views and beliefs
- Kenyan traditions and values
- Bringing government closer to the people
- Peaceful resolution of disputes
- International solidarity and African unity

A final issue relates to the status of these provisions in law. It will be clear that most of them cannot be made the subject of legal disputes like provisions on specific rights and duties. But they could be referred to as part of an argument in court. The Constitution will make it clear that these values and principles should guide the nation and its organs, and that those organs include the courts.

3. *The People of Kenya*

The provisions of the existing Constitution on who is a Kenyan citizen are extremely complex in both their effect and their legal language. There are several different ways to become a Kenyan: by being born in the country of a Kenyan parent, by being born outside the country to a Kenyan father, in various circumstances people have the right to be registered as a citizen even if not born a citizen, or they may apply to be registered, and in some circumstances a person may apply to become a citizen by the slightly different process of naturalization. The provisions give a great deal of discretion – saying that certain people “may” be granted citizenship. They do not permit a person to hold Kenyan citizenship and the citizenship of another country at the same time. They do not contemplate the possibility that a person may have the right to live in Kenya, without needing to renew a visa constantly, but not have full citizenship. They permit the citizenship of someone who was not born a Kenyan to be taken away, but not that of someone born a citizen – thus discriminating between two types of citizen. And finally they discriminate between men and women: particularly because the wife of a Kenyan man has a right to be Kenyan but not the husband of a Kenyan woman, and the child born outside the country of a Kenyan father become an automatic citizen but not the child of a Kenyan mother. The Review Act singled out the last feature for particular mention.

Submissions to the Commission:

- Were strongly in favour of removing the sex discrimination aspect.
- Opinions on dual nationality were somewhat divided; those in favour included not only people born or living overseas but members of pastoral communities or other communities which straddle borders and whose lifestyles involve frequent cross of the borders.
- Some people thought that all those born in the country should be citizens.

The recommendations in the Draft Constitution are on the following lines (qualifications for citizenship are in the box):

- All citizens are equal in their enjoyment of the rights of citizenship. This includes equality as to losing citizenship. That residence within the country also gives rights and responsibilities; that the system should be transparent and fair
- There is a right to an ID card and a passport
- There must be no discrimination on the basis of sex
- Dual nationality is possible
- A law must be passed creating a category of people who have the right of residence after having lived in the country for a significant time.

Who is a Kenyan citizen?

- Someone born in Kenya either of whose parents is a citizen
- Someone born outside Kenya either of whose parents is a citizen
- The husband or the wife of a citizen can also become a citizen
- A person adopted by a Kenyan can become a citizen
- A child found in the country with no known nationality is Kenyan
- People who are stateless by reason of history but who were born in Kenya whether before or after independence are Kenyan
- Others may apply for citizenship

4. *Human Rights*

Ever since the American revolution, human rights have been an important part of a constitution. Constitutional provisions on human rights have gradually become more complex and comprehensive. National provisions on human rights have been supplemented and reinforced by international and regional treaties which impose obligations on states and other entities to promote and protect rights, and establish machinery for international supervision of national implementation of these obligations. They are one of the most important ways to declare national values and express the purpose of the state. Today it is hard to imagine a constitution without a bill of rights.

Rights are regarded as inherent in the human being and are not surrendered to the government when people form a political community. They are necessary for human beings to live in dignity, to fulfil their potential, to satisfy their physical and spiritual needs, etc.; They empower citizens and residents, giving them central role in decision making in organs of the state and the right to associate and by protecting their vital interests against violation by the state. They limit the power of the state and protect against the excesses of 'majoritarianism'. Many rights, such the right to vote, the freedom of expression and of the media, access to information, are necessary for the establishment and protection of democracy, including the accountability of public authorities. They justify special treatment of minorities and other disadvantaged communities Rights define the relationship of the state to the people; in this way they provide a framework for the entire constitution.

The Review Act gives a high priority to human rights. It refers expressly or by implication to protection of human rights and democracy (democracy, as understood today, cannot exist without rights—right to assemble, associate, vote and be candidates, expression, minority protection), to gender equity and issues of discrimination generally, to the basic needs of the people through the establishment of an equitable framework for economic growth and equitable access to national resources to securing equal rights of all to the rights of child.

Human rights are important in the existing Constitution as well. The current Bill of Rights guarantees the following rights:

- The rights to life and liberty
- The rights to be protected against slavery; forced labour; and from torture, inhuman or degrading treatment;
- The protection of the right to private property;
- The right to be protected against arbitrary search and seizure
- The protection of the rights of conscience, expression, assembly, association, movement
- The right not to be discriminated against on the basis of sex, race, tribe, place of origin or residence or other local connection, political opinions, colour or creed.
- The right to a fair trial before an independent tribunal established by law in a criminal case including the right to be considered innocent until proved guilty and to a lawyer.

The scope of the human rights protections is rather limited, in terms of those who are protected, in the types of rights protected and in the range of those who are bound by the duties associated with the rights. There is no provision of social and economic rights; and nothing to ensure the basic needs of Kenyans. There is nothing on solidarity rights (peace, development, or environment). Such cultural rights as exist are somewhat negative; culture, in the form of customary law, justifies exceptions to equality rights, which mainly disadvantages girls and women. There are no special provisions for minorities; the constitution says nothing about the rights of the child, the elderly or disabled persons; the protection against discrimination applies only to citizens of Kenya. Even in the area of civil and political rights, not all are protected: for example there is no recognition of privacy, or rights of political or other forms of people's participation'; the right of an accused to fair trial does not oblige the state to provide a lawyer to the accused even in cases where the death penalty may be imposed. Many modern constitutions are more explicit in the rights of particular sections of society, which in the Kenyan context should include pastoral communities, consumers, prisoners and people on remand, refugees, trade unionists. It does not give citizens a right to obtain information held by the government and thus minimises opportunities for people to scrutinise the efficiency, integrity and honesty of public authorities. It places few obligations on corporations or private actors to respect or promote fundamental rights. The constitution itself provides for a large number of exceptions even to those rights which it does create. Several rights can be suspended during a war or a declaration of 'emergency'. A law passed with a view to safeguarding the interests of defence, public order, public morality, public health or the control of nomadic peoples, may take away from constitutional rights and freedoms. The protection against discrimination does not apply with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. In effect, African customary laws that discriminate against women or girls, or person with disabilities, are exempt from human rights provisions.

The Bill of Rights is weak by modern standards in enforcement procedures and institutions: It has no specialised bodies like an Ombudsman or Human Rights Commission for promoting or enforcing rights; there is no proper legal aid to enforce rights, and few effective remedies. Since the Bill was drafted, new international procedures have been developed for the enforcement of human rights and these are not reflected in the Constitution.

Very many of the submissions made to the Commission centred on, or implied, better protection of human rights, and – strikingly – not only for the benefit of

those making the submissions. People demanded better protection for their own rights – especially groups who felt discriminated against such as women, persons with disabilities and some ethnic and religious groups. They want a better deal for street children – and children more generally, including refugee children, children with disability, and the girl child. The basic needs of society for food water shelter should be met.

Rights are sometimes thought of as including different types: political and civil rights—the protection of life and liberty, civil rights like right to associate and assemble, freedom of expression, political rights, the right to vote and stand for elections, and the right to participate in public affairs are the best known and best established. The next group are social, economic and cultural rights. They include the right to education, employment, shelter, health, and food. Solidarity rights (i.e., rights which pertain to the whole community) include the right to a clean, healthy and sustainable environment, to peace, to nurturing of one’s culture and to development. These rights are important for the community as well as for the individual. In the draft constitution various types of rights are included in the Bill of Rights, and there is no ‘hierarchy’ of rights with some being more important than others. It is not true that civil and political rights protection requires only state restraint, and the other require positive state action and state expenditure: for example, the protection of people from discrimination (a civil right) requires not only that the state not discriminate but that it prevent others from doing so, while elections (a political right) are extremely expensive. On the other hand, the state can be a positive violator of economic, social and cultural rights (for example by unfairly evicting squatters which may violate the right to housing) as well as a ‘mere’ negative violator by failing to provide services. The Covenant on Economic Social and Cultural Rights obliges a government to ‘take steps,... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights ... by all appropriate means’ (Art. 2) – not to achieve miracles. The nature of the obligation has been analysed in some detail by the Committee on the Covenant. Firstly the state must achieve ‘at the very least, minimum levels of each of the rights’ and to give priority to achieving this minimum level. Beyond that the duty is to ‘respect, protect, promote and fulfil’ the rights: respect means not to interfere itself with the right; protection is against infringement by others; promote involves education and encouragement; fulfilment involves the positive action of the state to achieve the right. In fact this way of analysing the duty of the state fits perfectly well its duty with respect to civil and political rights, too.

What does the draft Constitution do for children?

- Tries to ensure a more peaceful and prosperous future
- Gives them the same rights as adults – except where there is good reason
- Gives them, as they leave childhood, the right to vote at age 18
- States the duty of the state to provide free primary education
- States the duty of the state to work towards providing subsidized education at other levels
- Protects the rights to maternity leave
- Says that adopted children can be Kenyans
- Gives children a right to have their births registered
- States the duty of parents and society to protect children
- Gives a right to health to all
- Gives a right to a healthy environment
- Gives a right to food and water (which the state must not interfere with and must do what is reasonable to protect and ensure)
- Children should not be forced to attend religious services against their or their parents' will
- Imposes a duty on the state to implement treaties including the Convention on the rights of the Child

(a) A Brief Survey of Draft Bill of Rights

- The rights that are protected in the draft Constitution include what one might term rights of dignity, equality, non-discrimination, culture and religion. They cover the most fundamental concerns of people in society: the rights to be treated with basic respect and on a par with other members of society. With these we can include the right to privacy.
- Then there are rights of special sections of the community: women, people with disabilities, children, the elderly, refugees. These emphasise the fact that these groups are entitled to the range of rights enjoyed by people generally – in response to the sense that some of the groups have of being marginalized in society. Then concerns particular to the individual groups are picked up and detailed responsibilities of society to them are spelled out.
- The rights of political participation including the right to vote, freedom of speech, of assembly and association are standard in constitutions. We have added a relatively recent right: that of obtaining access to information held by Government often called the freedom of information.
- The rights of people accused of criminal offences to fairer treatment when arrested and detained, and to a fair trial are also usually found in constitutions. The proposal strengthens these to some extent, and also adds the rights of prisoners, which is a recent addition to the range of human rights, and responds to concerns expressly strongly in many submissions to the Commission.
- The draft also proposes the abolition of capital punishment: the death penalty. Many submissions recommended this step
- Rights to an existence of basic human dignity include not just an attitude of respect, but require some basic level of food, health, housing and education. Here the duty of the state is expressed in terms of respecting as well as promoting and fulfilling the rights.
- The work situation also involves certain rights: the rights to choose one's occupation, the right to fair treatment within work, to equal pay for the sexes, and to standards of health and safety at work. Within the family context there is also the right to choose whether or not to marry, and the rights to equality and respect within the family.
- The enforcement mechanisms for human rights are also stronger than under the existing constitution. There is to be a Commission on Human Rights and Administrative Justice, which will have the task of receiving individual complaint about breaches of human rights. It will have the power to try to resolve these disputes by mediation between the parties, and also by

recommending compensation, It will have the responsibility of keeping the laws and policies of the government under review – including considering planned law – to see whether they are satisfactory by human rights standards. The Constitution also provides that when applying the provisions about human rights the courts and other people must try to achieve the objective of human rights. They must look at how human rights law has developed elsewhere.

- Kenya is a party to a number of international human rights treaties (such as that on the rights of the child and the elimination of discrimination against women). Under these treaties the country is supposed to report periodically on its own performance in meeting the standards laid down. Organisations within the country also have the opportunity to comment on the government's human rights performance. And the government's report will then be discussed in the committee set up to monitor each treaty. Kenya's performance in meeting this reporting obligation has been dismal. The Constitution makes it a duty in Kenyan law for the government to carry out these duties – and also to make its reports public and provide adequate opportunity for public discussion within the country.
- Finally, the Constitution has something to say about the circumstances in which rights can be suspended or reduced in the public interest. It is very important that these possibilities are strictly limited or there is a risk that the Constitution will give with one hand and take away with the other. First there is the possibility that the rights given may be limited in the wider interest of society, or of other values, which must also be protected. A simple example is that freedom of speech cannot be totally unlimited – it must respect the reputations of others. But the essential nature of the right must be protected. It is proposed that there should be a general provision which says that rights may be limited but the requirements should be demanding: reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, and the major factors should be indicated for the guidance of courts.
- Then there is the possibility of declaring a state of emergency. Certain rights may need to be suspended during a grave situation of national emergency, war or disaster. The draft Constitution restricts the circumstances in which the power to declare an emergency can be used, and the time for which it can be used, those who may declare it (it must be under the control of Parliament) and the rights which may be limited during such a situation. Also special precautions are necessary for people who are detained during such a period.

5. *Land, Environment, Economy and Natural Resources*

Land is the basis for Kenya's economy and for the livelihood, directly or indirectly, of most of its people. Agriculture and livestock raising are the activity of most of its people. Tea, coffee, flowers and horticultural products are its main exports. And tourists come for its game parks and its beaches. For farmers in the traditional way, for pastoralists and for forest dwellers, land and their way of life are intertwined. The situation is not fundamentally different for fishermen.

The experience of colonialism when the people were robbed of the whole of their land, and many were robbed of rights to own or even to live on or use the specific tracts of land which belonged to their ancestors, gives an added dimension - one of a continued sense of injustice - to the land issue. Post-independence developments have failed to address the deprivation of many; while new forms of land accumulation, even hoarding, by some, and land impoverishment for others, have been created and refined. Many who are landless feel that access to land is their only hope, while many who have land cannot make a living from it, because plots are too small, or the rewards of farming too low. Land, ethnicity, identity and way of life have been closely intertwined. For some the land issue breeds despair, for others anger, ethnic tension, and sometimes violence, and for the country as a whole, and for many communities, unresolved issues make it difficult to move on.

The Review Act says that the people of Kenya in reviewing the Constitution shall:

- examine and review the place of property and land rights, including Private, Government and Trust land in the constitutional frame-work and the law of Kenya and recommend improvements that will secure the fullest enjoyment of land and other property rights.

The Act also mentions equitable access to national resources as a route to attaining the provision of basic needs and to economic development, a process with which issues of the environment and natural resources are closely linked.

Under the 1963 'majimbo' Constitution, all the rights of the government to land were given to the region where the land was situated. This meant the 'government land', and the underlying title in freehold and in leased land (when the lease ends the land goes back to the government). All land in the 'native reserves' became 'Trust Land' and was held by the county councils. The councils were to hold that land for the benefit of those who live on it, and were required to recognise rights under customary law that applied to that land. When the provisions of the constitution relating to devolution were repealed, Trust Land remained with the

country councils, but all rights in land given to the regions were transferred to the central government. That is still the case, but the current Constitution is now silent on land apart from Trust Land.

(a) *What people told the Commission about land*

- Many people said that issues of land management should be a matter for local bodies.
- They complained of land grabbing: land which is earmarked for community/public use being allocated to members of the elite, including road reserves being allocated or even seized (making future road development difficult), forest areas being ‘degazetted’, allocated to individuals, and deforested, in disregard of environmental and resource considerations or even of resident communities, even markets, cemeteries and public toilets being handed over to individuals.
- They complained that many people who are entitled to titles to land have been unable to get the necessary documents. The effects of unjust deprivation of land during the colonial period are still felt by some communities. Some communities are deprived of access to important cultural sites. People complained that county councils allocated trust land to individuals, and there were calls in some places for the restoration of community land rights.
- There was a great deal of complaint about land problems going back many years – very often traceable to colonialism. For example, while the Maasai complain of being dispossessed by the colonial power, the Pokot complain that they were in turn displaced by Maasai.
- There is a good deal of land lying idle while others are crying out for access to land; some hold land as a source of power, rather than for productive use. Many asked for an upper limit on the amount of land that can be held by an individual or organization.
- Not all problems are in rural areas. 65% of Nairobi dwellers, and many in other towns, live in slums, often as squatters with no rights, no facilities, and no incentive to improve their living conditions. Land grabbing is a problem everywhere.
- A great deal of concern was expressed over environmental degradation in various ways. Pollution of land, air and water, deforestation, waste disposal problems, unplanned building development are all causes of complaint.
- On resources one of the most common areas of complaint related to the use of land for game parks for the national benefit but to the exclusion of the local people. In Taita-Taveta about 75% of the land is included in national parks, and most of the rest is in the hands of a very small number of people, with the local people owning only 11% of the land. Ironically, about 90% of the country’s wildlife is outside the boundaries of the parks. This is the

- most dramatic example of a sense experienced very widely: that local control of resources, and therefore of their lives, had been wrested away.
- Finally: on the economy more generally. There were submissions about the importance of encouraging scientific and technological advancement, and of protecting the rights of those who develop scientific and other advances. The need for considering the development needs of all parts of the country was also mentioned frequently.

It is not possible for the Constitution to provide a detailed blueprint for dealing with land issues. All it can do – and this is what the Commission is suggesting – is to set out a set of principles which must be used as the basis of land policy and law in the future. The principles are in the box.

Land Principles for the New Constitution

- 1 All land belongs to the people of Kenya.
 - the people will hold such land in accordance with systems of tenure defined by legislation.
 - Non-citizens of Kenya would be prohibited from acquiring land except on the basis of leasehold tenure.
- 2 Land in Kenya shall be classified as public, private or commons.
- 3 Public land shall be clearly delineated and held in trust for the people in Kenya in terms of legislation defining the nature and extent of such trust.
- 4 Private land may be acquired and held by individuals or other jural persons in accordance with systems of tenure defined legislation.
- 5 The commons shall be clearly delineated and vested in communities or agents thereof in accordance with systems of tenure defined by legislation.
- 6 Property rights lawfully acquired shall be protected and may be freely by alienated without discrimination as to gender subject only to such restriction as are inherent in the tenure systems creating them.
- 7 All land however acquired or held are subject to the inherent power of the state to acquire or regulate such land in the public interest or for the public benefit.
- 8 There shall be established a Land Commission whose functions will include: -
 - Holding title to public land
 - Periodic review of land policy and law
 - Developing principles for the sustainable use and management of land
 - Exercising residual land administration functions.
- 9 Parliament shall make law within two years of its first sitting under this constitution providing for: -
 - The incorporation of the above principles
 - Mechanisms for resolving land disputes under different tenure categories
 - An expeditious and cost-effective system of land alienation (transfers and transmissions)
 - Equitable distribution of land including the resolution of problems of landlessness, or spontaneous settlements in urban areas.
 - The investigation and resolution of historical claims especially within the Coast, Rift Valley and North Eastern Provinces and other areas.
 - The introduction of tax on idle and underutilized of land, and
 - The coordination and simplification of land laws.

6. *Environment*

On the environment, certain basic principles are included in the draft human rights provisions: right to a healthy environment, and the basic principles of sustainable development. Sustainable development includes the idea that there should be equitable development among the people alive in the world today, but also that the rights of future generations to the resources of the world must be respected. These ideas are should be further developed in the Land chapter, drawing to some extent on the recent Environmental Management and Coordination Act.

- Those making decisions and laws must have regard to the following principles of sustainable development: public participation, the cultural and social principles traditionally applied by any community on Kenya for the management of the environment or natural resources, the principle of equity as between present and future generations and as between those living at the same time, the polluter pays principle, the precautionary principle
- Government must protect the wildlife, genetic resources and biological diversity of Kenya. to protect forests, practice, encourage and where practicable require waste minimisation and recycling, water conservation, the use and development of energy efficient technology and the use of renewable energy sources.
- Government must set up and ensure the effective functioning of a system of environmental impact assessment and environmental audit and monitoring; and ensure that environmental standards enforced in Kenya keep up with developing standards internationally.
- All minerals and water resources belong to the people of Kenya. And the National Land Commission holds any such natural resources as are formally vested in or managed by it in trust for the people of Kenya, but a share of the income must go to the people who own the land.
- So far as reasonably possible, the administration of natural resources must involve the participation of the local community, while not losing sight of the need for natural resources to be protected and developed for the benefit of the nation as a whole

The Principles of Sustainable Development

Development which meets the needs of the present generation while not compromising the ability of future generations to meet their needs

- Equity within generations
- Equity between generations
- The precautionary principle
- The polluter pays principle
- Public participation
- Respect for traditional environmentally friendly ways
- International cooperation

- The law must provide for Parliament, as Guardian of the rights of citizens, to be consulted on major decisions affecting the use of the land and natural resources of the nation.

7. *Economy*

A constitution cannot prescribe detailed rules for the economic management of a country. Only the most general principles can be included:

- The encouragement through education and other means of the development of relevant scientific and technological techniques and knowledge
- The principles of even development in the country
- The protection of intellectual property rights
- the protection and development of indigenous knowledge
- The encouragement of trading relations within the African continent
- Assistance to various sectors of the economy including agriculture, livestock

8. *Public Finance*

Raising and spending public money are self-evidently functions which require careful regulation – especially in a country like Kenya where most people are poor and can hardly afford any wastage of their own or public money and where, even more importantly, there has been massive criticism of impropriety in the use of public money.

The Review Act (s. 17 (d)) provides that one of the functions of the Commission is to ensure that Kenyans:

...(viii) examine and review the management and use of public finances and recommend improvements thereto;...

Kenyans told the Commission that

- That steps should be taken to ensure that everyone liable to pay tax actually pays; for example if there is any waiver of the obligation to pay tax this should be made public; the Constitution to include principles of fair and prudent taxation
- There should be greater involvement of the public and parliament in the preparation and approval of the budget
- In various ways parliamentary control of budget processes should be tightened
- The independence and powers of the Auditor-General should be strengthened

- There should be better controls over expenditure of state revenue outside the budget
- The whole process should be more transparent
- The two functions of budget control and audit should be performed by separate bodies
- The office of the Governor of the Central Bank to be established by Constitution and given security of tenure and independence of operations

The existing Constitution has some standard provisions: setting up the main accounts into which public money is paid, providing for the procedures to pass law raising taxes and incurring expenditure, providing for the creation of the independent post of Auditor-General to audit the accounts of the public. There are various ways in which these provisions can on the one hand be tightened to exercise better control over financial matters. Secondly they restrict severely the powers of Parliament to make laws, which involve public expenditure, or to propose changes in the budget. Thirdly the whole process could be much clearer to the public. The fact is that at present the whole budget process is too much in the hands of the executive. Neither Parliament nor people fully understand the process or what is planned. They are not provided with enough information, or enough time, to evaluate the executive's plans.

The draft Constitution includes the following main principles:

- a statement that budgetary processes must be transparent, and must involve the participation of Parliament and of civil society as much as possible; they must ensure accountability and the effective financial management of the economy, debt and the public sector.
- The process of preparing the annual estimates must involve much more openness and participation, especially of Parliament. In order to make this possible:
 - the material presented to Parliament must be in such a form that members are able to understand and contribute to discussions on the budget
 - the budget for a particular financial year should not be presented in isolation, but showing the place of the proposed income and expenditure in the context of the previous year, and of plans for the following year
 - the budget submissions must be prepared and presented to Parliament by a date to be set by legislation which gives sufficient

time for useful discussions, which should take place before the beginning of the next financial year

- Parliament must set up a Committee to consider the estimates, and provide it with the necessary resources
- There will be tighter controls on the expenditure of funds:
 - the amount which can be advanced at the beginning of the financial year but before the budget is approved should be reduced (at present it is 50% of the planned budget)
 - there will be tighter conditions on the use of the contingency fund
- There will be tighter regulation of the power of the government to borrow money – the control of Parliament over and the transparency of this process being increased.
- The draft Constitution is more specific about the requirement that, subject to the Constitution, all raising of tax should require the authority of Parliament.
- It requires that decision to waive the obligation to pay taxes must be made by Parliament.
- There will be an office of the Controller of the Budget – with the responsibility of authorising expenditure from governments accounts to ensure they are in accordance with the law and only for the purposes approved - separate from the Auditor General whose office currently has this responsibility but without the capacity to do it thoroughly.
- There are clearer requirements on the timing of submission of the Reports of the Auditor General.
- The independence of the office is increased.
- The Auditor General is to report direct to Parliament.
- The Central Bank is recognised in the Constitution and the Governor is given security of tenure (to protect him or her from pressure from the Government to increase the money supply, or permit the Consolidated Fund to have an overdraft, for example).

9. *Kenya and the World*

Kenya is an international citizen: it is a Member of the United Nations, of the African Union, the Common Market for Eastern and Southern Africa (COMESA) and of the East African Community. It has agreed to be bound by many international agreements, including on human rights and the environment. These

are probably very mysterious to most people! What do they mean to the ordinary Kenyan? Are they of any benefit to his or her daily life? Do they involve the government – and therefore the taxpayer – in new expenditure? Is Kenya a good international citizen? These are all questions to which the answers ought to be readily available – and are not.

The draft Constitution puts all this much more in the public domain. But first it's necessary to explain a little about how international law works: International agreements may be made by an agreement between two nations (bilateral), or between many nations (multilateral). A treaty may be sponsored by an international organisation (such as the United Nations). The government will agree to a treaty, but it then has to be 'ratified' locally; what the process of ratification involves depends either on local law or on the provision of the treaty itself. In Kenya, treaties are ratified by signature by the President. International law may also develop as a practice of nations (called customary international law) or it may be made by an international court interpreting treaties, such as the International Court of Justice at the Hague. Customary international law is part of the law of Kenya – though the Constitution does not say so. Under Kenyan law a treaty does not automatically become part of Kenyan law - usually an Act of the Kenyan Parliament must be passed bringing the new international rules into local law. It may be many years before this is done. And the fact that Kenya has accepted an international obligation creates no right on the part of a Kenyan citizen - even if the treaty was intended to benefit Kenyans.

The Commissions' proposals will make the system a bit clearer, and also place it more in the control of Parliament as the people's representatives:

- The Constitution states that customary international law (unless it is inconsistent with the Constitution or an Act of Parliament) and treaties to which Kenya is a party are part of the laws of Kenya.
- The Government negotiates and signs treaties – as part of the executive functions which are vested in the Government, but with the participation of Parliament.
- Before a treaty is finally approved, it must be approved by Parliament (by at least half the members of Parliament and if the treaty would require an amendment of the Constitution there must be approval by the same percentage of the people as the constitutional amendment would require). Parliament must be given adequate opportunity to debate the treaty.
- Some treaties may have effect in Kenya without an Act – this is because of the terms of the treaty itself. This is permissible under the draft.

- Existing treaties, which have not yet been brought into effect in the country by an Act of Parliament, must be brought into effect within one year of the enactment of the new Constitution.

There is another topic on which the Constitution needs to say something: the possibility of Kenya declaring war or committing its troops (for example to a peace-keeping force), though many constitutions say nothing on the subject.

- The draft Constitution provides that a Declaration of War is made by the President, after consultation with the National Defence Council but requires the prior approval of at least two-thirds of the entire Parliament within a fortnight.
- Any other Commitment of the Defence Forces outside the boundaries of the state would require the approval of an absolute majority of Parliament.