



**THE PROPOSED CONSTITUTION OF
KENYA, 2010**

MADE SIMPLE

A Citizens' Handbook.

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INTRODUCTION

(i) What is a Constitution?

A constitution is a social contract or covenant which is the basic law upon which all other legal, policy and regulatory frameworks are built. Apart from providing for the establishment and functioning of key institutions in society, the constitution describes the relationship between the people and their governors as well as among the people themselves and equally the governors. A constitution lays down the essential relations within a society.

Usually then, the constitution is referred to as the Basic Law or Basic Norm or the Pillar of all Laws. Any law that contradicts the Constitution is said to be null and void; of no effect of consequence.

A democratic constitution regards the people as sovereign masters and the governors as trustees or agents or servants for a specific term on behalf of the people. A constitution seeks to negate the rule of arbitrariness. A constitution opens the door for an open and free society.

Through a constitution, people donate some of their power to governors who rule according to basic rules established by the people. The people however also reserve their sovereignty through which they can act directly or via organized civil society.

(ii) A Brief History of Constitutional Change in Kenya

From 1963 to the present, constitutional rule in Kenya has been uninterrupted. In the same period, many African nations have experienced constitutional breakdown occasioned by the overthrowal of the constitution by means not anticipated by it. Immediately after independence in Africa, coups d'état were common place.

From 1966 in Kenya, Jaramongi Oginga Odinga led a movement to resist the gradual erosion of the independence constitution and multiparty democracy and its replacement with a one party restrictive constitutional structure and culture. However, Kenyans began to seriously hunger for change and the corresponding constitutional overhaul, in 1989 as the Berlin Wall collapsed in the Western world. In 1991 and later 1997, the struggle for national rebirth through a new constitution witnessed two peaks. Although the Moi-KANU regime endeavoured to crush the renewal, the struggle demonstrated a remarkable resilience.

Due to the many amendments that the 1963 constitution was subjected to, by 1997, a national consensus had developed that it should not be merely amended but rather a new constitution needed to be developed. The post – election violence emanating from the disputed 2007 general election confirmed the necessity and urgency of constitutional overhaul more than any other occurrence in Kenya’s history.

A rare opportunity then has surfaced through which the constitution can now be replaced by another during peacetime without the old constitution having been overthrown by force of arms. By voting for or against the constitution in a referendum, the people will affirm their sovereignty and speak to their future.

(iii) Towards the Referendum

A referendum (also known as a **plebiscite** or a **ballot question**) is a direct vote in which an entire electorate is asked to either accept or reject a particular proposal. This may result in the adoption of a new constitution, a constitutional amendment, a law, the recall of an elected official or simply a specific government policy. It is a form of direct democracy.¹

¹ Source: <http://fen.wikipedia.org/referendum> accessed on 9th June 2010.

A referendum on the constitution is a vote about how future generations will be governed while a vote at a general election concerns the replacement of one set of leaders with another set usually for five years.

The coming referendum is a popular people's vote to affirm or reject the Proposed Constitution of Kenya. A YES vote means Kenyans will enact and give to themselves a new constitution whereas a NO vote means they will continue to be governed under the existing constitution.

As we approach the impending Referendum, it is vital that each Kenyan puts the Proposed Constitution on a scale and weighs its strengths and shortcomings as compared to those of the Independence constitution (as amended) so that he or she can vote on the basis of knowledge and their conscience.

The time for a country-transforming and life-changing decision by each one of us is here. On August 4th, each Kenyan should decide on his or her own. As a nation, we have a date with destiny. There is no two ways about it.

PART I: THE PROPOSED CONSTITUTION UNVEILS A NEW SOCIETY TO BE BUILD AROUND A VISION AND VALUES

A key strength of the Proposed Constitution is that it boldly announces a foundation of values on which the new Kenyan society will be build. In the past, our country, unlike Tanzania for example, has paid little attention to the centrality of values or ideology upon which to construct a nation-state from our diversity. We are still a loose confederation of ethnic groups driven by ethnic chauvinism.

The new vision which underscores the primacy of values in the reconstruction of Kenya is to be found in the Proposed Constitution's Preamble, the First Part of most of the 18 Chapters and the National Anthem which is incorporated in the proposed Constitution.

A Preamble is an introduction to a constitution which outlines the philosophy of the constitution. The constitution and all other laws, policies and regulations of a country are interpreted in line with, or within the spirit of, the Preamble.

1. The Preamble of the Proposed Constitution:

- acknowledges the supremacy of the Almighty God;
- honours those who have struggled for the realization of freedom and justice;
- celebrates our ethnic, cultural and religious diversity and affirms our desire to live in peace and unity as one indivisible sovereign nation;
- confirms our determination to protect the environment for the benefit of future generations;
- reinforces our commitment to nurturing and protecting the well-being of the individual, the family, communities and the nation;
- recognizes the desire by Kenyans to be governed through a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law;
- affirms that Kenyans have a sovereign and inalienable right to determine their form of government and to enact a constitution for themselves.

2. The Proposed Constitution declares all sovereign power belongs to the people of Kenya. The people may exercise it either directly or through their democratically elected representatives. The citizens are the primary source of power, not politicians, public servants, other leaders or foreign powers. The proposed constitution identifies ordinary people as extraordinary people.

3. The Proposed Constitution declares itself as the supreme law of the land and will bind all public officials, public organs and persons. The constitution is the mother of all laws. It clearly prohibits any person or group from claiming or exercising state authority which is not authorized by itself. The Proposed Constitution outlaws dictatorship of any form.

4. Kenya is declared a Sovereign Republic which therefore cannot be subjected to foreign domination. The Republic is conceived as a multi-party democratic state founded on explicit national values and principles of governance.

5. The National Values and Principles of Governance bind all state organs, state officers, public officers and all persons. These values and principles include -

- patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
- good governance, integrity, transparency and accountability; and
- sustainable development.

6. The Bill of Rights is perceived as an integral part of Kenya's democratic state and the framework for the social, economic and cultural policies. The Proposed Constitution clarifies that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Such rights and freedoms are inalienable; they are not granted by the State. They belong to a human being by virtue of his or her being a human being. The Bill of Rights places the individual above the state; it is a key protector of the individual from state avarice. In the future, other rights and fundamental freedoms can emerge which continue to define and edify the individual.

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7. Land is Kenya's basic natural resource since our economy is agro-based. The Proposed Constitution describes the following principles of land policy:

- land shall be held, used and managed in a manner that is equitable, efficient and sustainable, and in accordance with the following principles –
 - a) equitable access to land;
 - b) security of land rights;
 - c) sustainable and productive management of land resources;
 - d) transparent and cost effective administration of land;
 - e) sound conservation and protection of ecologically sensitive areas;
 - f) elimination of gender discrimination in law, customs and practices related to land and property in land; and
 - g) encouragement of communities to settle land disputes through recognized local community initiatives.

8. Regarding the environment and natural resources, the Proposed Constitution provides that the state shall guarantee sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits. Kenyans have a right to a clean and healthy environment.

9. The Proposed Constitution lays down appropriate guiding principles of leadership and integrity. First any state or government official must exercise authority bearing in mind it is a public trust to be deployed:

- according to the constitution;
- to ensure respect for the people;
- to bring honour to the nation and dignity to the office one holds;
- so as to promote public confidence in the integrity of the office;
- so that the officer serves the people, rather than exercises power over them.

Other principles of leadership include:

- selection of public officials on the basis of personal integrity, competence and suitability, or election in free and fair elections;
- objectivity and impartiality in decision-making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper or corrupt practices;
- selfless service based solely on the public interest, demonstrated by:
 - (i) honesty in the execution of public duties;
 - (ii) the declaration of any personal interest that may conflict with public duties;
 - (iii) accountability to the public for decisions and actions; and
 - (iv) discipline and commitment in service to the people.

The Proposed Constitution thus envisages the vision of a Public Service based on servant leadership.

10. The electoral system, according to the Proposed Constitution, shall comply with the following principles:

- freedom of citizens to exercise their political rights;
- no more than two thirds of the members of elective public bodies shall be of the same gender;
- fair representation of persons with disabilities;
- universal suffrage based on the aspiration for fair representation and equality of vote; and
- free and fair elections, which are:
 - i. by secret ballot;
 - ii. free from violence, intimidation, improper influence or corruption;
 - iii. conducted by an independent body;
 - iv. transparent; and

- v. administered in an impartial, neutral, efficient, accurate and accountable manner.

11. The principles of executive authority, according to the Proposed Constitution, are:

- Executive authority derives from the people of Kenya and must be exercised according to the Constitution; and
- Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

12. The proposed constitution identifies the following principles and roles as key in relation to Parliament:

- a. the legislative authority of the Republic is derived from the people;
- b. parliament manifests the diversity of the nation, represents the will of the people and exercises their sovereignty;
- c. the National Assembly represents the people of the constituencies and special interests in the National Assembly;
- d. the National Assembly deliberates on and resolves issues of concern to the people; and
- e. the Senate represents the counties and serves to protect the interests of their counties and their governments.

13. The Proposed Constitution also lays down several principles regarding judicial authority as follows:

- judicial authority is derived from the people;
- in exercising judicial authority, the courts and tribunals shall be guided by the following principles:
 - a) justice shall be done to all, irrespective of status;
 - b) justice shall be affordable and shall be accessed by all;
 - c) justice shall not be delayed;

- d) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted so long as traditional dispute resolution mechanisms do not contravene the Bill of Rights and generally the Constitution;
- e) justice shall be administered without undue regard to procedural technicalities; and
- f) the purpose and principles of the constitution shall be protected and promoted.

Further the Proposed Constitution places premium on the independence of the judiciary and security of tenure of judges.

14. The Proposed Constitution describes the objects of devolution of government as:

- to promote democratic and accountable exercise of power;
- to foster national unity by recognizing diversity;
- to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the state and in making decisions affecting them;
- to recognize the right of communities to manage their own affairs and to further their development;
- to protect and promote the interests and rights of minorities and marginalized communities;
- to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- to facilitate the decentralization of state organs, their functions and services, from the capital of Kenya; and
- to enhance checks and balances and separation of powers.

The principles of devolved government are outlined as follows;

- county governments shall be based on democratic principles and the separation of powers;
- county governments shall have reliable sources of revenue to enable them to govern effectively; and
- no more than two thirds of the members of representative bodies in each county government shall be of the same gender. (This principle and its realization aim to change the gender face of leadership in Kenya permanently).

15 .The Proposed Constitution introduces strict separation of powers and checks and balances between the executive, parliament, judiciary on the one hand; and between the national government and county governments.

16. The Proposed Constitution announces the following principles regarding public finance. These are:

- there shall be openness and accountability, including public participation in financial matters;
- the public finance system shall promote an equitable society, and in particular –
 - (i) the burden of taxation shall be shared fairly;
 - (ii) revenue raised nationally shall be shared equitably among national and county governments; and
 - (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalized groups and areas;
- the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;
- public money shall be used in a prudent and responsible way; and
- financial management shall be responsible, and fiscal reporting shall be clear.

17. A key part of values and principles relates to the public service. The values and principles of public service include-

- high standards of professional ethics;
- efficient, effective and economic use of resources;
- responsive, effective, impartial and equitable provision of services;
- involvement of the people in the process of policy making;
- accountability for administrative acts;
- transparency and provision to the public of timely and accurate information;
- generally fair competition and merit as the basis of appointments and promotions;
- representation of Kenya's diverse communities; and
- affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of-
 - (i) men and women;
 - (ii) the members of all ethnic groups; and
 - (iii) persons with disabilities.

18. The Proposed Constitution describes national security as the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its peoples, their rights, freedoms, property, peace, stability and prosperity, and other national interest. National security, according to the Proposed Constitution, is to be promoted in accordance with the following principles:

- national security is subject to the authority of the constitution and parliament;
- national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;

- in performing their functions, and exercising their powers, national security organs shall respect the diverse culture of the communities within Kenya; and
- recruitment by the national security organs (the National Police Service [consisting of the Kenya Police Service and the Administration Police Service], Kenya Defence Forces [i.e. the Kenya Army, the Kenya Air Force and the Kenya Navy] and the National Intelligence Service) shall reflect the diversity of the Kenyan people in equitable proportions.

15. As stated earlier, the National Anthem is part of the Proposed Constitution. The values it envisages are also part of the said constitution. These are:

- acknowledgment of God of all creation and his blessings
- justice
- national Unity
- peace and liberty
- commitment to developing Kenya through common endeavour
- service
- loyalty to the homeland
- protection of the national heritage
- enjoyment of the fruit of common labour.

Under the Proposed Constitution, singing of the National Anthem constitutes a commitment to and an affirmation of the constitution on a continuous basis.

We have deliberately and extensively detailed the vision, values and principles of the Proposed Constitution to show that they can be the foundation of building a new nation-state which brings Kenyans together in their diversity. The dawn of a New Kenya is heralded by the Proposed Constitution if it is passed and its vision faithfully implemented.

PART II: CHAPTER BY CHAPTER ANALYSIS

CHAPTER 1: SOVEREIGNTY OF THE PEOPLE AND SUPREMACY OF THE CONSTITUTION

STRENGTHS

1. The people are sovereign or superior to the constitution.
2. The constitution is above the other laws (including customary law) and actions of officials and individual persons.
3. Dictatorship at any level is outlawed by the constitution.
4. General rules of international law and treaties or conventions that Kenya ratifies will supplement the laws of Kenya.
5. Every person has an obligation to respect, uphold and defend the constitution.

SHORTCOMINGS

1. To admit international law into Kenya's body of domestic law without a mechanism for determining its local suitability and without providing for a citizen based ratification process can potentially undermine and do harm to Kenya's legal system.

CHAPTER 2: THE REPUBLIC

STRENGTHS

1. The governments at the national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation.

2. A national state organ shall ensure reasonable access to its services in all parts of the Republic.
3. Because the official languages of Kenya are both English and Kiswahili, all official documents shall be in these languages.
4. The state shall promote and protect all Kenyan languages and Kenyan Sign language, Braille and other means of communication for persons with disability.
5. There shall be no state religion.
6. October 20 is converted into Mashujaa (Heroes) Day.
7. Culture is recognized as the foundation of the nation and constitutive of the cumulative civilization of the Kenyan people and the nation. The state shall:
 - (i) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage;
 - (ii) recognize the role of science and indigenous technologies in development of the nation; and
 - (iii) promote the intellectual property rights of the people of Kenya (e.g. musicians and authors and all other creative persons) and ensure the law guarantees that communities receive compensation or royalties for the use of their cultures and cultural heritage.

A robust cultural industry is likely to thrive.

SHORTCOMING

1. Any constitutional provision or other legal or policy provision which does not treat faiths equally will be challenged as contrary to the separation of State and Religion doctrine.

CHAPTER 3: CITIZENSHIP

STRENGTHS

1. Every Kenyan has a right to a passport and any document of registration or identification.
2. A Kenyan woman or man will give their child Kenyan citizenship irrespective of where the child is born.
3. Any person married to a Kenyan can apply to become a citizen after seven years of the marriage.
4. a) A Kenyan citizen by birth can become a citizen of another country without losing his or her Kenyan citizenship. This is what is popularly called Dual Citizenship.
b) If a Kenyan by birth has to give up his or her citizenship to become a citizen of another country, they can apply to regain Kenyan citizenship whenever they choose to do so.
5. A law will be passed to prescribe the duties or responsibilities of a citizen.

CHAPTER 4: THE BILL OF RIGHTS

As stated earlier, the Proposed Bill of Rights is one of the most comprehensive and forward looking in Africa and indeed the entire world. It provides a framework for transforming Kenya into a nascent welfare state.

STRENGTHS

1. a) Every person can go to court to enforce an actual or threatened breach of a right or fundamental freedom.
b) Those who have the right to institute court proceedings are:

- A person acting on behalf of another person who cannot act in their own name;
 - a person acting as a member of, or in the interest of, a group or class of persons;
 - a person acting in the public interest; or
 - an association acting in the interest of one or more of its members.
2. Upon breach of a right or fundamental freedom, the court has explicit and extensive remedies which it may grant.
 3. There are four absolute rights and fundamental freedoms which cannot be denied a human being in Kenya. These are:
 - freedom from torture and cruel, inhuman or degrading treatment or punishment.
 - freedom from slavery or servitude.
 - the right to a fair trial, and
 - the right to an order of habeas corpus i.e. the right to be produced in a court of law for the determination of the justification of detention if the state has held a person.

As far as the above four rights and fundamental freedoms are concerned, a law cannot qualify them so that their enjoyment is denied any Kenyan.

4. Recognition that life starts at conception, not birth.
5. Equal treatment of women and men including the right to equal opportunities in political, economic, cultural and social spheres.
6. Identification of new grounds on the basis of which discrimination is outlawed such as pregnancy, marital status, health status, culture and dress. (An employer will not be permitted to discriminate against a married or pregnant or single woman or a person infected by HIV/AIDs, for example.)

7. Where individuals or groups have suffered under past discrimination, the state shall redress that discrimination through affirmative action and other measures.
8. The state shall take legislative and other measures to implement the principle that no more than two thirds of the membership in elective or appointive bodies shall be of the same gender. (At least one third of elective or appointive officials in any public body shall be women.)
9. Violence against any person even from private sources is outlawed.
10. Torture which is defined to include a psychological component is outlawed.
11. Corporal punishment is proscribed (in prisons, schools, in the family etc.).
12. Right to privacy is clearly introduced in the Proposed Constitution.
13. Freedom of expression as guaranteed in the Proposed Constitution does not extend to:
 - a. propaganda for war;
 - b. incitement to violence;
 - c. hate speech; and
 - d. advocacy of hatred and discrimination.
14. Wide freedom of the media is guaranteed which includes:
 - state media affording fair opportunity for the presentation of divergent views and dissenting opinions; and
 - parliament setting media standards and the regulation and monitoring of compliance with such standards.
15.
 - a. Every citizen has the right to access
 - i. to information held by the state; and
 - ii. information held by another person for the exercise or protection of any right or fundamental freedom.
 - b. Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

- c. The state shall publish and publicize any important information affecting the nation.
16. a. A person shall not be compelled to join an association of any kind.
- b. The registration of an association of any kind shall not be withheld or withdrawn unreasonably; and there shall be a right of a fair hearing before a registration is cancelled.
17. The right of assembly is extended to encompass the elements of demonstration, picketing and petitioning public authorities.
18. The right of a Kenyan right for a person to reside anywhere in the country is guaranteed.
19. a. Private property is guaranteed.
- b. The state or any person cannot arbitrarily deprive or limit the enjoyment of a person's private property.
 - c. The state shall not protect property that has been unlawfully acquired.
 - d. The state shall support, promote and protect the intellectual property rights of the people of Kenya.
 - e. The state can acquire property or any interest in property as detailed in the Constitution for public purpose subject to prompt payment in full.
20. For the first time, the Proposed Constitution grants the right to fair labour practices. It confirms every worker has the right to fair remuneration; to reasonable working conditions etc. Employers under the Proposed Constitution are expected to ensure that their employees work in a good working environment. Also the employees' terms of employment must be fair.
21. Again for the first time, the Proposed Constitution provides for the right to a clean and healthy environment enforceable in a court of law.

22. The Proposed Constitution guarantees not only political and civil rights but also economic and social rights. The proposed constitution states every person has the right:

- a. to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
- b. to accessible and adequate housing and to reasonable standards of sanitation;
- c. to be free from hunger, and to have adequate food of acceptable quality.
- d. to clean and safe water in adequate quantities;
- e. to social security; and
- f. to education.

23. The Proposed Constitution reinforces:

- a person shall not be denied emergency medical treatment
- the state shall provide appropriate social security to persons who are unable to support themselves and their dependants.

The state shall take legislative, policy and other measures, including the setting of standards to achieve the progressive realization of the above economic and social rights.

24. The Proposed Constitution guarantees:

- every person has the right to use the language, and to participate in the cultural life, of the person's choice;
- the right of members of a community to form, join and maintain cultural and linguistic associations and other organs of civil society;
- a person cannot compel another person to perform, observe or undergo any cultural practice or rite (e.g. circumcision of women).

25. Various rights relating to family are provided for in the Proposed Constitution. Some of these are:

- recognition and protection of the family by the state;
- parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage; and

- recognition of marriages conducted under any tradition (e.g. customary law marriages), or system of religious personal or family law.

26. The Proposed Constitution aims to protect consumers. It guarantees consumers the right:

- to goods and services of reasonable quality;
- to the information necessary for consumers to gain full benefit from goods and services;
- to the protection of their health, safety, and economic interest;
- to compensation for loss or injury arising from defects in goods or services; and
- to fair, honest and decent advertising.

27. On administrative action:

- a. under the Proposed Constitution, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Public officials will not henceforth lord it over those they serve.
- b. if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

28. The rights of arrested persons, fair hearing and rights of persons detained, held in custody or imprisoned are some of the most elaborate in Africa just as the Bill of Rights in its totality is. Security organs, prosecutors, courts, remand and regular prisons, given the above rights, will not easily treat persons they process unfairly.

29. The Proposed Constitution domesticates the international rights of children. It guarantees every child the right, among other rights:

- to free and compulsory basic education (the government must ensure this takes place if the constitution passes);

- to basic nutrition, shelter and health care;
- to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
- to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.

A child's best interests are of paramount importance in every matter concerning the child.

30. Every person with disability, according to the proposed Charter, is entitled –

- to be treated with dignity and respect and not to be addressed and referred to in a manner that is demeaning;
- to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;
- to reasonable access to all places, public transport and information;
- to use Sign language, Braille or other appropriate means of communication; and
- to access materials and devices to overcome constraints arising from the person's disability.

Critically, the Proposed Constitution guarantees that the State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities. (Approximately the percentage of persons with disability in Kenya is estimated at 15)

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31. Regarding the youth (persons who are 18-35 years) the Proposed Constitution provides the state shall take measures, including affirmative action programmes, to ensure that the youth -

- access relevant education and training;
- have opportunities to associate, be represented and participate in political, social, economic and other spheres of life;
- access employment; and
- are protected from harmful cultural practices and exploitation.

32. Other categories which are specially protected by the Proposed Constitution are minorities and marginalized groups. The state in relation to them shall put in place affirmative action programmes designed to ensure that they –

- participate and are represented in governance and other spheres of life;
- are provided special opportunities in educational and economic fields;
- develop their cultural values, languages and practices; and
- have a reasonable access to water, health services and infrastructure (e.g. roads, electricity supply etc.).

33. The Referendum Constitution also seeks to protect older members of society (those who are 60 years and above). The state shall take measures to ensure the rights of older persons to -

- fully participate in the affairs of society (so that life does not end at retirement);
- pursue their personal development;
- live in dignity and respect and be free from abuse; and
- receive reasonable care and assistance from their family and the state.

34. The National Human Rights and Equality Commission as envisaged in the Proposed Constitution is an extremely powerful promoter and protector of human rights. It combines functions of a human rights commission; gender commission; equality commission; and an ombudsman. It will, inter alia:

- ensure both private and public institutions including national security organs observe human rights;
- co-ordinate and facilitate gender mainstreaming in national development;
- act as the principal organ of the state in ensuring compliance with obligations under treaties and conventions relating to human rights; and
- investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct.

The commission may be restructured by Parliament into two or more separate commissions.

SHORTCOMINGS

1. Article 27 on equality and freedom from discrimination and any other provisions relating to equality shall not be applied to Muslims before Kadhis' courts in the areas of personal status, marriage, divorce and inheritance. In this regard, the Muslim Law in question will operate over and above the equality provisions of the Bill of Rights.
2. It should be noted that no other law, including customary law, can override the Constitution. In most states where Islam is a state religion, Islamic law does not override the Bill of Rights as articulated in the constitution. This provision, that is Article 24(4), is not part of the current constitution.
3. Due to the nature of their work, national security organs are usually exempted from enjoyment of certain human rights e.g. rights to assembly, demonstration, picketing and petition. Until an ordinary law is passed in Parliament to deal with these issues (as has been provided for in Article 24(5)), the Kenya Defense Forces or the National Police Service (the National Intelligence Service is even omitted from Article 24(5)) will not be subjected to any limitations relating to human rights. There is a two year time period after the promulgation of the Constitution within which the above legislation may be passed.

4. The limitation of some rights for the Kenya Defense Forces and the National Police Service, especially economic and social rights, may be hard to justify.
5. Although the Proposed Constitution clearly stipulates that life begins at conception and abortion is not permitted, controversy regarding the right to life has arisen because termination of pregnancy is allowed if in the opinion of a trained health professional:
 - there is need for emergency treatment; or
 - the life of the mother is in danger; or
 - the health of the mother is in danger, or
 - if permitted by any other written law (that is other than the constitution).

It has been argued that the category of the health of the mother being in danger can be used to justify termination of pregnancy on flimsy grounds. The question is: what health hazards (short of those that endanger the life of the mother) can be accepted as a basis for abortion on medical reasons? Secondly if the first three categories are specified, what other category would justify termination of pregnancy so that a law is needed to permit it? These matters (termination of pregnancy on the basis of the health of the mother being in danger, or if permitted by any other written law), it is argued, require eventual streamlining.

6. Article 32(3) can potentially create problems. It provides: A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion. If a believer of one religion seeks access to an institution of another religion in order to undermine it, this can precipitate a conflict.

CHAPTER 5: LAND AND ENVIRONMENT

STRENGTHS

1. a. Land which is currently held by the government as unalienated government land which the Commissioner of Lands is able to give out, according to the Proposed Constitution, will vest in the respective county government and be held in trust for the people residing in the county, and shall be administered on their behalf by the National Land Commission.
 - b. Such public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.
 - c. The Ministry of Lands as it exists today will have a minimal role in the alienation of land.
 - d. The National Land Commission will be guided by a law, and will act as an agent of the county residents and governments in respect of the above public land.
2. a. Another category of land under the Proposed Constitution is community land which shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. This was previously land held in trust by county councils.
 - b. Community land consists of:
 - land lawfully registered in the name of group representatives under the provision of any law;
 - land lawfully transferred to a specific community by any process of law;
 - any other land declared by an Act of Parliament; and
 - land that is -
 - (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

- (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
- (iii) lawfully held as trust land by the county governments.

c. Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.

d. Community land shall not be disposed or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

3. a) The Proposed Constitution clearly defines private land as:

- registered land held by any person under any freehold tenure;
- land held by any person under leasehold tenure; and
- any other land declared private land under an Act of Parliament

b) All persons who have titles to land which was lawfully acquired have property rights which are fully protected and therefore secure.

4. a) Non-citizens under the Proposed Constitution can only hold land for a maximum 99 year old leasehold.

b) Existing freehold or leases by foreigners which exceed 99 years will be reduced to a maximum of 99 years.

5. The new National Land Commission will be the key institution in land management if the Proposed Constitution is adopted. Some of its functions will be:

- to advise the national government on a comprehensive programme for the registration of title in land;
- to investigate complaints of present or historical land injustices, and recommend appropriate redress; and

- to assess tax on land or premiums on immovable property in any area designated by law.

6. The Proposed Constitution provides that Parliament shall enact legislation which:

- i) prescribes in relation to land minimum and maximum land acreages in respect of private land;
- ii) regulates the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage;
- iii) protects, conserves and provides access to all public land;
- iv) enables review of all grants or dispositions of public land to establish their propriety or legality; and
- v) protects the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land.

This law should be in place within 18 months after the Proposed Constitution is passed.

7. Obviously the Chapter on land does not favour persons who have acquired land illegally.

8. The Proposed Constitution provides that:

- the state shall work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya; and
- every person has a duty to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

9. Any future agreements relating to natural resources after the Proposed Constitution comes into effect must be ratified or approved by Parliament to ensure the country gains maximum benefit from the exploitation of her natural resources.

SHORTCOMING

1. It is not clear whether the reduced 99 year leasehold for non-citizens will start when the leasehold grant was given or when the new constitution becomes effective.

CHAPTER 6: LEADERSHIP

STRENGTHS

1. a) The Proposed Constitution describes undesirable conduct by state officers (including President; Deputy President; Cabinet Secretary; Member of Parliament; County Assembly elected officials etc) which:
 - creates conflict between personal interests and public or official duties;
 - compromises any public or official interest in favour of a personal interest; and
 - demeans the office the officer holds.
- b.) Further:
 - a state officer is not permitted to keep a gift or donation unless a law so permits; and
 - a state officer shall not:
 - (i) maintain a bank account outside Kenya unless a law so permits
 - (ii) seek or accept a personal loan or benefit in circumstances that compromise the integrity of the state officer.
- c.) There are other activities that state officers are restricted from doing e.g. participating in other gainful employment; holding office in a political party etc.
- d.) Breach of the above may lead to disciplinary action and dismissal from office.
- e.) Any state official dismissed or removed from office due to breach of the above, is disqualified from holding any other state office. (For example, such a person cannot stand for elective office.)

- f.) A state officer or a member of the defense forces shall not hold dual citizenship.

2. An independent Ethics and Anti-corruption Commission shall, according to the Proposed Constitution, be established to deal with integrity issues in relation to state and public officers. For the first time, it is envisaged an anti-corruption initiative will be entrenched in the constitution.

CHAPTER 7: REPRESENTATION OF THE PEOPLE

STRENGTHS

1. The Proposed Constitution targets:
 - the progressive registration of citizens residing outside Kenya, and their realization of the right to vote; and
 - a voting process that takes into account the special needs of
 - (i) persons with disabilities; and
 - (ii) other persons or groups with special needs (e.g. pregnant women and older members of society).
2. If any person has not been a member of a political party at least three months before an election, the Proposed Constitution provides that the person can stand as an independent candidate (for National Assembly, Senate and County Assembly elections).
3. The Independent Electoral and Boundaries Commission (IEBC) is authorized by the Proposed Constitution to –

- settle electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results; and
 - regulate the amount of money that may be spent by or on behalf of a candidate or party in respect of an election.
4. a) The Proposed Constitution endeavours to ensure that each constituency or ward has more or less equal population but gives some allowance for sparsely populated areas.
- b.) The boundaries of each constituency shall (thus) be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota, but the number of inhabitants of a constituency may be greater or lesser than the population quota so as to take account of:
- (i) geographical features and urban centres
 - (ii) community of interest, historical, economic and cultural ties; and
 - (iii) means of communication.
- c. The number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin of not more than-
- (i) forty percent for cities and sparsely populated areas, and
 - (ii) thirty percent for the other areas.
- d. In reviewing constituency and ward boundaries (every 8-12 years) the Commission shall progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota.
5. Part of the elections to parliament and county government are based on party lists provided in advance of the elections so that for some of the seats, parties will get members according to the percentage of votes the party garners. Party list members are different from the traditional nominated members.

6. Also conduct of political parties is substantially regulated within the Proposed Constitution.

CHAPTER 8: THE LEGISLATURE

STRENGTHS

1. The envisaged Parliament is bicameral, that is it consists of two chambers, the National Assembly and Senate. The membership is expanded as follows:

(a.) National Assembly

- i) 290 constituency MPs
- ii) 47 women elected from each county
- iii) 12 nominated by political parties according to their proportion of members in the National Assembly to represent special interests including the youth, persons with disability and workers
- iv) The Speaker, who is an ex-officio Member.

The total membership is 350.

b. The Senate

- i) 47 senators elected from each county
- ii) 16 women nominated by political parties according to their proportion of members of the senate
- iii) 2, being one man and one woman, representing the youth;
- iv) 2, being one man and one woman, representing persons with disabilities
- v) the Speaker, who shall be an ex-officio member.

The total membership is 68.

2. Both houses are designed to complement each other. Senate will focus on issues of devolution while the National Assembly will concentrate on national issues.
3. The Proposed Constitution provides that Parliament shall enact legislation to promote the representation in Parliament of –
 - women;
 - persons with disability;
 - youth;
 - ethnic and other minorities; and
 - marginalized communities.
4. The term of parliament will be fixed and elections will be held on a fixed date, according to the Proposed Constitution.
5. An elected Member of Parliament can be recalled that is dismissed by the electorate on grounds to be established by parliament e.g. dismal performance of his or her duties as a peoples’ representative.
6. Other critical offices in Parliament according to Proposed Basic Law are:
 - leader of majority party in parliament (from one party or coalition)
 - leader of minority party (from second largest party or coalition)
7. a. Under the Proposed Constitution every person has a right to petition parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.

b. Quorum of the new parliament is 50 for the National Assembly and 15 members for Senate.

SHORTCOMINGS

1. The number of legislators has increased considerably and this may imply a huge wage and allowances bill.
2. The Senate, unlike in other countries, is designed to function as a lower house. This is despite the fact that a senator should be voted in by a larger group of voters as compared to the MP.
3. A better form of proportional representation is one based on the votes cast for political parties rather than the seats capture in representative bodies.

CHAPTER 9: THE EXECUTIVE

STRENGTHS

1. The President shall not hold any other state office e.g. that of Member of Parliament
2. According to the Proposed Constitution, high ranking members of the executive e.g. cabinet secretaries, attorney general, principal secretaries, high commissioners, ambassadors and diplomatic and consular representatives etc. will be nominated by the President with the approval for the National Assembly, and appointed by him or her. Hence the National Assembly will vet these senior officials to determine their suitability.
3. A decision of the President in the performance of any function of the President under the Proposed Constitution shall be in writing and shall bear the seal and signature of the President. Roadside declarations have no place in the new constitutional dispensation.
4. If the Proposed Constitution is passed, the President will henceforth be elected by over 50% of the people who vote in a general election and further through garnering at least 25 percent of the votes in over half of the counties. If no winner emerges in

the first round, in the subsequent election only the two persons with the greatest number of votes will be candidates. The winner will be the person who garners a simple majority. It is thus clear that an elected President will have majority support in the country.

5. Every fifth year after general elections, the next general election will occur on the second Tuesday in August. This means the election dates will no longer be controlled by the executive.
6. A presidential candidate will have a running mate who will become Deputy President if the presidential candidate wins.
7. The President, under the New Basic Law, can be impeached or removed by Parliament-
 - on the ground of a gross violation of a provision of the constitution or any other law;
 - where there are serious reasons for believing that the President has committed a crime under national or international law; or
 - for gross misconduct.
8. The Proposed Constitution stipulates that Cabinet Secretaries (previously called ministers) will no longer serve as Members of Parliament. There is strict separation of executive and parliamentary powers. Cabinet secretaries working alongside Principal secretaries (previously called permanent secretaries) shall be professionals who therefore run ministries as chief executives.
9. The new cabinet envisaged by the Proposed Constitution is lean with a membership of the President, Deputy President, the Attorney-General and not fewer than fourteen (14) and not more than twenty two (22) cabinet secretaries.
10. The National Assembly will, if the new constitution is passed, have the power to recommend the dismissal of a cabinet secretary on the same grounds as those which can cause the impeachment of the President.

11. The Attorney-General is the principal legal adviser of the Government. He or she will no longer be the principal prosecutor. The Director of Public Prosecution will be in charge of investigations and the prosecution of crimes.

SHORTCOMINGS

1. Under the new system of strict separation of executive and parliamentary powers, the manner in which the executive coordinates with parliament to ensure its legislative agenda is effected may need elaboration in the immediate future.
2. Though the elected President and his or her running mate cannot be both an MP and a President/Deputy President, they can run for both seats.
3. No term limit for the Attorney-General is provided.

CHAPTER 10: JUDICIARY

STRENGTHS

1. The provisions of the Proposed Constitution will ensure a truly independent and robust judiciary with a new Supreme Court at the apex of the judicial system.
2. Instead of the Chief Justice being the only senior judge in the judicial system, the Proposed Constitution creates the office of Deputy Chief Justice.
3. The independence of the judiciary is enhanced by the establishment of a Judiciary Fund from where expenses of the judiciary will be met.

SHORTCOMINGS

1. Kadhis' courts are retained in the Proposed Constitution as they substantially are in the current constitution. Given the existing controversy about them which is

spearheaded by the Christian leadership, further dialogue about them and inter-faith co-existence is essential to enhance religious harmony in Kenya.

CHAPTER 11: DEVOLVED GOVERNMENT

STRENGTHS

1. County governments have been established in the Proposed Constitution as a new level of government distinct from local authorities. They are 47 in number. A County government consists of a county assembly and a county executive committee. Their membership is as follows:

- **County Assembly**

- A single member elected from each ward (the number will vary according to the geographic size and population of each county)
- Number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly is of the same gender
- Number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and
- The Speaker, who is an ex officio member.

- **County Executive Committee**

- The County Governor (elected)
- Deputy county governor (running mate)
- Appointed members: one third of the elected members of the County assembly, if the assembly has less than 30 members or a maximum of 10 if the assembly has thirty or more members. These are appointed by the county governor, with the

approval of the assembly, from among persons who are not members of the assembly.

2. Urban areas and cities within any county shall have a separate governance and management system.
3. The Fourth Schedule to the Proposed Constitution distributes functions between the national government and county government. Any function not itemized in the schedule, will be discharged by the national government.
4. The membership of both county assemblies and county executive committees must guarantee:
 - no more than two-thirds of the members are of the same gender; and
 - community and cultural diversity of the county.
5. Further legislation will protect minorities within counties.

SHORTCOMINGS

1. Counties have uneven populations. For example Nairobi has about 3-4 million people whereas some counties have 100,000-200,000 people. Consequently issues of representation and equitable division of resources will arise.
2. At the grassroots level there are three types of government that is county government; some form of administration for urban areas and cities; and local authorities. The proposed constitution should have dealt more elaborately with these structures instead of leaving the architecture of the entities to ordinary legislation.

CHAPTER 12: PUBLIC FINANCE

STRENGTHS

1. The Proposed Constitution guarantees:
 - revenue raised nationally shall be shared equitably among the national and county governments;
 - county governments may be given additional allocations, from the national government's share of the revenue, either conditionally or unconditionally; and
 - for every financial year, the equitable share of the revenue raised nationally that is allocated to county governments shall be not less than fifteen per cent (15%) of all revenue collected by the national government.

1. The Proposed Constitution establishes an Equalization Fund which shall be one half percent of all yearly national revenue. This revenue will be used for affirmative action in relation to the most underdeveloped areas in the country. The area for remedial development relates only to the provision of basic services including water, roads, health facilities and electricity to marginalized areas.
2. County governments may also raise their own revenue.
3. A county government, according to the Proposed Constitution, may borrow only-
 - if the national government guarantees the loan; and
 - with the approval of the county government's assembly.
4. The New Basic Charter proposes the establishment of a powerful Commission on Revenue Allocation which:
 - makes recommendations concerning the basis for equitable sharing of revenue raised by the national government-
 - a. between the national and county governments; and

- b. among the county governments.
 - makes recommendations on other matters concerning the financing of, and financial management by, county governments.
5. The Proposed Constitution also targets procurement of public goods and services to ensure it is done within a system which is fair, equitable, transparent, competitive and cost effective.
 6. The Proposed Constitution creates room for consultation between the national government and county governments on the budget process. Further representations from the public will be sought during discussions concerning budget estimates. Previously the Ministry of Finance played the dominant role in the budget process.
 7. The proposed constitution proposes a Salaries and Remuneration Commission which shall-
 - set and regularly review the remuneration and benefits of all state officers (and this includes the President, Deputy President, MPs, Cabinet Secretaries etc); and
 - advise the national and county governments on the remuneration and benefits of all other public officers.

CHAPTER 13: THE PUBLIC SERVICE

STRENGTHS

1. The principles of professionalism, effectiveness, transparency, accountability and inclusiveness, among others, will guide the proposed new Public Service
2. A Public Service Commission is created and will have the key role of establishing and abolishing offices in the public service as well as appointing, confirming, promoting and disciplining officers.

3. According to the Proposed Constitution, offices within county governments will be established and abolished; employees appointed, promoted and disciplined within a framework of uniform norms and standards prescribed by an Act of Parliament.
4. The Proposed Constitution protects public officers. They shall not be-
 - victimized or discriminated against for having performed the functions of office in accordance with the constitution or any other law; or
 - dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.
5. The Proposed Constitution establishes, for the first time, the Teachers Service Commission which promotes and protects the interests of the teaching fraternity. Its core functions are to:
 - review the standards of education and training of persons entering the teaching service;
 - review the demand for and supply of teachers; and
 - advise the national government on matters relating to the teaching profession.

CHAPTER 14: NATIONAL SECURITY STRENGTHS

1. The Proposed Constitution establishes the key organs of national security so that they can be subjected to constitutional oversight. The national security organs are subordinate to civilian authority.
2. The Proposed Constitution endeavours to coordinate the Kenya Police Service and Administration Police Service by bringing them under one umbrella, the National Police Service.

SHORTCOMINGS

1. There are several disciplined formations e.g. Forest Service Police, City Council Police, Kenya Wildlife Service Police etc which do not feature in the Proposed Constitution.
2. The Defence Forces are not given the leeway to try summary offences without recourse to review by ordinary courts and legal representation of those who face trial as is the practice world wide.
3. Recruitment and promotion in the Defence forces should be based on seniority and merit and to a lesser extent on ethnic background of candidates.

CHAPTER 15: COMMISSIONS AND INDEPENDENT OFFICES

STRENGTHS

1. a. The Proposed Constitution establishes the following key commissions:
 - the Kenya National Human Rights and Equality Commission;
 - the National Land Commission;
 - the Independent Electoral and Boundaries Commission;
 - the Parliamentary Service Commission;
 - the Judicial Service Commission;
 - the Commission on Revenue Allocation;
 - the Salaries and Remuneration Commission;
 - the Teachers Service Commissions; and
 - the National Police Service Commission.
- b. The independent offices are:
 - the Auditor-General
 - the Controller-General.

2. Other Commissions may be established, where appropriate, under ordinary law.

3. The functions of the commissions are extremely extensive. Some commissions even check the executive.

SHORTCOMING

1. Some of the duties of the executive have been off-loaded to commissions. The commissions are likely to be a fourth arm of government. Commissions and the other arms of government especially the executive may conflict in the discharge of their functions.

CHAPTER 16: AMENDMENT OF THE CONSTITUTION

STRENGTHS

1. Constitutional amendments unlike in the current constitution will henceforth have a component of support by the people in a referendum where the issues to be amended relate to:
 - supremacy of the constitution;
 - the territory of Kenya;
 - the sovereignty by of the people;
 - national values and principles of government;
 - the bill of rights;
 - the term of office of the president;
 - the independence of the judiciary and the commissions and independent offices;
 - the functions of parliament;
 - the objects, principles and structure of devolved government; and

- the amendment chapter of the constitution.
2. The above are specially entrenched and have an elaborate method of amendment requiring:
 - at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and
 - the amendment is supported by a majority of the voters of citizens voting in the referendum
 3. Any other part of the constitution not specified above shall ultimately be amended by not less than two thirds of all the members of both the National Assembly and Senate.
 4. The people of Kenya, under the Proposed Constitution, can amend any part of the Constitution in the following manner:
 - propose amendment through a popular initiative signed by at least one million registered voters;
 - the draft Bill by the promoters of the popular initiative is approved by a majority of the county assemblies, that is at least 24 as of now;
 - each house of Parliament, that is Senate and National Assembly, passes the Draft bill by a simple majority;
 - if either House of Parliament fails to pass the Bill, or the Bill relates to the specially entrenched provisions detailed above, the proposed amendment shall be submitted to the people in a referendum;
 - at least twenty percent of the registered voters in each of at least half of the counties vote in the referendum; and
 - the amendment is supported by a simple majority of the citizens voting in the referendum.

Involvement of the people in amending the constitution is a positive move.

SHORTCOMING

1. Where it is extremely difficult to change the constitution through the amendment procedure, a mood of national frustration can build up when the country wants the constitution changed but finds it difficult.

CHAPTER 17: GENERAL PROVISIONS

STRENGTHS

1. If the Proposed Constitution is approved, every person will have the right to institute court proceedings to prevent the constitution from being contravened. Such a person may be:
 - acting on behalf of another person who cannot act in their name;
 - acting as a member of, or in the interest of, a group or class of persons;
 - acting in the public interest; or
 - an association acting in the interest of one or more of its members.

Hence there is hardly any restriction in terms of who can litigate to enforce the constitution.

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2. The Proposed Constitution provides that the New Basic Law shall be interpreted in a manner that –

- promotes its purposes, values and principles;
- advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights;
- permits the development of the law; and
- contributes to good governance.

This means that any other type of interpretation shall be disallowed.

3. The Chapter also provides interpretation for many words used in the constitution to clarify their constitutional meaning e.g. state officer, public officer, marginalised community, disability, land, youth etc

CHAPTER 18: TRANSITIONAL AND CONSEQUENTIAL PROVISIONS (PLUS SCHEDULES)

STRENGTHS

1. Once approved in the referendum, the Proposed Constitution requires the passage of about 50 other ordinary laws to support it. The country will thus overhaul its legal system. Some past laws will be rendered obsolete; some new laws must be passed. The country will experience a major legal reform movement.
2. Two critical institutions for the implementation of the new constitution will be a Select Committee of the National Assembly called the Constitutional Implementation Oversight Committee and the Commission for the Implementation of the Constitution. The Attorney General will also have a major responsibility in the establishment of the new legal system.
3. It is clearly provided that whether the President promulgates the constitution or not, it shall come into force 14 days after an affirmative vote in the referendum.

4. To a large extent, the Proposed Constitution establishes a satisfactory framework for a transition from the old to the new constitution (in the Sixth Schedule).
5. The Proposed Constitution endeavours to create a new judiciary by vetting en-masse the existing judiciary. The Chief Justice must leave his position within six months of the promulgation of the constitution. He could also join the Court of Appeal if he so wishes after successful vetting.
6. The system of provincial administration is retained subject to restructuring so that it is in accord with the new system of devolved government. The eight Provincial Commissioners can be deployed to co-ordinate several counties. Other officials in the provincial administration from district commissioners to village elders will fit in the devolved system. Moreover the current administrative districts are likely to be retained as the executive needs them for execution of its duties and the proposed constitution does not abolish them (i.e. the national and county governments may use them as administrative units).
7. Oaths and affirmations are clearly outlined in the Third Schedule.

SHORTCOMINGS

1. If the Proposed Constitution is passed, before the next elections when it takes over in its entirety, parts of the existing constitution and parts of the new constitution will join together to form the Interim Constitution. Implementing portions of the two constitutions will be challenging.
2. If Parliament is unable to pass any of the laws required to be passed so as to implement the new constitution within the specified or additional time, parliament can be dissolved. A sequel parliament which also similarly fails can be dissolved. This can introduce confusion in the country. It may not necessarily be the fault of parliament that the laws are not passed in time since there are several actors in the matter.

3. Some key functions of government such as minerals exploration and exploitation are omitted in the division of functions between the national government and county government. The county government is also given some functions which it may have no competence to handle e.g. the maintenance of harbours.
4. The laws that must be passed to fully activate the constitution are very many. If not carefully handled, such eventuality can bottleneck the implementation of the new constitution if, for example, the new laws do not mirror the spirit of the constitution.
5. The so called “radical surgery” of the judiciary may saddle the country with a timid new judiciary which is subordinated to the other arms of government. The “surgery” constitutes partial targeting of the public sector. For example the entire public service has not been similarly treated.

CONCLUSION

This bird’s view of the Proposed Constitution has been rendered in simple language. Most of the language used is that of the Proposed Constitution itself. The idea is to present the positive aspects of the Proposed Constitution and the shortcomings so that the reader can make up his or her own mind as to whether the Proposed Constitution deserves support or it should be rejected.

It must also be borne in mind that if the people of Kenya vote against the Proposed Constitution, that also means they have given the existing constitution a new lease of life until such other time as the country may revisit constitution-making. Kenyans have the democratic right to vote “no” or to vote “yes.

Such a vote should in the final analysis be a personal decision. A vote on whether to accept or reject a constitution is radically different from the vote to elect political leaders. A new constitution guides the behavior of politicians and the life of a people and country for several generations, while leaders are elected only for a short span of five years.

Therefore each Kenyan must endeavour to understand the contents of the Proposed Constitution so that he or she can vote for their future and the future of their offspring wisely. The August 4th decision is an intimate decision; a decision that a person takes alone. And like all such decisions, it will have far reaching consequences in our lives.