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International Center for Policy and Conflict

AN OPEN LETTER TO THE CONSTITUTIONAL IMPLEMENTATION OVERSIGHT COMMITTEE

To: The Chairman *Constitutional Implementation Oversight Committee*

Parliament Buildings

P.O Box 41842- 00100,

Nairobi.

CC: The Speaker of the National Assembly Hon. Kenneth Marende

Parliament Buildings

P.O Box 41842- 00100,

Nairobi.

Date: 25th May 2012

Dear Honourable Mr. Chairman, Mohammed H. Abdikadir;

Re: Expression Of Concern Over Subversion Of The New Constitution: Legal Issues Arising On Appointment Of County Commissioners

Greetings from International Center for Policy and Conflict (ICPC) ¹

¹ International Center for Policy and Conflict is registered in Kenya under the Trustee (Perpetual Succession) Act and acts as a global independent non-governmental, non-profit Human Rights research and public policy institute.



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We humbly write this detailed letter to the *Constitutional Implementation Oversight Committee* based on Article 37 and as guardians of the sovereign power of the Kenyan People in line with Article 3 of the Constitution of Kenya 2010.

This letter brings out several issues touching on the Constitution and impartiality of Parliament while legislating, overseeing and providing policy direction on crucial national matters.

Background

Mr. Chairman, the recent appointment of the County Commissioners by the President of the Republic of Kenya raised fundamental questions about the nature of the new Constitution. The manner in which this matter will be decided will determine whether or not the objectives of the Constitution will be fulfilled. The Constitution achieved after a long struggle by the people, promises a democratic, transparent and accountable state which respects their rights and ensures them justice and the rule of law.

Mr. Chairman, the appointments come after another debacle appointment of the Chief Justice, Attorney General and Director of Public Prosecution by the President, which were declared unconstitutional by the Courts early last year.²

At the heart of this matter and in the future appointments to various public offices are the following: the constitutionality and legality of the appointments without (and or not respecting and upholding) proper policy and legal framework which correctly domesticate the letter and spirit of the Constitution; the process and procedure of appointing as stipulated in the Constitution and subsidiary legislation to the public service; the requirement that a candidate for a position in public office must be a fit and proper person with due regard to his or her experience, conscientiousness and integrity and must, having regard to the importance of the office be properly scrutinized; the social dimensions of the

² In Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR, Petition 16 of 2011.



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appointment including gender representation, regional balancing, people with disability, generation amongst others; and finally respecting, promoting and upholding the rule of law and advancing constitutionalism.

Source of State Power in Kenya

The Constitution is a radical social covenant which requires a major restructuring of the state institutional architecture of governance to achieve equality and social justice. It is greatly concerned with the nature and purposes of state power. It clarifies, at some length, the source of state authority in Kenya (even at the expense of some repetition).³ Further, Article 2 reiterates the supremacy of the Constitution and how it binds all persons and all state organs. The Constitution requires every person to respect, uphold and defend it returns to this principle.⁴

In addition, the Constitution defines the objectives and purposes of state power. The Constitution makes it clear that the people, not any monarch, President or legislature, are the source of all sovereign power in Kenya.⁵

All powers of the executive are derived from the Constitution, directly or indirectly, and none from the royal prerogative. State power must be exercised only in accordance with the Constitution.⁶ Sovereign power is delegated to various institutions at the national and county levels, including the Parliament and the Executive, but all these powers must be exercised in accordance with the Constitution⁷. It thus

³ Article 1 states clearly that people are the source of all sovereign power and the Constitution sets out the way in which that sovereignty is to be exercised by state organs.

⁴ Article 3 (1).

⁵ Art. 1.

⁶ Art. 1(1).

⁷ Art. 1(3).



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recognizes the sovereignty of the people, governance at the national and county level.⁸ This implies that the structure of the Executive⁹ and Parliament¹⁰ has changed significantly hence there is completely new governance and government structures.

The Constitution is the supreme law and binds all persons and all State organs at both levels of government.¹¹ No person or authority may exercise State authority except as authorized under the Constitution.¹² Article 3(1), partly reiterating earlier points, states that “Every person has an obligation to respect, uphold and defend this Constitution”.

The Constitution therefore does not recognize the supremacy of the Legislature or the Executive. Consequently, there is no place under Kenya’s new Constitutional order for Parliamentary Supremacy or overriding authority of the Executive: both have limited powers to be exercised strictly in accordance with the Constitution. Nor is there any immunity from the scrutiny of the courts. The Constitution is Supreme Law and all of it has to be enforced.

National Values and Principles of Governance

An important characteristic of the Kenya Constitution is that it not only establishes and grants powers to state organs, but specifies the purposes for which these powers should be exercised, as shown by the references in the preceding paragraphs to: “in accordance with this Constitution” (Art. 1 (1), Art.1

⁸ Article 4.

⁹ Article 130 (1) states that the National Executive of the Republic comprises of the President, Deputy President and the rest of Cabinet. Additionally, Article 152 (1) provides for the composition of cabinet as consisting of The President, The Deputy President, The Attorney General and not fewer than **fourteen (14)** and not more than **twenty-two (22)** Cabinet Secretaries. This is unlike in the past where there was no limit to the size of cabinet. The implication is merging and rationalizing many ministries and departments calling for proper policy and law outlining the new government structure.

¹⁰ Article 93(1) provides that there is established a Parliament of Kenya, which shall consist of the National Assembly and the Senate.

¹¹ Art. 2(1).

¹² Art. 2(2).



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(3)); “binds all persons” (Art. 2 (1)); “as authorized under this Constitution” (Art. 2(2)); every one’s “obligation to respect, uphold and defend this Constitution” (Art. 3(1)).

The purposes of and the principles on which state power is to be exercised is set out in a number of places in the Constitution, starting with the Preamble (which includes “human rights, equality, freedom, democracy, social justice and the rule of law” among them). There is a forthright statement of the foundational values and principles of the Republic in Article 4 which declares Kenya a sovereign Republic. Article 4(2) states that Kenya “shall be a multi-party democratic State founded on the national values and principles of government referred to in Article 10”. Article 10 is the most succinct statement in the Constitution of National Values and Principles. For the purposes of the present situation, they include the rule of law, participation of the people, good governance, integrity, transparency and accountability.

The supremacy of the Constitution and the rule of law would require scrupulous observance of the text and spirit of the Constitution. This is mandated by Article 2(3) which says that all laws or acts or omissions which are inconsistent with the Constitution are void to the extent of the inconsistency. The Constitution seeks to give teeth to these values and principles; they are not merely pious aspirations that can be ignored at will. Article 10 (1) says that these values and principles “bind all State organs, State officers, public officers and all persons” whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

The importance attached to the rule that the powers of the state institutions are to be exercised to promote national values and principles is reinforced by the rule prescribed for the construction of the Constitution. Article 259 requires that the Constitution be interpreted and applied in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.



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Mr. Honourable Chairman, Turning to the Contested Restructuring of the Provincial Administration: We Kindly Wish To Draw The Committee To The Following Key Issues:

1. Existence of Devolved Units in Kenya at present:

- The President's gazette notice referred to 'County' Commissioners apparently referring to counties envisaged under Article s 6 (1), 175 and 176 but more specifically identified under 4th Schedule of the Constitution.
- However, Article 2(2) of 6th Schedule **suspends** provisions of the Constitution on devolved government until the first general elections are held. Arguably therefore, 'counties' as devolved units are non-existent and cannot be a basis for gazetting officials. To that extent, the President's Gazette Notice is **null and void**.

2. Composition and Powers of National Government on 'Restructuring Provincial Administration':

- The gazette notice rightly refers to Article 17 of 6th Schedule which anticipates systematic restructuring of the wider provincial administration including chiefs. However, Article 17 donates the power to 'restructure' to the **National Government** and not the **President**.
- Accordingly, the obligation to 'restructure' under Article 17 of 6th Schedule ought to be construed with an appreciation of Article 12 of the 6th Schedule, which defines the 'National Government' to include the President and Prime Minister to the extent that their relationship is defined under the National Accord and Reconciliation Act, 2008.
- Thus, to the extent that the Honourable Prime Minister has publicly 'disowned' the appointments, then it fails the test of collective action of the 'National Government' and qualifies as unilateral and arbitrary action of the President, which doesn't meet the test of 'restructuring'.

3. Restructuring as a Process not Event

- Since Article 17 of 6th Schedule anticipates restructuring of the provincial administration... '*to accord with and respect the system of devolved government established under this constitution*',



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it therefore follows that the process must be undertaken with due regard to the entire constitutional theme in mind, which include the principles of rule of law, public participation and equity at its core. Arguably, broad and consultative public participation is an irreducible minimum as the very basis of devolution.

- It means that restructuring must be guided by a proper legislation which identifies levels and manner of engagement, and importantly defines relationship amongst various restructured organs of state and the devolved governments.
- Inevitably, this requires **legislation/Act of Parliament** (Article 15 of 6th Schedule) and not whimsical and blanket administrative measures like President's gazette notice.

4. Limitation on Exercise of Powers and Authority of the President:

- While Article 132 (4) (a), which is not suspended, anticipates that the President may indeed establish offices in the public service, it provides a rider that;
 - a) It must be subject to the Constitution or a national legislation;
 - b) And upon *mandatory recommendation of the Public Service Commission (PSC)*.

The gazette **notice alludes** nowhere to the recommendation of PSC, which in any case would have been in writing. Neither is there evidence that PSC delegated its powers to the President under Article 234 (5), in which case one may argue that he did not need the mandatory recommendation. In fact, the gazette notice does not even refer to Article 132 (4) and thus the President could not have been remotely exercising this power to 'establish office in the Public Service'. Yet, the County Commissioners are presented as offices in the Public Service! **Parliament needs to ensure that there is an established new Public Service Commission constituted in accordance with the new Constitution requirements for public office holders.**

- Importantly, Article 131 (2) binds the President to '*promote respect for the diversity of the people of Kenya*' and '*ensure protection of human rights and rule of law*' in exercising functions



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of his office. Since he did not comply with gender and regional balance threshold under Article 27 (8), he acted ***ultra vires***.

NB:

There are also interesting dimensions of EXECUTIVE CONTRADICTION and INCONSISTENCY as the President had bound himself to a consultative restructuring process in his memorandum to Parliament purporting to reject the County Government Bill 2011 enacted by Parliament.

5. Provincial Administration and Security Role

- National security of Kenya shall be promoted and guaranteed in accordance with the Constitution and Parliament which shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms.¹³
- Further, Article 239 provides in strict terms the composition of the **National Security Organs: that is the Kenya Defence Forces, National Intelligence Service and the National Police service**. This means that this clause is not open ended but closed and cannot be construed to include other agencies or state officers.
- The Constitution does not in any way mention the Provincial Administration or the County Commissioners as forming part of the National Security Organs. Their appointment on the basis of coordinating security at the county level is redundant since there is no **provision for a parallel system of state security**.
- Moreover, Article 239(4) bars any person from establishing a military, paramilitary or similar organization that purports to promote and guarantee national security except as provided by the constitution or an act of parliament. Consequently, even if the rationale for appointment of the county commissioners would be to exercise civilian authority in the exercise of state

¹³ Article 238(2) (a), (b).



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security functions, it is still not backed by legislation emanating from Parliament or Constitutional sanctions.

Conclusion

Flowing from the above, it is only proper that a national governance policy statement is issued clearly restructuring, transforming and rationalizing the new structure of government ministries, departments and their agencies before any public appointments are made as contemplated in the Constitution. This should be backed up by a **proper legislative law outlining** that structure in relation to their mandate and core functions.

The new rationalized, standardized government structure needs to introduce shared corporate services policy in back office operations especially in human resource management , financial and asset management , procurement , legal services , information communication and technology , internal audit , as well as communications and public relations to allow merged ministries and departments concentrate on their respective functions.

The Kenyan people want a transformed, coherent, lean, cohesive public sector that is performance-based, efficient, cost-effective and service -oriented. The country deserves an economical government and not a government of duplication, ostentatious and superfluous wastage of meagre public resources.

We wish to reiterate the role of Parliament in safeguarding the Constitution. All members are charged with the duty of ensuring the promotion of Constitutionalism in appointments to state offices and in passing of legislation.

Thank You.



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Signed:

Ndung'u Wainaina

Executive Director

International Center for Policy (ICPC)