



International Center for Policy and Conflict

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MEMORANDUM ON DRAFT HARMONIZED CONSTITUTION TO THE COMMITTEE OF EXPERTS.

About ICPC

THE INTERNATIONAL CENTER FOR POLICY AND CONFLICT

The International Center for Policy and Conflict (ICPC) is a non-profit and non-partisan organisation founded in 2005 to create a platform to foster democratic, peaceful, secure and just societies in Africa and globally. The Great Lakes and Horn of Africa region which have experienced widespread political instability for decades is the ICPC's major focus. The Center is registered in Kenya under the Trustees (Perpetual Succession) Act Chapter 164.

a). Vision

To create a democratic and peaceful state accountable to the people.

b). Mission

To advance the course of transitional justice, conflict resolution and promote human security.

c). Goal

To promote the principles of justice, accountability, respect for rule of law and sustainable human security among the people of Kenya and the region.

d). Values

- Accountability and transparency
- Gender equity
- Professionalism

- Performance reporting
- People-centeredness and respect

e). Institutional Objective

The International Center for Policy and Conflict actively help societies re-establish the rule of law and deal with the legacy of the past marked by mass atrocities committed during armed conflict or authoritarianism, in order to prevent the recurrence, promote accountability, deepen culture of justice and respect for human rights. Also create a reliable organization on broad transitional justice and human security perspectives.

g). Programmes

ICPC's broad programs are as follows;

- Transitional Justice
- Conflict Resolution and Peace-building
- Human Security and Displacement
- Gender Justice Programme
- Capacity Building and Technical Assistance

h). Governance

The International Center for Policy and Conflict comprise of the Board of Trustees, the Secretariat and host of Senior Associates/Consultants. The Board members are responsible for the strategic and policy direction of the Center. The Director is the head of the secretariat, responsible for its management, coordinating programmes and ensuring accountability in utilization of its resources.

INTRODUCTION

ICPC's Submission

ICPC believes that there are certain crucial elements that underscore the basics of every constitutional that vindicates constitutionalism. Briefly discussed and recommended are critical areas that to us will either make or break the constitution making process in Kenya. As an organization we have zeroed our critique and recommendation on seven key areas namely;

- ❖ **Electoral and Representation**
- ❖ **System of Government**
- ❖ **Devolution**
- ❖ **Land Question**
- ❖ **National Security**
- ❖ **Directorate of Criminal Investigations**
- ❖ **Amendment of Constitution**

1. Electoral and Representation

It is evident from the Constitutional of Kenya Review Commission analysis that Kenyans demand a fair and inclusive representation, additionally this featured in the Lancaster Conference negotiation of 1962 where there were two competing groups: Kenya African National Union (KANU) and the Kenya African Democratic (KADU) KANU advocated for a national system while KADU advocated for federalism. The former was informed and motivated by the fear of majority tyrannizing the minority ones.

The choice of electoral system in a country determines the model of governance to be adopted and even the criteria of delimiting electoral boundaries.

Currently it is alleged that some people are creating electoral-war-chest by amassing resources in readiness for the next electoral battle. This culture of individualized politics must be curtailed by creating systems and structures that institutionalize politics within a framework of democratic ideals and good governance.

Principles of representation

- ❖ inclusiveness
- ❖ fairness
- ❖ equality and equity
- ❖ accountability
- ❖ system legitimacy

Models of representation

(a)First past the Post (FPTP)

The winner takes all culture regardless of the support base, currently practiced in Kenya and has been questioned and caused great discontent amongst the Kenyans. The harmonized draft has retained status quo. This model of electoral representation does not augur well in diverse and fractured society like our.

(b)Proportional Representation (PR)

Every vote assumed to be of equal value and in addition other factors like support base is taken into account to make allocations for more seats without necessarily increasing the number of constituencies. This is the case in South Africa, Canada, Namibia and Australia.

It would facilitate institutionalization of political party systems and vindication in Kenya.

(c) Mixed Member Proportional Representation (MMPR)

Adopts both FPTP and PR and being adopted across the Southern African region.

This model is better than FPTP and P.R.; there is inclusive and fair representation with equity and diversity thus facilitating inclusive and wide participation with collective ownership.

Both PR and MMPR models do allow for coalition building based on principles of policies rather than for convenience or tribal permutations.

It is proposed that Kenya adopts MMPR model. Be a requirement for political parties to submit list of their candidates in order for priority like the case of Namibia. It allows for inclusive and reflective representation in terms of representation of regions and interest groups.

Provide for representation of political parties which garner at-least 1% nationally as is the case in Israel, it will be erase the perception of 'wasted' (sic) votes and representation of the minority.

2. System of Government

(a) Model 1

The harmonized draft provides for parliamentary cum cabinet model of executive under chapter twelve, the Prime Minister is the head of the government, bound by the cabinet decision and then promulgated by the president. This is similar to the Indian model with the exception of the mode of election of the president. We do recommend that the President becomes head of state bound by the decision of cabinet as far as promulgation of its decision is concerned.

The mode of election of president as proposed by the CoE is similar to Ireland; we do recommend that the president is elected by an electoral college that is consisting of delegates from the Senate, National Assembly and the Counties.

Upon vacancy of the office of Presidency the election by the Electoral College should held within 45 days, meanwhile the Speaker of the National Assembly assumes the office in acting capacity. Basically no need for the office of Deputy President as is the case in Israel.

If we adopt a parliamentary system, members of cabinet to be Members of National Assembly nominated by the Prime Minister and vetted by the relevant Parliamentary Committees.

As proposed in the draft, Prime Minister, ought to the leader of party with majority of members in the National Assembly, this has proved to be more successful as compared to direct election by the electorates as was the case in Israel initially.

An additional requirement for the party/coalition forming the government to garner at-least half of the seats of the counties apart from the requirement to at-least garner 50% plus one votes cast.

(b)Model 2

We do recommend that that we adopt a pure system since a hybrid system is entangled by confusion and paralyse the system and specifically experience of National Accord has indicated that it cannot deliver efficiently.

A parliamentary system is better in terms of accountability, consider both U.S.A. and Britain foreign policy in Iraq, the U.S. Senate could not impeach President Bush for the policy misadventure while the Britain's Prime Minister Tony Blair opted to resign when he realized that the waters were becoming turbulent. More recently the Kenyan executive has been complaining that there is much grilling by the Parliamentary Committees.

Incase of a Presidential system, members of cabinet to be professionals who are not members of parliament and if so resigns upon assuming the office as is the case in the United States of America. In either case, the size of the cabinet should not exceed twenty or be less than fifteen.

3. Devolution

Adopt a two system not as proposed in the harmonized draft, which are the national government and the Counties. We should not institutionalize ethnicity by creating Regional governments lest we are in decentralization of state affairs while applying principles of devolution. Past tribal clashes have been based on pre-depositions of regions for a defined group!

Kenyan called for an inclusive government and decentralized effective structure.

Salient features for a realistic devolution

- ❖ To break up the epicenter of power.
- ❖ Recognize he diversity of the country and its people.
- ❖ promote greater participation in public affairs.
- ❖ make government more efficient, response and accountable.
- ❖ Power should be devolved as close to people as possible compatible with efficiency.
- ❖ Government at all levels must be democratic with some form of separation of powers in the South Africa model.
- ❖ Interests of minority must be protected.
- ❖ Equitable distribution of resources and opportunities for development.

Relation between different levels should be constructive and co-operative as is the case in South Africa with clear mandate as regards: Executive, Financial autonomy, Discretionary powers, and Legislative powers.

The number of devolved units should be economically viable and not based on the district boundaries. The units should be at-least fourteen and a maximum of eighteen.

4. Land Question

Empower the National Land Commission to undertake audit of land crisis since pre-colonial times, land question underlies as the major cause of civil strife in this country.

5. National Security

The draft does not reflect recommendations by the Police Reforms Taskforce; much discretion is conferred upon the appointing authorities in terms of top management contradicting the recommendations of the Police Reforms Task Force.

We highly recommend reflection of the Task Force on Police Reforms in the constitution.

6. Directorate of Criminal Investigations

Be established as an autonomous body.

The Director to be appointed for a five year term which is renewable once by a Board to be established under the constitution and composition set in an Act of Parliament.

The Directorate mandate to include:-

Investigation of economic crimes, cyber crimes, carrying out forensic examination, human trafficking, fraud and any other activity perceived to be a threat to the national interests pursuant to national policies.

7. Amendment of Constitution

The powers of the legislature to amend the constitution should be curtailed as well as the limiting the definition of word '*amends*'. If the Parliament amend the constitution to change the structure of the government, such an amendment should be subject to ratification through a referendum held within 90 days of the amendment and shall remain ineffective till ratification by at-least 60% percent of the registered votes.