



International Center for Policy and Conflict

## **MEMORANDUM ON HARMONIZED DRAFT CONSTITUTION TO THE COMMITTEE OF EXPERTS**

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## **About 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 major focus. The Center is registered in Kenya under the Trustees (Perpetual Succession) Act Chapter 164.

### **Institutional Objective**

The International Center for Policy and Conflict proactively reflects and engages in public policy and legal dialogues, research and analysis as well as advocacy and capacity building on the broad realms of transitional justice, human security, conflict resolution and gender justice. Furthermore, this is done to prevent conflict recurrence; promote accountability and equality; and deepen culture of justice and respect for human rights and democracy. The Center is designed to establish, promote and build sustainable human development; and democratic human rights adhering states.

### **Governance**

The International Center for Policy and Conflict comprises a Board of Trustee, Management Committee and a full-time programmatic and administrative staff. In addition, it utilizes a network of associates and experts and works in cooperation with other local, regional, and international organizations. In addition, the Center also offers internships.

The Board Members are responsible for the strategic and policy direction of the Center. Furthermore, the management committee guarantees a sound internal management structure and policies that contribute to the optimal functioning of the organisation. Lastly, the Executive Director is the head of the secretariat, responsible for its management, coordination of programmes and ensuring accountability in utilization of its resources.

## **INTRODUCTION**

International Center for Policy and Conflict believes that there are certain crucial elements that underscore the basics of every constitutional order 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 System and Representation**

It is evident from the Constitution of Kenya Review Commission (CKRC) 2004-05 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 electoral systems and structures that institutionalize politics within a framework of democratic policies, legitimate institutions 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 has been questioned and caused great discontent amongst the Kenyans. This model of electoral representation does not augur well in diverse and fractured society like Kenyan society. Politics is personalized with little or no accountability. It is based on rule of mighty, violence, corruption and money instead of contestation of policies.

The driving motivation is state capture with sole purpose of maximizing extraction for self enrichment not national good. It is the electoral system that led Kenya to near collapse in 2007/08 election violence. The Harmonized Draft Constitution has retained status quo. It has to be scrapped in its entirety.

### **(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, Australia and among many other countries.

It facilitates institutionalization of political party systems, policy based politics and entrench affirmative action

### **(c)Mixed Member Proportional Representation (MMPR)**

This electoral system adopts certain elements of FPTP and PR. It is increasing becoming popular and being adopted across the Southern African region.

This model is better than FPTP and PR. There is inclusive and fair representation with equity and diversity thus facilitating inclusive and wide participation with collective ownership. A voter's vote counts at two levels: party and individual representation. This ensures accountability and discipline.

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

We are highly recommending that Kenya adopts MMPR model. Be a requirement for political parties to submit list of their candidates in order for priority. It allows for inclusive and reflective representation in terms of representation of regions and interest groups.

Provide for representation of minority 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.

Senate shall remain as crucial pillar of legislative, devolved units' representative and providing checks and balances to the National Assembly and Executive functions.

## **2. System of Government**

We do recommend that that Kenya adopt a pure system since a hybrid system is entangled by confusion and paralyze the system and specifically experience of National Accord has indicated that it cannot deliver efficiently. A hybrid system has no known theory rather than perpetuating impunity and authoritarianism.

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.

If this model is adopted 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. However, instead of universal suffrage 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 be 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 of national votes casted.

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**

We are recommending that Kenya adopts a two system not as proposed in the harmonized draft constitution, 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!

Kenyans called for an inclusive government and devolved effective structure.

#### **Salient features for a realistic devolution**

- ❖ To break up the epicenter of power.
- ❖ Recognize the 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, and administratively viable and effective not based on the district boundaries. The units should be at-least fourteen (14) and a maximum of eighteen (18).

#### **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 constitution must be candid in harmonizing and creating effective security instruments. While we recognize the report and recommendations of the Police Reforms Taskforce the drafting of the Constitution cannot be bound by it.

We are recommending that all security apparatus must be placed under civilian authority and accountability. Further, the architecture of security institutions and policing must be crafted with futuristic security concerns in mind.

We are recommending that to have following:

- i. Kenya Armed Force
- ii. Kenya police force (Regular Police and Administration Police)
- iii. National Intelligence Service
- iv. Nation Criminal investigation
- v. Another other security body can only be created through an Act of Parliament with clear purpose.

The Harmonized Draft has effectively taken care of the first three and last above but not (IV).

#### **6. For the Directorate of Criminal Investigation we recommend:**

Article under section of other Offices:

There shall be established a Directorate of Criminal Investigations. The Directorate shall be headed by Director-General who shall be appointed by the President but approved by Parliament.

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 Functions shall be:

- I. Establishing investigative capacity to prioritize and to investigate particularly serious criminal and or unlawful conduct committed in an organized fashion, and or certain offences or unlawful conduct, with the objective of prosecuting such offences and investigating unlawful conduct in the most efficient, timely and effective manner.
- II. Providing timely and relevant criminal justice information and identification services concerning individuals, stolen property, criminal organizations and activities, crime statistics, and other law enforcement related data to qualified law enforcement, criminal justice, civilian authority, employment, licensing, and firearms handling institutions
- III. Conducting professional investigations and authorized crime related intelligence to identify, disrupt, and dismantle existing and emerging criminal enterprises whose activities threaten national security including corruption
- IV. Expanding international liaison and through the conduct of extraterritorial investigations as mandated by laws and Executive Order
- V. Establishing and conducting law enforcement training programs and conduct research to provide assistance to state and devolved law enforcement agencies
- VI. Providing, without cost, technical and scientific assistance, including expert testimony in national and or local courts, for all duly constituted law enforcement agencies, Directorate of Public Prosecution; and to provide identification assistance in mass disasters and for other humanitarian purposes.

## **7. Bill of Rights**

**Article 72 (1) (f):** The provision of 48 hours detention by police must be deleted. It fundamentally infringes on the right of citizens and attacks their civil liberties.



## **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 (see Njoya Ruling)*'. 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.