



**Institute of
Certified Public Accountants
of Kenya**

PROPOSAL TO THE COMMITTEE OF EXPERTS ON THE HARMONIZED DRAFT CONSTITUTION

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Preamble

We, the Institute of Certified Public Accountants of Kenya (ICPAK), welcome this Constitutional process and commend the Committee of Experts for the release of the Harmonized Draft Constitution.

ICPAK members reconfirmed through various participative fora that the key principles to ground the constitution once developed and enacted would be a law abiding culture as well as respect for one another as Kenyans. To inculcate these principles we propose that the Harmonized Draft Constitution explicitly recognizes the need for leadership to institutionalize an attitude change by Kenyans for the Constitution to have any meaning to us and our country by rephrasing one of the tenets in the preamble as follows;

- COMMITTED to **respecting one another**, nurturing and protecting the well being of the individual, the family, community and the nation.

CHAPTER ONE

SOVEREIGNTY OF THE PEOPLE OF AND SUPREMACY OF CONSTITUTION

Article 5: Territory

This article recognizes the national boundaries as being defined by international law. We propose that our national laws should also include a definition of the national boundaries.

Further, the Article outlines the geographical areas of the Republic of Kenya. We note an omission in recognizing territorial waters and therefore propose that the Harmonized Draft Constitution should specifically recognize Kenyan territorial waters for example the Indian Ocean and Lake Victoria among others. This should be specifically set out in the first schedule similarly with the regions and counties.

CHAPTER TWO

THE REPUBLIC

Article 6: Devolution

We propose a two-tier system of government namely the national and county governments. The regional governments as envisaged in the Harmonized Draft Constitution would not in our view add any value to the citizen.

At the county level, we propose that the Constitution should be explicit that representation should be equitable so that the electorates feel truly represented.

In addition we recommend that there should be legislation setting out the minimum skills and knowledge to be possessed by the representative so as ensure that they are effective and accountable as envisaged in the Constitution.

Article 8: Access to Services

We propose that the counties be included specifically as beneficiaries of the services by a national state organ.

Article 10: State and Religion

The spirit of Article 10 should run through the entire Constitution where the word religion is used.

CHAPTER THREE

NATIONAL VALUES, PRINCIPLES AND GOALS

Article 13 (2) enumerates what can be considered the value system for the nation. We propose that a deliberate effort in encouraging positive work ethics and commitment to promote national vision and create an attitude of hard work, to support Article 24.

CHAPTER FIVE

CULTURE

Article 44: Minorities and Marginalized groups

We observe that the country has reached a stage where it must take stock and define those who are minority and marginalized groups and take comprehensive and targeted actions to redress this issue. Long-term there should be no groups which are branded minority or marginalized.

Various rights of individuals

We appreciate the fact that Articles 61, 62, 63, 64, 65, 66 convey upon Kenyans certain rights. However the articles go further to indicate how these rights will be actualized, a process that is best left to specific legislations rather than the Constitution.

Article 76: Human Rights and Gender Commission

Article 76 (2) (d) in relation to the religious groups, retain the spirit of Article 10 hence we propose that reference to religious minorities and marginalized groups should be deleted.

CHAPTER NINE

LEADERSHIP AND INTEGRITY

Article 99: Ethics and Anti-Corruption Commission

The current Kenya Anti-Corruption Commission's effectiveness in the eyes of the public is measured by number of successful prosecutions of the cases it has taken up and investigated. The proposed Ethics and Anti-Corruption Commission's role with respect to prosecutorial powers should be linked with the applications of Article 194 (7).

The above notwithstanding, entrenching the Ethics and Anti-Corruption Commission in the Harmonized Draft Constitution presupposes that, in essence, the country has totally and permanently lost the war against the vice. Instead of portraying the image of having surrendered in the fight against corruption, we should focus on managing and containing corruption to minimal levels. The fight against corruption will be achieved through sustained civic education and behavioural change. Accordingly, we propose that the anti corruption crusade should be managed through an Act of Parliament. The existing Ethics and Economic Crimes Act, 2003, should be strengthened to give Kenya Anti-Corruption Commission prosecutorial powers.

Instead of entrenching the Ethics and Anti-Corruption Commission in the constitution, we propose the creation of an Ethics and National Values Commission whose role would be to ensure that the national values as prescribed in the Constitution are inculcated in each and every Kenyan so that we become those values.

CHAPTER TEN

REPRESENTATION OF THE PEOPLE

Representation

The spirit of the Constitution must achieve fair representation as recommended in the Kriegler report.

Article 107: Independent Candidates

Article 107(b) assumes that all members of a political party will be in a register that is verifiable and open for public scrutiny whereas this is currently not the case. It would thus be difficult to determine who an independent candidate really is.

Article 109: Voting

Article 109 (b) – (d) is too prescriptive and presumes that the voting system is manual, whereas there are modern voting methodologies such as electronic voting systems as envisaged in 109 (a). The Constitution should retain clauses (a) and (e) and should explicitly include a clause that the election process and results can be auditable.

Article 110: Electoral Disputes

The Article provides that through an Act of Parliament, there shall be established mechanisms for settling electoral disputes. We propose that the Constitution should expressly provide for an arbitration unit for settling any election disputes.

Article 112: Independent Electoral and Boundaries Commission

Sub Article (1) The Draft talks of the establishment of the Commission but fails to make mention of the appointing authority. We propose that the Constitution include the appointing authority while enabling legislations be put in place to address the procedures, minimum qualifications among others.

Article 114: Basic Requirements for Political Parties

Article 114 (1) (d) The Article provides that the political parties will have a democratically elected governing body. How do we ensure that the political parties have the democratically elected governing body as above? We propose that the legislating Act of Parliament should prescribe the ways and means of attaining this. This is a key foundation to ensuring that the people elected to Parliament are democratically nominated by their respective political parties.

Article 116: Commissioner of Political Parties

Sub Article (1) provides for the office of the Commissioner of Political Parties but fails to identify the appointing authority. We propose that the Constitution include the appointing authority while enabling legislations be put in place to address the procedures, minimum qualifications among others.

Include a provision on the audited financial accounts under sub-article (e) as one of the responsibilities of the Commissioner.

Article 120: Accountability of Political Parties

We propose that the audit of the Political Parties should be by professional auditors as defined in the Accountants' Act rather than the office of the Auditor-General as provided for by the Article 120 (3). Political parties are private entities and their audit should not be paid out of public funds.

CHAPTER ELEVEN

THE LEGISLATURE

Article 124: Role of Parliament

Article 124 (2) (i) should explicitly include the office of the Prime Minister as one of those offices whose conduct will be reviewed by Parliament.

Article 124 (2) (j) contradicts with the provisions in Article 158 (5) where the former indicates that Parliament will approve declarations of war and states of emergency while the latter provides that the approval will be by the Cabinet. This contradiction should be resolved.

Article 125 (1) we propose that the Committee combines the provisions of (a) and (b) in line with our recommendations to abolish the regional level of government. The county assembly shall thus act as an assembly to elect senators of whom one third must be women. We should concentrate on improving transparency in the electoral process to eliminate the unfavourable electoral environment against women.

Sub article (c) which provides for the special seats for the persons with disabilities should be amended to provide for means and ways of distributing the eight special seats by way of legislation.

Sub article (d), we recommend that the Speaker should be elected by the senators from among themselves but upon election, such a member will relinquish his position and another election organized to replace him/her.

Article 126: Membership to the National Assembly

The proposal that no more than two thirds of the National Assembly should be of one gender is welcome in keeping with the spirit of the Constitution. Nevertheless there should be proposals to address scenarios where after the declaration of election results this provision is found not to have been complied with. We propose that an enabling legislation should provide a formula to ensure that the provision is met. This same principle should apply to the lower government level elections.

The Speaker

We have noted that the Speaker is empowered by the draft to veto some decisions. We recommend that veto powers be vested in the house.

Article 127: Qualification of Members for Election

We propose those interested in running for political office must be citizens in good standing. The parameters of good standing should be defined in legislation but may include tax compliance, integrity, not having been convicted of any crime and/or corruption as meets the needs of the country from time to time.

Article 131: Right to Recall

Article 131 (2), provides that Parliament enact legislation to provide for grounds for member recall. The member of parliament are themselves the targeted group and are therefore interested parties and would not be able to objectively pass the necessary legislations. We recommend the introduction of a provision on specific grounds for member recall.

Article 138: Money Bills

This article indicates that a Money Bill may be introduced only by a Minister which implies that any Minister can present a Money Bill which may potentially result in conflicts as to the respective roles of the Ministers. We propose clarification in the Constitution that a Money Bill should be introduced by the Minister responsible for Finance.

Article 139: Consideration by the other House

This article proposes that legislation must be approved by both houses which will result in duplication of functions and essentially lengthen and delay the legislative process.

We do propose that the Article be amended to draw a line between legislative roles of each house, with clear indications of the nature of Bills to be passed by one house and which to be referred to the other house. We should also define the responsibilities and authorities of each house.

CHAPTER TWELVE

THE EXECUTIVE

Article 157: Authority of the State President

We recommend that we retain the current title of President as it is currently.

We submit that the executive authority should be vested in one Institution as the Chief Executive Officer. In exercising the executive authority, there should be checks and balances through the Institutions of Parliament, Cabinet, Constitutional Commissions, other state offices in the Constitution and the Devolved Governments.

Article 184: Cabinet and Deputy Ministers

In keeping with the spirit of the Constitution, we propose inclusion of a clause indicating that no more than two thirds of the Cabinet Ministers and Deputy Ministers respectively should be of one gender.

We also recommend that in keeping with the aspirations of Kenyans to live harmoniously, the cabinet must maintain at all time a national outlook.

CHAPTER THIRTEEN

JUDICIARY

The Harmonized Draft Constitution has strongly argued for devolution and gone ahead to create devolved governance units at Regional and County levels. It has however failed to provide for a judicial system at the devolved levels. Does this mean that for arbitration of disputes at the devolved levels, there will be reference of cases to the national court system?

We observe that the Constitutional Court does not seem to be necessary because any constitutional issue can be addressed through an ad-hoc constitutional bench as and when the issues arise.

CHAPTER FOURTEEN

DEVOLVED GOVERNMENT

We do appreciate the enshrining of the concept of devolution in the Constitution and the resulting proposed structures which are intended to bring service delivery closer to the recipients.

Nevertheless we propose that we build in accountability mechanisms which will ensure that the devolved government structure create wealth for the citizens which more than offset the cost of running these structures.

Article 215: Regional Government

The provision for a regional government we feel introduces a duplication of functions and thus gives rise to unnecessary costs. Essentially the draft has retained the provincial administration but renamed it the Regional Government. We do propose that the article giving rise to Regional Government should be deleted in toto given that with effective senate and county government, the principle of devolution will have been met.

Article 232: Conflict of Laws

Article 232(2) provides for conflict of laws and allows in some instances the laws of the devolved governments to supersede the national laws. To avoid instances of conflict between laws made by various levels of government, the draft must clearly provide that national laws shall prevail over county laws. We therefore propose that Art 232(2) to (8) are deleted and replaced with the following new clause:

(2) Subject to Article 2(4), national laws shall prevail over county legislation.

CHAPTER FIFTEEN

PUBLIC FINANCE

Article 244: Principles and Objects of Public Finance and Revenue Management

Article 244 (h) proposes that public accounts are audited and reported on regularly which creates ambiguity regarding what constitutes and is acceptable as regular. We propose being specific and indicate that the public accounts should be reported on a regular basis but in any case not longer than one year.

We further recommend that the Article expressly states that the preparation and audit of the financial reports of all government and governmental agencies be undertaken on the basis of nationally recognized and accepted standards of financial reporting and auditing so as to enhance their credibility. The specific standards of financial reporting and auditing will be mentioned in separate legislations.

Article 247: Devolved Governments' share of National Funds

This article proposes that each devolved Government would be entitled to an equitable share of national funds irrespective of the regional contribution to the national kitty and at the same time proposing to introduce equalization allocations.

We propose that the first clause ensures that each devolved government receives an equal share of national funds allocated to the devolved government kitty. In addition, we propose that the parameters to be used for equalization must be described in such a manner as to ensure equity.

Article 253: Borrowings by Government

We observe that there are too many clauses in the Constitution relating to government borrowing. We recommend that parliament provides legislations to guide the government borrowings. Such legislations would lay out the ceilings, approval levels among other proposals to ensure accountability in the area of government borrowing.

Article 264: Controller of Budget

Article 264 (4) c the Controller of Budget provides technical advice to Parliamentary Finance Committee on the budget whilst at the same time Parliamentary Finance Committee is meant to oversee the office of the Controller of Budget. We therefore propose that the Controller of budget does not provide technical advice and therefore delete clause 4(c) so as to enhance the independence of the two institutions.

We recommend that the phrase "if qualified" should be deleted from Clause 264 (3). Clause 4 b of this Article states that the Controller of Budget shall provide accounts of actual as opposed to budgeted expenditure. The Controller of Budget cannot prepare accounts of actual expenditure but rather these must be prepared by the Accountant General. In addition the accounts should include a comparison of the actual expenditure versus the budgeted expenditure.

We propose that the Constitution should include provisions regarding security of tenure for the office of the Controller of Budget which would contribute significantly to their independence and performance of their duties. Further removal from office should be as prescribed by an appropriate legislation.

Article 265: Auditor-General

While assigning the responsibility to the Auditor General to audit public funds and their use, the Constitution should not be restrictive by stating explicitly that the audits must be undertaken by the Auditor General but must allow for room for outsourcing of the role to professional auditing firms as defined in the Accountants' Act

We further recommend that the phrase "if qualified" should be deleted from Clause 265 (3).

We propose that the Constitution should include provisions regarding security of tenure for the office of the Controller of Budget which would contribute significantly to their independence and performance of his/her duties. Further removal from office should be as prescribed by an appropriate legislation.

Articles 264 and 265 Controller of Budget and Auditor General

The two articles propose the creation of separate offices of the Controller of Budget and Auditor –General with different roles. Specifically the Controller of Budget ensures that the funds are disbursed according to budget while the Auditor General provides the auditing services after the funds have been spent.

To ensure effectiveness and the ability to stop funds from being misused prior to spending rather than highlighting misuse after the fact, we propose that the two offices be merged. This way the same office will ensure that funds are utilized as budgeted and will be able to identify risk areas which can be reviewed at the end of the year. This may however require that we review the capability and resources of the combined office to enable it carry out its expanded mandate effectively.

In addition, to complete the accountability cycle, we propose that the office of the Accountant General be established as a constitutional office in keeping with the spirit of the constitution to enhance good governance. The accountability cycle includes the budget stage, actual expenditure as documented through financial statements and the audit stage. The Constitution has dealt with the first and last stage and ignored the second stage which will equally impact good governance. Hence the need for the Accountant General as a constitutional office with the same qualifications and tenure as the Auditor General.

Proposed roles of the Accountant General shall include, the preparation of the accounts (actual versus budgeted of the national government and devolved levels of government within three months of the financial year end, ensuring good financial management and system of internal control over the usage of the funds.

Article 267: Commission of Revenue Allocation

The draft provides that the Commission shall comprise more of political personalities yet its terms of reference prescribe that the nature of work it will be doing is technical in nature. We propose amendments to open membership to people with the technical know-how than political ability to ensure effectiveness of the Commission.

GENERAL OBSERVATIONS

Qualifications of Constitution Office Holders

We note and appreciate the fact that the Constitution has entrenched professionalism by ensuring that Constitutional Office Holders hold the necessary relevant professional qualifications. We propose that the enabling legislation goes further to require that such holders are members of their professional bodies so as to ensure that they remain up to date with their profession and continuously enhance their competence which will impact on their ability to discharge their mandates as prescribed in the Constitution.

Term of Office for Constitution Office Holders

We observe that the harmonized Draft Constitution prescribes different terms of office for the various constitutional offices. We recommend that a uniform term of office be prescribed and in this case we propose six years which will allow for transition for one year in the event of change of government.

Service Commissions

The draft has prescribed the creation of Service Commissions such as the Judicial Service Commission and the Parliamentary Service Commission. Notable is that most of the members of these Commissions are interested parties. We propose that in putting in place the Secretariats of the Constitutional Commissions as provided by the draft, independence of the constitutional office holder, should be the guiding principle.

Definition of Terms

There are various terms that have been used in the Constitution which we propose should be clearly defined so as to avoid ambiguities. Such terms include culture, marginalized, minority, and corruption among others. These should be defined by way of legislations which would reflect changes in society that would occur from time to time and impact these terms and our understanding of them.

Electoral Code of Conduct

The spirit of the conduct of elections must ensure that we avoid abuse of electoral process including the nomination process. In this regard, the code of conduct should address violence, threats, bribery among others.

Independent Candidates

The Independent Electoral and Boundaries Commission through legislation should establish the framework for vetting independent candidates running for political office.

Use of Experts in redrafting certain sections

We have observed the need for experts in drafting sections that are technical in nature, for instance the Chapter on Public Finance. We recommend the use of experts in these areas and in this regard, the Institute of Certified Public Accountants of Kenya would be willing to avail the expertise in Public Finance.

Other General Observation

We find the draft too long and in legalese such that the common person would not quickly understand the Constitution. Further the Harmonized Draft Constitution is overly prescriptive and too detailed. We propose that the Constitution be simplified and provide only the overarching principles and framework. The corresponding details to be worked out through appropriate legislative processes. Ultimately the Constitution should be contained in a pocket size book that all Kenyans can carry and refer to with regards to our nation's sovereignty.