ICPAK Constitutional Review Proposals, Roadmap and Recommendations

December 2018

Background

In August 2010, Kenya promulgated the Constitution that introduced significant changes to its state and governance structures. The Constitution established two levels of government, namely; the National and County Government, which are distinct and inter-dependent, and which shall conduct their mutual relations based on consultation and cooperation.

Alongside the division of roles between the national and county governments, the Constitution addressed the financing of the functions of the two levels of government towards an equitable society based on openness, accountability and public participation in financial matters. The Constitution further introduces fiscal independence in the budget process where the three arms of government, that is the Judiciary, Executive and Legislature prepare individual budgets unlike in the past.

Equally, the Constitution introduced further reforms in our judicial, electoral and representation systems. The Constitution provided timelines for enactment of the respective legislation and legal frameworks for its implementation. Now, the country is in the fifth year of implementing the devolved system of government and overall eight years since the promulgation of the Constitution.

Current Initiatives towards Constitutional Review

Despite these developments, there have been efforts and concerns on the impact of the Constitution on our governance and economic structures. For instance, the National Assembly, through a resolution established a Working Group (WG) to carry out a Socio-Economic Audit of the Constitution of Kenya 2010 under the auspices of the Auditor General established on 26th February 2014.

The Working Group was tasked with among other deliverables to:

(a) Assess the impact of the implementation of the Constitution to the economy and its public finances;
(b) Make a rapid assessment of the impact of the implementation of the Constitution on public institutions; and
(c) Make recommendations to the National Assembly on potential measures that could enhance prudent management of the country's public resources.

Some Preliminary Thoughts

The clamor for Constitutional amendment has reached advanced stages with various Bills being proposed to that effect. There are already some proposals from ICPAK members (at high level) on areas that need amendment in the Constitution of Kenya 2010 as illustrated in Table 1 below.

Table 1: Constitutional review- Issues arising

Issue		Chapter/Article of the Constitution	Issues Arising (ICPAK Perspective)	Proposals	Global Comparison
1.	**Separation of Powers**	Chapter 8 – Legislature Article 95 and 96 on the establishment of Parliament, role of the National Assembly, Senate, Chapter 9- Executive	It was important to separate legislature and the executive roles. According to the Constitution, Article 95 (4) (b) the National Assembly appropriates funds for expenditure by the national government and other State organs and, (c) exercises oversight over national revenue and its expenditure. Article 96 states that the Senate will allocate and exercise oversight over the national revenue allocated to County governments. However, the legislature (Parliament and County Assemblies) sometimes seem to be drifting into the management of funds e.g. by reallocating large	In Kenya, the principle of separation of powers is recognized as a permanent and indispensable feature of our governance structure. This is manifested horizontally through the relationship of the legislature, executive and the judiciary. To further strengthen this principle, we propose (i) Amend Article 95(4) to clearly define the role National Assembly in budget appropriation for the national government (ii) Chapter 8-Define the interrelationship between National Assembly and Senate; and their overall relationship with the National and County Governments in budgeting and oversight (iii) General on separation of powers-We need to make a decision on whether to strictly	The US Constitution adheres closely to the separation of powers. Article I grants powers to the legislature; article II gives executive power to the President; and article III creates an independent judiciary. In the UK, and other common law jurisdictions, the executive and legislature are closely entwined. The Prime Minister and a majority of his or her ministers are Members of Parliament and sit in the House of Commons. The executive is therefore present at the heart of Parliament.

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			sums of money from one budget item to another. The ambiguity in separation of powers between the legislature and executive raises the following questions (i) How far Parliament and County Assemblies can alter the budget presented by the executive in an Assembly without being seen to usurp executive roles? (ii) How do we better define the role of Parliament/County Assembly as an overseer of governance rather than as an executor of executive authority?	adhere to the separation of powers (like the US or have the executive and legislature intertwined- UK)	
2.	**Public Financial Management : Role of the Legislature in Budget making**	Chapter 12 on Public Finance Chapter 8 on Legislature Article 250 (12) (a) and (b)	This is closely related to separation of powers especially on the aspect of fiscal parity. The following issues arise: (i) To what extent does the legislature influence the budget proposals? (ii) What capacity does the Executive have in dealing with any or perceived legislative excesses? (iii) What are the checks and balances in the budget making and oversight (iv) In addition, the Country has witnessed near stalemates in	We need to define the extent of interaction between the Executive and the Legislature in the budget process.	According to Werner (2004), With regard to the scope of legislative authority, there are three categories of influence over budgeting: 1. **Budget-making legislatures** have the capacity to amend or reject the budget proposals of the executive and to substitute one of their own (Sweden, United States). 2. **Budget-influencing legislatures** can amend or reject executive budget proposals but lack the capacity to formulate their own independent budgets (Italy, Netherlands). The amending power

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			County Governments on budget making and approval due to friction between the County Assemblies and the Executive. This has in some cases paralyzed business including delayed approval of budgets- Nakuru and Makueni Counties		is often constrained as well: many legislatures may cut but not add to executive budgets, while others may add as long as they find offsetting cuts. 3. **Legislatures with little or no budget role** lack the capacity to reject or amend executive proposals in any substantive way, largely for fear of prompting the fall of the government (United Kingdom)
3.	**Public Financial Management: Independent Offices**	Chapter 12 Chapter 15	(i) Lack of separation of duties between the Accounting Officer, CEO and Secretary. In Constitutional bodies these three critical responsibilities are vested in one officer by taking Article 250 (12) (a) and (b) (ii) Besides the lack of separation of duties and hence checks and balances in this framework, accounting officers have extensive powers built into the public finance management legislation e.g. the Public Finance Management Act, Public Procurement and Disposal Act. NB- We believes that vesting all these powers on one officer may lead to weak controls	- Provide strong financial controls for independent officers- - Ring-fence the funding and independence of the independence offices to enable them deliver on their mandates without interference	

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			(iii) How do we address what is perceived as executive onslaught on the independent offices?		
4.	**Strengthen governance and integrity structures**	Chapter 6 of the Constitution	Despite having elaborate provisions on leadership and integrity, the implementation and sanctions for non-conformance to the integrity principles are weak. The current framework for prevention and fighting corruption is inadequate in structure. Though the constitutional requirement of Integrity is well settled, neither the Constitution nor the Leadership and Integrity Act define integrity in precise terms or at all	- Introduce punitive sanctions for non-conformity to leadership and integrity principles in Chapter 6; - Strengthen the EACC, Director of Public Prosecutions on integrity and ethical issues- for instance, EACC given prosecutorial powers on corruption related cases. - Weaknesses in building cases and prosecution can be overcome by using financial/audit experts i.e. accountants. DPP can train some for prosecution. - Amend to include multi-agency vetting of persons to hold public positions- Kenyans in entrenching Chapter 6 of the Constitution desired to clean our politics and governance structures by insisting on high standards of personal integrity. To meet these aspirations, only a rigorous vetting process will help meet these aspirations.	Issues of integrity can be viewed from the prisms of global conventions on anticorruption, integrity and ethical issues. One such is the United Nations Convention Against Corruption, which entered into force on 14 December 2005. The convention is premised on prevention of corruption, criminalization, international cooperation around it and asset recovery. These principles bind all States that are party to the convention.
5.	**Public Participation and Role of Professional bodies in governance/**	Articles 10, 201, 196 among others have given provisions on Public Participation. It is even a national value and principle	The country is still grappling with developing practical principles and practices on public participation. Three years of Constitutional implementation have not yielded	(v) Define public participation in clear and comprehensive terms. (vi) The redefinition will help in positioning professional bodies such as ICPAK to play a bigger role in the country's governance and	Studies have shown that Public participation is important in promoting transparency and accountability in financial matters which can positively impact on the economy. For instance, according to International Budget

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	public financial management		much in terms of effective public participation.	particularly the aspect of financial management.	Partnerships (IBP) transparency and public participation can help shine the light on leakages and improve efficiency in public expenditures. In addition, fiscal transparency and participation can foster equity by matching national resources with national priorities.

Concerns on the Cost of Representation

However, the Institute is also alive to the cost implications of facilitating a constitutional review. It is imperative that this be assessed in light of the burden it portends to the citizens and necessary arrangements made to cushion the citizens against high cost of living, which they already experience. The facts as demonstrated below should give a clear perspective of what it means to the citizens;

1. There are concerns regarding the cost implications of the expansion of Parliament from a single Chamber with 222 members, including nominated members, to a bi-cameral Parliament with 418 members (Senators and National Assembly Members).

2. In terms of representation, the current Parliament translates to an average of 120,000 constituents per MP and 100,500 including the Senate.95 This is lower than the global average of 146,000 constituents per MP, but higher than the African average of 83,450 per MP.

3. The global norm corresponds to a Parliament of 290, on average, and the African average of 500 members.

4. Kenya's Parliament, both the National Assembly and the Senate, has 416 members. This number tends towards the African average and way above the global average. This suggests that Kenyans indeed are over-represented.

5. There are 47 County Assemblies; in total there are about 2,526 Members of County Assemblies, both elected and nominated. Kenya appears to be over-represented when compared to representation in countries with similar size of economy and population as illustrated in the table below;

Figure 1: Comparatives: Representation

Country	Population size of each country	GDP	Representation	No. of Members/Size of chamber
Kenya	44.35	60.94	Senate	67
			National Assembly	349
			Members of County Assembly	2,526
			Total	**2640**
Ethiopia	99.39	55.61	Upper House	108
			Lower House	547
			Members of regional State Councils	1989
			Total	**2644**
Nigeria	178.52	568.51	Upper House	109
			Lower House	**547**
			State legislators	**978**
			Total	**1,447**
South Africa	54	350.09	**National Council of Provinces**	**90**
			National Assembly	**400**
			Provincial legislatures	**430**
			Total	**920**

Source: Report by the Working Group on Social- Economic Audit of the Constitution.

According to the Working Group (WG) to carry out a Socio-Economic Audit of the Constitution of Kenya 2010 , the budget for Parliament is about 2% of the national budget, against a global average of 0.57% (for countries with population of 10-50 million). This is more than three times the global average. Comparatively, Kenya's previous unicameral Parliament's budget (Ksh 10.2 billion in 2011/12) was 0.88% as a share of the national budget.

The report further points out the fact that Kenyans are over-represented. Members of Parliament (national level) and Members of County Assemblies (County level) combined, represent Kenyans and play the role of oversight and making legislation, in addition to representation. Kenyan MPs and MCAs are also overpaid. Emoluments for Kenya's MPs and MCAs are higher than those of comparator countries, especially when benefits are included.

The Institute therefore submits that the issues highlighted are salient and weighty enough to warrant amendments that would ease the burden on the taxpayer. However, the Institute feels that the current economic factors prevalent in Kenya are not favorable for a plebiscite. The Institute welcomes other means to effect the changes that would be cost-effective and not negatively impact on our economy.