

## Chapter IV: Constitutionality

This chapter tries to answer the following kinds of questions by proposing institutions and procedures:

- Considering how quickly and fundamentally the 1963 constitution was amended, how can we protect the new constitution from a similar fate?
- How can we prevent the decay of constitutional institutions and state organs as has happened with the institutions of the present constitution?
- How can we be sure that the changes introduced by the new constitution will be implemented?
- How can we ensure that powers given under the constitution are not abused?
- How can we hold ministers and public servants accountable for their policies and actions?
- What remedies will the people have against violations of their rights?
- How can we be sure that judges will interpret the law and decide cases impartially?
- What do we need to do to ensure free and fair elections?
- How can we protect constitutional values like consensus, people's participation, the independence of and resources for constitutional offices and bodies?
- How can we eliminate corruption which is responsible for the denial of so many rights and is an important reason for our poverty?

The Review Act requires the new constitution to include the following provisions which are devices to establish and maintain 'constitutionality':

- A system enshrining constitutionalism and the rule of law (s. 3(b))
- Separation of powers and checks and balances 'to ensure accountability of the Government and its officers to the people of Kenya' (s. 3(c))
- People's participation (sec. 3 (d))

- ‘Examine and recommend improvements to the existing constitutional commissions, institutions and offices and the establishment of additional ones to facilitate constitutional governance and the respect for human rights and gender equity as an indispensable and integral part of the enabling environment for economic, social, religious, political and cultural development’ (sec. 17(d) (iii))
- Make recommendations on the judiciary generally and in particular, the establishment and jurisdiction of the courts, aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the judiciary’ (sec. 17(d)(v)).

*Devices to safeguard constitutional values and provisions include*

- Requiring that the exercise of certain kinds of state power, which have a major impact on the fair operation of the political and administrative system, such as the enforcement of law, the recruitment of civil servants, currency policies, and the conduct of elections, should be insulated from political influence. This is achieved by giving these powers to independent institutions and commissions.
- Giving the courts the power to review and declare laws or policies unconstitutional and therefore void.
- Supplementing the courts with other institutions for receiving, investigating and dealing with complaints by the public against the administration, because access to courts is difficult and expensive and legal proceedings take a long time.
- Connected with the previous approach is the establishment of ‘multi-purpose’ institutions for the protection of the rights of all persons or some special category of persons (such as women). These institutions receive and investigate complaints, but also promote the knowledge of and respect for human rights and develop regulations to enforce rights.
- Establishing institutions to ensure the accountability of public authorities, taking action on their own, without waiting for complaints from the public. The best known of these is the Auditor-General; recent examples include anti-corruption bodies.
- Establishing a strong, effective and independent legal system, for it is only through the rule of law that some of the most blatant abuses of power can be checked. An effective legal system requires that the Attorney-General, who is head of the system and the chief legal adviser to the government, should be independent. It is also requires an

independent system of prosecutions. It requires a strong and competent legal profession. In order to enable people to seek the help of courts to enforce their rights, legal aid should be provided to the needy.

- Ultimately the people have to be guardians of the constitution. To perform this role people have to understand the constitution and know their rights. They have to know how to use the machinery of the constitution and the law to hold public authorities accountable. They should be involved in the conduct of public affairs. They can also act as agents of accountability: for example by
  - providing alternative budgets or analysis draft state budgets
  - publishing annual assessments of the record of government and corporations of human rights, social justice, environment and natural resource policies, etc
  - providing alternative reports to regional and international human rights supervising bodies on the national record
  - undertaking constitutional litigation to prevent the state or private interests from breaching the constitution or law
  - Since individuals work together with others, the role that civil society and non-governmental organisations can play is some times recognised and protected in the constitution, such as in the Philippines.

An important asset for civil society is access to the information collected, commissioned and stored by public authorities—such access is now provided in many countries.

#### *1. What Kenyans told the Commission*

After the experience of seeing the 1963 Constitution emasculated by a process which began almost as soon as the country became independent, Kenyans were very concerned in their submissions to the Commission that the new Constitution should not be lightly amended, and also that it should be respected.

- One of the most frequent suggestions was for an Ombudsman – an office to which members of the public can go to complain about their treatment at the hand of the public service, without having to pay a fee, and which will investigate the complaint, make recommendations for putting the situation right, and for improving the performance of the public service in the future.
- Women wanted a Gender Commission – which would receive and investigate complains from women about violation of their rights, and laws and policies which are detrimental to women.

- Advocates for children wanted a Children’s Commission.
- Many groups wanted an independent Human Rights Commission. People who complained about the Police wanted a Police Complaints Commission.
- Others wanted a corruption commission (like the Kenyan Anti-Corruption Commission that the courts declared unconstitutional in 2001).

It will be clear that there is a strong belief in the virtue of independent bodies to investigate complaints. Perhaps it will also seem that there is a risk of too many commissions being set up. None of this can be done without expense, and some of the functions and tasks will be similar between the various commissions.

There are also certain other functions which will require the establishment or the confirmation of a commission: running elections is the most obvious, which should continue to be the function of the Election Commission. Another is the Auditor-General: he/she may sound like an individual but in reality the office needs a large staff and functions like a commission.

The experience of Uganda and South Africans cautions us against having too many independent institutions. They are expensive, it is hard to raise money for them and it is not easy to find enough people with the necessary skills to staff them. Their functions overlap; this is likely to cause confusion among both the public who may have some doubt as to where to take their complaints (for example, would treatment by a public official which suggests bias against women be a matter for the Gender Commission or the Human Rights Commission?). And officials too may get confused – different commissions are likely to develop different approaches to similar issues. And, unfortunately, it is hard to avoid competition between commissions, especially if more work means better resources.

## 2. *Proposed Constitutional Bodies*

We should therefore restrict the number of new institutions. The CKRC recommends the following bodies, some of which are new, others are old:

### (a) *The Various Service Commissions*

- o Public Service Commission
- o Judicial Service Commission
- o Parliamentary Service Commission

- o Constitutional Commissions and Constitutional Offices Service Commission

This may seem to violate the principle of not having too many commissions! But in reality some of these bodies already exist. Any detailed discussion of them comes under relevant sections of this report.

***(b) Commission for Human Rights and the Administrative Justice***

This would include the functions of people's protector, gender/equality commission, the human rights commission, and accountability of and complaints against disciplined forces. Its structure would be 'federal'—each commissioner would have a specific responsibility and resources (in addition to general responsibility)—gender, children, disability, 'minorities', the conduct police and armed forces, complaints against administration, etc.). The institutions which are proposed to be merged in this way have overlapping responsibilities. They have similar functions. These functions centre around human rights; they include education in human rights, advocacy, lobbying, setting of standards, receiving and dealing with complaints, giving advice. A special responsibility would to ensure that people's basic needs are met. One of the early tasks of the CHR and Administrative Justice would be to deal with the backlog of complaints of harassment and oppression.

Advantages of this arrangements include

- Economy
- Better co-ordination
- Pooling of resources—library, premises, vehicles, research staff
- Provide 'one stop shop': a person with a complaint or suggestion would not be turned away because she has come to the wrong institution (it would be the responsibility of this commission to refer the matter to the most relevant commissioner/division); there would be one field office in every district or constituency for advice and receiving complaints, etc, thus increasing presence throughout the country
- More effective lobbying
- Better able to protect its independence/resources
- Means that all these responsibilities and functions would commence at once when the Commission is set up—it is possible that if there were to be many commissions, some may not be set up for a long time (as experience elsewhere shows)

(c) *Ethics and Integrity Commission*

This body is recommended to deal with the very important and difficult issues of corruption and integrity in public life. It would be the body responsible for giving operational effectiveness to the Leadership Code. It would also be the body to deal with allegations of corruption – which would be breaches of the Leadership Code but also of the criminal law.

There would be some unavoidable overlap with the CHRAJ, and a system of coordination would have to be developed between the two. Both would receive complaints from the public, and both would have important educational functions: directed both at the public and at public functionaries. But the CHRAJ would need a mediatory style of operation, avoiding confrontation between the public and the public service, and between the Commission itself and the public service. The style of the EIC would inevitably be rather different. The Leadership Code will require political leaders and public functionaries of all types, at a senior level, to declare their assets. And it will investigate allegations of serious criminal conduct. It is difficult to combine these with a mediatory style. It needs considerable investigative capacity; there is a great need for confidentiality; and the activities of the EIC are likely to incur the anger of politicians and civil servants. Bodies in some parts of the world which have both ‘ombudsperson’ style functions and corruption investigation functions have often found that the latter tends to swamp the former – either in terms of their actual allocation of time and resources, or because the public and media tend to concentrate on the corruption aspect.

(d) *The Electoral Commission*

This is retained but it is smaller, the Chair must be qualified to be high Court Judge; members must be of proven integrity

(e) *Salaries and Remuneration Committee*

This body would be appointed periodically, say once every four years, to review salaries and remuneration of the President, ministers, Members of Parliament, judges, senior commanders of the armed forces, independent office holders, full time members of commissions, etc.

(f) ***Fiscal Commission for Devolution***

It will consist of three members appointed by the National Council to represent districts and three appointed by the central government. It will advise on the allocation of financial grants to districts, including equalisation grants to the less development districts.

(g) ***The Constitution Commission***

This body is to have the primary responsibility for overseeing the implementation of the constitution, and is discussed under Transition below)

(h) ***The Judiciary***

The Chief Justice and judges of the Supreme Court, the President and judges of the Court of Appeal and the President and judges of the High Court (including the Chief Kadhi)

(i) ***The Attorney General*** to provide independent legal advice to the Government and to uphold the rule of law

(j) ***Director of Public Prosecutions*** to decide on and conduct prosecutions without political interference

(k) ***The Public Defender***

This office would provide legal representation to people unable to afford legal costs; it would be publicly funded and have branches in all provinces.

(l) ***The Governor of the Central Bank*** to ensure the management of state currency in accordance with sound economic principles

(m) ***The Controller of the Budget*** to supervise the disbursement of state revenue and to ensure that funds are spent for the purpose for which they are given, and are spent efficiently

(n) ***The Auditor-General and the National Audit Office*** to audit accounts of public bodies and to bring corruption and other breaches of the law to the attention of Parliament and the Director of Public Prosecutions.

(o) *The Director of the Central Bureau of Statistics* to ensure, *inter alia*, proper census and collection and analysis of politically sensitive information.

(p) *The Land Commission*

This body is to hold the land in trust for the people of Kenya and to develop land policies which, among other things, respect constitutional principles

### 3. *Principles Governing the Constitution of Independent Commissions*

Certain principles should be observed in setting up these commission and bodies (not all these apply equally to all bodies):

- They should have assured finance
- They should not be subject to direction by government
- They should have security of tenure
- Each commission should not be too large
- They should reflect the diversity of Kenyan society in terms of gender, disability, geography and ethnicity, economic, occupational and professional roles
- They must have the powers they need to operate effectively
- There should be a procedure and mechanism(s) to ensure that their reports are scrutinised and where appropriate acted upon
- They should report to the people or to the people's representatives (Parliament)
- Where they interact with the public they should be accessible – physically, financially and in terms of operating 'style'
- They should operate fairly and with regard to the human rights of those whose conduct they inquire into as well as of the members of the public who bring complaints or issues to them

### 4. *The President as Guardian of the Constitution*

The proposed Constitution envisages a new role for the President. Rather than being, as in the past, the head of the executive in a day-to-day sense, one of his or her functions is to be a key element in the maintenance of constitutionality. The President's functions will include:

- referring proposed legislation back to Parliament for reconsideration with reasons



- asking the courts for a ruling on constitutionality of legislation

##### 5. *Amending the Constitution*

It may seem strange the question of amending the Constitution is raised even before its enactment – until you remember how soon the independence constitution was amended. This has caused a great deal of criticism. The essential problem is that, although the Constitution will be given to the people of Kenya by the people themselves, in future their control over lawmaking will be less direct. But if there were a rule which said the Constitution could never be amended, this would mean that quite desirable activities by government might be impossible. Times change, constitutions are a product of their own times, and, if the Constitution can never change, the only solution might be some sort of revolution. The answer must be to strike a balance between it being too easy to change, and too difficult. This balance is not necessarily the same for all the provisions of the Constitution. It is also important that certain groups of people have the right at least to be consulted, and perhaps to have a veto over proposed amendments. Some provisions of the Constitution may be so important that they should not be able to be amended at all, and some would require a referendum: a vote in which all electors could participate.

The Commission is proposing that amendments of the constitution can only be done by three fourths of the vote in each house of Parliament, except for specially entrenched provisions which will require, in addition, a referendum so that the people can decide directly.