

Chapter V: Transition

A new Constitution involves a big upheaval in the legal and political life of the country. It is impossible to bring all the legal changes into effect straight away, and decisions have to be made about speed and about priorities.

1. Maintaining the old

In fact most things about life in Kenya will remain the same – even legal things. The system of law will continue. Civil servants and other public employees will keep their jobs. People will continue to own what they owned before – except for some provisions about land improperly acquired or ‘grabbed’.

2. Bringing in the new

The things that are likely to change soonest are those connected with the political system and structure of government. This is partly because it is likely that there will be a general election soon after the new Constitution comes into force. Indeed, many have been saying that they want the elections to be under the new Constitution. But this means not just that the electoral system will change but the political roles for which people are elected will also change.

The electoral system will be very different from the existing one – because electors will have to choose not just an MP for their constituency, but they will also have to cast a vote for a party. So there will have to be new ballot forms. Returning officers and counters will have to be trained. Parliament will have to accommodate 90 extra MPs. And the ballot paper for the Presidential election will also be rather different

- To give time to the Electoral Commission to organise the elections the Commission is recommending that the National Constitutional Conference should consider whether elections should take place in April 2003 (this would not represent an extension of Parliament under the existing Constitution)

Some existing bodies will have to be restructured. These include the Electoral Commission, the Judicial Service Commission and the Public Service Commission.

The Commission is proposing various dates for this to happen, depending on urgency. The new JSC is a very urgent matter – especially because of the proposal for the establishment of a Supreme Court.

- Parliament must set up its Committee to consider judicial appointments as a matter of urgency

The new structure of government – with new powers for the President, the Prime Minister etc. will come into effect after the first general elections under it.

The system of devolved government will take some time to organise and the Commission is recommending that that it should be fully in place by 2004.

Constituency boundaries for national elections must be considered and if necessary redrawn in good time for the election of 2008. The Commission is recommending a National Boundaries Commission to be set up in 2004 to recommend on provincial, district and constituency boundaries.

The life of the Parliament elected in 2003 may be slightly longer than 5 years in order to make it possible to hold the 2008 elections at the best time of the year, namely August.

The CHRAJ must be set up before the end of 2003.

The Land Commission must be created before the end of 2003.

Policies to deal with historic injustice in the area of land will take a long time to set up and must be done with great care. But the difficulty and sensitivity must not be allowed to delay the process excessively

Some of these dates can be fixed in the Constitution. But other arrangements may need some flexibility. But how can the people be sure that the new arrangements are put into place with reasonable speed? The Commission is proposing the creation of an independent body specially to deal with this: the Constitutional Commission. This body will come into existence after the Constitution is passed into law. It will be responsible, in conjunction with the office of the Attorney General and other relevant organisations to implement the outstanding provisions of the constitution in accordance with the timetable in the transitional provisions of the constitution. It will also keep a watch on what the government and other bodies are doing to implement the Constitution, and produce periodic reports on progress. It will report directly to the people and also to Parliament. And if progress is not fast enough it will have the power to go to the courts and get a declaration of failure to implement the Constitution – and in some circumstances even a direction to someone who has failed to do what is necessary to implement. It will have an initial tenure of three years, which could be extended for another two years.

Conclusion

The Commission has recommended a constitution that departs in radical ways from the present constitution. It believes that these radical departures are necessary to find directions to national unity, economic and social development, the dignity of individuals and communities, and social justice as well as for the renewal of our national institutions. The draft constitution establishes an ambitious agenda which cannot be achieved overnight. What must be done as a start is the establishment of the broad framework of governance, particularly the institutions and the values that must guide them. A democratic, participatory and responsive government is critical to the success of other institutions that we have proposed. We therefore recommend that the constitution along with the electoral system should be brought into force as soon as Parliament enacts the constitution. We also recommend for the consideration of the National Constitutional Conference that the next general elections should be conducted under the new constitution. In order to ensure that adequate time is available for civic education on the new constitution, voter education on the new electoral system, and the administrative arrangements for the election, we recommend that the next general elections should be held in March or April 2003. This is consistent with the present constitution as regards the time within which elections should be held. We hope that the National Constitutional Conference will consider and endorse our recommendation.

It is possible that some people may be uncomfortable with the number and size of new institutions that we are recommending, particularly due to increased demands on state revenues. Most of the new institutions we are recommending are to ensure public participation, accountability of ministers and public authorities, honest administration, and the fair exercise of politically sensitive powers - as well as in some cases to provide a framework for policy making which is inclusive and professional, guided by the overall objectives defined in the constitution. And the principles of which are the costs of running them. We believe that this framework will save the state a great deal of revenue that seeps out of its coffers illegitimately into private pockets, that it will energise our people and give them opportunities for productive employment and entrepreneurial activities, and bring in foreign investment and technology.

The new constitution makes many promises to the people of Kenya. We have shared with them their dreams of a peaceful, prosperous and caring society. We believe that the constitution we are proposing, if properly implemented, can deliver on these promises. We plead with our leaders not to let the people down.

**Dated, Sealed and Issued by the Constitution of Kenya Review
Commission in Mombasa at 10.00 a.m. on Wednesday the
18th day of September, 2002.**