# Constitutional Reform In Kenya: Basic Constitutional Issues And Concepts

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ISSUES AND CONCEPTS

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1. Introduction

The significance of the present constitutional reform initiative lies at two levels:

(a) the ordinary one, that applies to law reform in general, and which dictates that the somewhat rigid shape of the operative law be reviewed from time to time, to keep it in tune with real life as expressed in changing social, economic and political trends; and (b) the special level that responds to Kenya's unique history, marked by several decades of single-party government, and by the attendant restrictions to broad-based participation in the governmental process. This second level also entails the need to respond to the call of a more globalised world, in which international law and broader world developments have established new governance standards that, today, demand incorporation in national governance systems. This international call upon national constitutional systems today introduces into the agenda of good governance, matters of great concern for human welfare everywhere, such as observance of human rights; giving fulfillment to the rights and welfare of the child; prudent stewardship over natural resources; environmental rights and sustainable development; popular participation and consent in the governmental process; etc.

As Kenya seeks a more progressive dispensation in its governance set-up, and to consolidate the new order in a firm constitutional arrangement, we are inevitably involved in a new learning process; a process of consultation among ourselves; a process of fundamental reflection; a process of identification of and dedication to new values. The sanctity of such values has, ultimately, to be reduced to the print of the law, to the formulation of a new constitutional instrument.

The aim of this paper is to attempt to map out the broad terrain of constitutional reform in Kenya, addressing relevant concepts, raising pertinent issues, and focusing attention on the cardinal points that should lie at the centre of our search for a new Constitution, and that should be placed, in a proper case, before the people of Kenya for attention, consideration and expression of preference. The guidance gained from such consultation should help the Constitution of Kenya Review Commission to formulate a practical, sensible and potentially viable new Constitution for Kenya.

2. Glimpses at the Constitution of Kenya Review Act (Cap. 3A, Laws of Kenya)

The Constitution of Kenya Review Commission (referred to hereafter as "the Commission") is created by the Constitution of Kenya Review Act (Cap. 3 A) and derives its whole mandate from this Act. The broad task of the Commission is to serve as an instrument for "the comprehensive review of the Constitution by the people of Kenya" (Long Title to the Act). The Act is set out in six Parts, namely: (a) the preliminary Part which contains a definition of terms; empowers particular bodies to play a role in the review process; and sets out the governing principles to guide the constitutional review process; (b) the second Part which establishes the Commission; (c) the third Part which specifies the functions, powers and privileges of the Commission and Commissioners; (d) the fourth Part which defines modalities relating to the Report to be eventually formulated by the Commission; (e) the fifth Part which makes provisions for the expenses of the review process; and (f)the sixth Part which provides for the conclusion of the review process and the dissolution of the various organs participating in the review process.

Several elements in this setting for the review process are outstanding and deserve to be remarked here:

(a)Informed and expert collection, collation and assessment of evidence and opinions is required, and this task is entrusted to the Commission which is expected to operate professionally and with integrity (S.4 of the Act);

(b)The development of a new constitutional document is required to be conducted in the context of popular participation, and of consultation with the National Assembly which is the principal representative constitutional forum in the country (S.4 of the Act);

(c)The constitutional review process is required to be open to public participation, transparent and accountable to the people, as well as inclusive of and accommodating to the diverse categories of Kenyan people and their peculiarities such as those relating to faith, ethnicity, gender, race, occupation, etc. (S.5 of the Act);

(d)The primary task in the conduct of the constitutional review process, and in ensuring that the objects of the Act are fulfilled, rests upon the Commission. This is quite clear from basic facts such as: out of the 35 sections of the Act, 23 are squarely devoted to the Commission - its establishment, functions and powers, its output in the form

of a Report, etc. The prominence of the Commission in the review process is not atallnovel. A new Constitution must take the form of a sound legal document once the political and other related inputs have been made by all the people in their diverse vocations. As practice in most countries of Africa shows, a constitutional commission is a most appropriate device for eliciting from the people their broad opinions on desirable paths of governance, and crystallising these into constitutional instruments based on a wide consensus;

(e)The functions of the Commission are set out in detail (Section 17 of Act). They include -

i). stimulating public awareness for useful

participation in the review process, through the conduct of civic education;

ii). eliciting and processing the views of the Kenyan people at large, towards the formulation of a realistic Constitution founded on the needs, feelings and inclinations of the people;

iii). researching into general constitutional issues and into comparative constitutional experience, for the purpose of enriching Kenya's constitution-making process;

iv). making specific recommendation for ensuring the incorporation of the principle of constitutionalism in Kenya's constitutional document - this entailing a careful balancing of the mutual powers and operation of the Executive, the Legislative and the Judiciary;

v). considering the practicality and appropriateness of unitarian as well as decentralist modes of national government;

vi). making appropriate recommendations for constitutional reform aimed at enhancing human rights and gender equality;

vii). making recommendations for an improved electoral process in Kenya;

viii).taking views and making recommendations regarding property rights;

ix). re-examining the nationality laws and making appropriate recommendations;

x). considering the interplay between cultural practices and modern notions of rights and opportunity, and making suitable recommendations that favour individual liberty;

xi). considering current legal arrangements regarding accession to public office, and recommending more efficient and more progressive constitutional procedures;

xii). re-considering the working of the foreign affairs power, and recommending appropriate constitutional adjustments for the democratisation of this area of public power;

xiii).considering the need for setting the requirements of a new Constitution in a context of defined directive principles of state policy; etc

(f)The Act entrusts the Commission with certain powers, to ensure the fulfilment of the specified functions(S.18). There is a general empowerment for the performance of these functions, but it is specifically stated that -

i). the Commission shall visit every parliamentary constituency in Kenya, for the purpose of receiving the views of the people regarding the Constitution;

ii).the Commission shall receive memoranda and hold public or private hearing throughout Kenya, for the purpose of recording and synthesising the views and opinions of the people, and to this end it may summon public meetings anywhere;

3. The People: A New Presence in Kenya's Constitution –making

Kenya's current Constitution dates back to independence in 1963, except that it has been repeatedly amended over the years. Its essential character today is quite different from what it was in 1963. Most of the amendments, and especially those of the 1960s, had a purely governmental - cum - ruling - party origin and sought in the first place to consolidate the authority of the Executive, almost at the expense of the other organs of government. To this extent, the people were strangers to the process of constitutional change. Besides, the general profile of constitutional change was unprogressive, seen from the standpoint of constitutionalism. Rather than promote checks - and - balances, the changes of that time tended, in effect, to relegate both the Legislature and the Judiciary to positions of subordination, as compared to the meteoric-ally ascendant Executive. [essentially, the 1960s, 70s and 80s decades witnessed an Executive -centered Constitution made by the Executive, with hardly any informed participation by the people.

It is indeed arguable that the very popular demand for constitutional reform today, is a reaction to that Executive - centered constitutional order. Growing enlightenment on the part of the people, the thrust of global development upon the national scene, and the increased apprehension of the dialectics of public power and individual rights, have led most Kenyans to a realisation that constitutional change is desirable; that the centralised power of government ought to be subjected to more checks and balances; and that greater governmental accountability can only be realised with the operation of a greater plurality of decision - making centres.

Thus, this round of constitution - making belongs to the people, as is clearly reflected in the Act. Let us consider the role of the people in constitution- making, as we must expect that our new Constitution will have a much clearer imprint of the people than has in the past been the case.

A Constitution carries the most basic principles of law that relate to a nation's main political arrangements. Such political situations include governance patterns, as well as the public power schemes that the people have accepted, or acquiesced in, or been subjected to.

Where such public power arrangements have broadly been accepted, the outstanding problems of politics then become mainly ones of a technical and rather limited kind.

Where the people have acquiesced in such arrangements, again the unresolved issues of politics are in essence limited — because there is no major quarrel with the power dispensations.

Where the people have been subjected to an unpopular public power dispensation, a major problem of politics comes to exist, which persistently cries out for new political dispensations - and these must be given effect by new constitutional dispensations.

To understand which one of the three foregoing scenarios exists, we must address one basic issue. Is there a united people, politically aware and knowledgeable of its rights, which has by an overwhelming voice expressed its support for, or opposition to the operative governance arrangements?

It is quite easy to answer the above question in the affirmative, in the case of a largely secular national community that has been homogenised through urban living, through universal education, through shared working conditions in a market - driven economy , etc. In such a situation, the dominant values are largely agreed and, in the circumstances, common attitudes to governance largely prevail. Therefore, in such a condition it can easily be said whether the constitutional order is "good" or "bad", judging by its level of contribution to social welfare. In such a condition, constitution-making will be a straightforward exercise.

By contrast, where a country lacks social homogeneity - as is the case with most developing countries which have not fully become part of the market economy built around the production of standard goods and services, around urban living and international trade, with their attendant cultures nurtured by access to universal education and association with political modernism - the factor of one people passing judgement on crucial government options will tend to be in short supply. In these conditions, the crucial issue in constitution-making may not exactly reflect what "the people" may think or want. This entails the risk that a constitutional order may be put in place that is not truly informed by the social or economic needs of "the people". A Constitution made in such circumstances is likely to be a reflection of the interests of elite groups.

The lesson, for Kenya as well as for other developing countries, is that

elite groups who play a fundamental role in bringing about a new Constitution should ensure the existence of an open procedure for incorporating the genuine expectations of the people.

The scope for bringing about a new Constitution for Kenya that fully responds to the expectations of the whole Kenyan people will largely depend on the Commission, and the extent to which all its members genuinely attempt to understand and to accommodate the country's social reality. The legal framework for the Commission to achieve this end is abundantly provided in the Act (Sections 17 adn 18 of the Act).

4. Certain Key Features of Kenya's Post-Independence Constitution — and the Question of Reform

Most African countries attaining independence in the late 1950's in the 1960s and 1970s adopted what may loosely be termed "revolutionary {constitutions", as the foundation of their governance systems in the decades following. The making of such constitutions took place in largely elite-type ceremonies involving the participation of nationalist leaders and representatives of the departing colonial power. If one asked the question: who was responsible for the creation of these Constitutions, the correct answer would be: numerically limited elite groups of nationalist men and women nurtured in the colonial era and largely carrying a legitimacy resting on the overall goodwill of largely - illiterate populations. The nationalist elites were, of course, working together with the representatives of the colonial powers. During this earlier period, literacy and levels of education in Africa were extremely low; and quite naturally, only a puny elite could have been effectively involved in the complex business of constitution - making. The nationalist elites, thus, did have clear popular mandates founded on trust and goodwill.

The constitutional dispensation that came with independence, in its essential features, was by no means the brainchild of the African elites alone. In the case of the former British colonies, most of the Independence Constitutions were modeled on the British Constitution - the model then known as the British Export Model Constitution.

For the African leaders then, and for their peoples as well, the primary political concern of the time was attainment a/independence, and it did not matter so much what constitutional or juridical instruments expressed and delivered that independence. There was no major concern to secure any kind of "original" constitutional document - not to mention that the intellectual and research resource - base for such a pre-occupation would have been rather short. Indeed, governance arrangements, given their overwhelmingly practical concerns and the premium placed on their inclusivity, are rarely founded on abstract notions; they are, in virtually all cases, founded instead on experience, the dominant social pressures and needs, pragmatics, and political reality. The Westminster export Model Constitution, in the circumstances of the time, offered the most practical framework for the transfer of power to Kenyan nationals. Thus the 1963 Constitution was the handiwork of the British government working with the Kenyan political elite. And as was to be expected, Kenya's Independence Constitution was substantially shaped by the well-worn constitutional principles, concepts and theories of Western democracy and constitutionalism.

Kenyan's Independence Constitution rested on three firm pillars that have always taken expression with only minor modifications in the older members of the Commonwealth: a Parliament - centred governance system; a dual Executive structure intimately linked to the control systems of Parliament; and an aloof judicial edifice guided by the principles of the common law and by evidence, and with a full mandate to interpret and pronounce on the law - a judiciary that is the key purveyor of the free play of the general law. : - ^

The merits of such a constitution cannot be gainsaid, as Kenya takes a new look at its Constitution. Whether, on the whole, it was a "good" or a "bad" Constitution for this country, at this point in Kenya's constitutional development, is of little relevance. It is more important to recognise that the 1963 Constitution represented a vital step in the country's evolution as an independent state. It indeed provided the crucial institutions that set the country afoot in independent statehood and, on this account, has become a historical heritage and a critical reference - point in any current and future reform initiatives.

In 1964 Kenya moved the next logical step in its constitutional dispensation, by shedding off the "Dominion" link with the British Crown and becoming an African Republic.

Kenya's original post-independence Constitution provided for a complex set of institutions. The most significant such institution was the semi-federal (or Majimbo) system which took the form of seven Regions, each with a Regional Assembly and a separate public service. Attendant upon this federalist element was a bi-cameral legislature at the national level. Provision was also made for several staff commissions, for different aspects of the public service.

The multiplicity of public institutions under the 1963 and 1964 Constitutions was clearly intended to serve the cause of controlled government, with minimal abuse of power. Such control was seen to inhere not only in the design of the legal and administrative arrangements, but also in the political dimension of public life as manifested by the interplay of political parties inside and outside the National Assembly.

Today it is readily appreciated that limitation to governmental power is a desirable thing as it checks abuse and enlarges the scope for individual self-fulfilment and the enjoyment of human of human rights. The limitations placed on public power by the original Constitution can readily be associated with the goals of constitutionalism and the rule of law, which most will agree, ought to feature prominently in a reformed Kenyan Constitution. The early post-independence history, therefore, is a vital reference point for the ongoing work of the Commission.

The Commission may need, however, to consider also the resource-cost factor that must be confronted. It is not immediately clear whether the financial implications of such overlapping institutional arrangements had been taken into account at independence; but it would appear that the national economic status was not at the time so robust as to be able to support an infinite proliferation in governance bodies.

Numerous changes to the Constitution subsequently took place, especially after 1964. The result was that by 1970, Kenya no longer had a Westminster Model Constitution - founded on multipartyism, the central role of Parliament, the Executive's accountability to Parliament, the autonomy of the Judiciary. By 1970 the controlling environment for the functioning of constitutionalism and power checks - and - balances, namely the buoyant play of a multi-party political system, had vanished. Kenya was now a settled one-party system with a unicameral Parliament and a much scaled-

down institutional base for autonomous constitutional agencies. The 1965-

1970 period may be regarded as the watershed period in the flowering of power concentration in the hands of the Executive, in post-independence Kenya's entire historical profile. Thereafter and up to 1992, Kenya's history was marked by a constriction in space for political activity - and thus for the exercise of civil rights linked to political activity. In the whole time-span running from 1965 to 1997, there have been peacemeal changes to the Constitution, providing for momentary power-shift demands; and these have Emanated mainly from government although sometimes also from Parliament or from civil society.

The effect is that the Kenya Constitution, today, is in an essentially patchwork form. In this form it carries only somewhat truncated principles; rather inchoate lines of political inspiration; and in a number of cases, apparent contradictions (eg., of Sections 23-25 on the one hand and Sections 107-108 on the other, on the subject of the exercise of Presidential prerogatives). This is likely to undermine the Constitution as a dependable legal instrument for the protection of the individual, and for assuring the decisive conduct of governmental business.

There is thus a manifest case for a professionally conducted review of the Constitution, leading to the enactment of a reformed instrument benefiting from the lessons of history, incorporating the needs and priorities of the people, and incorporating the more progressive developments on the international scene.

The Kenya Constitution ought to be subjected to a reform initiative - that is, the rectification of those aspects of the governance scheme which 38 years of experience have shown to be unsatisfactory. In this process a more professional assessment of the Constitution would also be done, to the intent that the document be freed of any potential contradictions. A more rational and coherent constitutional document would lend itself better to the tasks of interpretation by the courts and by the Speaker of the National Assembly. This professional task should run alongside a substantive review process which relates the Constitution's power allocation scheme to governance lessons received over the years.

5. Proposing a Constitutional Reform Terrain

(a)Broad Reform Issues

It is to be assumed that the primary interest of the Kenyan people in securing a reformed Constitution will rest upon certain broad social welfare issues. In any country, citizens do expect governance systems to secure values such as equity, justice, peace and tranquility. The attainment of these ends is intimately linked to the management of public welfare issues - in particular economic and social issues. Therefore, the critical issues underlying the procedural arrangements and juridical logistics of the constitutional order are: (i) access to economic sustenance; (ii) equity in the distribution of economic resources; and (iii) social empowerment for a better quality of life.

The realisation of the above-mentioned attributes is a function of power allocation and power management. These, therefore, are at bottom, the ultimate concerns of a Constitution. Hence a Constitution establishes the most crucial public institutions, defines their functions, and assigns them powers. The Constitution, then, must address the issue of the relationships among the various organs thus established, and must deal with checks and balances. There are, perhaps, no ideal and specific checks and balances that apply to all countries. Appropriate checks and balances, in their precise details, for any particular country will depend on the social and political experiences of that country; the broad outlook of its people; that country's moral ethos, and its fundamental policy goals.

Is it possible to identify Kenya's primary policy goals? The exercise would have to be undertaken in the context of the country's essential survival and welfare needs, and in particular in relation to its economic status.

Kenya's largely agricultural economy cannot attract more than a limited amount of value - added, as the international markets of exchange have placed much higher value on industrial products, services, scientific technology and all kinds of invisible earnings. It is unavoidable that the country cannot, in these circumstances, fully meet the economic welfare needs of all its 30 million people. Kenya must work towards industrialisation, greater trade, and the development of marketable services. The country's desirable governance system, therefore, must be one that frees the national capacity of unnecessary impediments- i.e., the capacity for the conception of policy and programming, in the interest of industrial and related development. Constitutional reform should be guided by such practical concerns, as it addresses current constitutional and power arrangements. In this regard the Constitution in its reformed character, should underline such values as prudent utilisation of resources, technological growth, professional management of institutions, public participation in major decisions affecting public interests, openness and accountability. These values are not only conducive to the enhancement of social welfare and for the achievement of development goals, but they also coincide with well-recognised principles of democratic empowerment, constitutionalism and good governance. There is thus an important meeting-point between what must be regarded as Kenya's constitutional ideals, on the one hand, and the common principles of legality, accountability and good governance which now enjoy distinguished international status as represented by the many Conventions on matters such as human rights, children's rights, gender equality, etc.

The terrain of constitutional reform in Kenya should be inspired by such broader background issues. In that context, the Commission should address certain specific matters, reflect and consult upon them, adopt any emerging consensus in relation to them, and ultimately formulate a report and draft Constitution that addresses them squarely.

(b) Identifying Areas of the Constitution for Reform

i) General Comments

As the Commission visits the different parts of the country it can expect to receive indications on the direction of reform, in relation to particular issues. However, it is more likely that the responsibility of identifying the most critical public issues, so that the people may make suggestions for reform in relation to these, will fall on the Commission. This is because issues of law and the development of constitutional principles tend to be rather too professional and technical in character to be fully knowable to the ordinary person. It must, therefore, be one of the primary objects of the Mombasa Workshop to provide an opportunity for brain-

storming on the key constitutional reform issues of the day. Since this Workshop is, on that account, in many ways unique, its proceedings should be regarded as the seed for the reform process. It is thus to be expected that the points of agreement emerging from the Workshop deliberations will be carefully recorded, and made the conceptual reference-point for formulating issues and questionnaires, in very simple terms, to be placed before the people for opinions and recommendations, as the Commission visits the various parts of the country.

None of the many papers to be presented at the Workshop can claim to identify all the critical constitutional reform issues. Indeed, not even all of them put together will constitute the exhaustive constitutional reform agenda. And this paper can make no pretence of comprehensiveness, in its identification of the crucial constitutional reform issues. It will, however, set out, with conviction, those areas of the Kenyan constitutional domain which do claim the Commission's attention. The expectation is that the Commission will anchor its work upon such issues and make them, in addition to others, a point of full-scale consultation with the Kenyan people, prior to the preparation of its report and the drafting of a new Constitution.

ii) Articulating the spirit of the Constitution

Kenya's Constitution in its present form reads like an ordinary legal document. Apart from establishing governmental agencies and describing their procedures and modes of operation, it provides for certain individual rights (e.g. in Chapter V (fundamental rights and freedoms) and Chapter VI (Citizenship)). Where specific rights are thus provided for, the responsibility for interpretation rests with the judiciary which, it is clear, is expected to use its traditional common law methods, without any particular policy guidance. This character of the Constitution makes it, in almost every respect, a juridical document and an instrument in the operation of the conventional legal process.

It will be necessary for the Commission to consider whether or not the Constitution should be given a stronger political character— i.e., that it should also contain directive principles of state policy to guide and condition the professional work of the lawyers.

The new generation of African Constitutions (eg. the Constitution of the Republic of Namibia (1991), the Constitution of the Republic of South Africa (1996); the Constitution of the Federal Democratic Republic of Ethiopia (1994); the Constitution of the Republic of Uganda (1995); the Constitution of Burkina Faso (1991). which may be said to be quite progressive in many respects, have invariably set out national guiding

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principles to serve as the reference point in the implementation of the specific provisions of the Constitution.

For example, the Namibian Constitution commences with a Preamble which runs as follows:

"WHEREAS recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace; and WHEREAS the said rights include the right of the individual to life, liberty and to the pursuit of happiness, regardless of race, colour, ethnic origin, sex or religion, creed or social or economic status; and

WHEREAS the said rights are most effectively maintained and protected in a democratic society where the Government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary; and

WHEAREAS these rights have for so long been denied to the people of Namibia by apartheid, racism and colonialism;

NOW THEREFORE, we the people of Namibia accept and adopt this Constitution as the fundamental law of our Sovereign and Independent Republic".

On similar lines, the Constitution of Burkina Faso commences with a Preamble in the following terms:

"We, the Sovereign People of Burkina Faso;

Being conscious of our responsibilities and our obligations towards history and humanity;

COMMITTED to the preservation of our democratic gains;

DEVOTED to the preservation of these gains and having the will to build a State that guarantees the enjoyment of collective and individual rights, liberties, dignity, safety, welfare, development, equality and justice as fundamental values of a pluralist society

APPROVE and ADOPT the present Constitution with this Preamble forming an integral part thereof

The Constitution of the Republic of South Africa contains a Preamble which states in part:

"We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."

The Ethiopian people, in the Preamble to the Constitution of the Federal Democratic Republic of Ethiopia, are —

"Strongly committed, in full and free exercise of our right of self-

determination, to building a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order, and advancing our economic and social development;

Firmly convinced that the fulfilment of this objective requires full respect of individual and people's fundamental freedoms and rights to live together on the basis of equality and without any religious or cultural discrimination

In the African Constitutions considered above, the Preamble serves not just as an entry-point into the text of the Constitution, but as a set of declarations recalling a nation's past historical experience and committing it to a new life in which past errors are eschewed. These declarations are intended to set the tone for the nation's constitutional practice, and to inspire the people and their public servants to be guided in certain approved directions.

The Constitution of the Republic of Uganda has adopted a slightly different approach in its entry-point into the text. Apart from its short Preamble, it devotes as many as 29 separate articles to "National Objectives and Directive Principles of State Policy".

In its Preamble the Ugandan Constitution, as is to be expected, recounts its exceptionable history of "tyranny, oppression and exploitation", and restates the people's commitment to "building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress".

The Uganda Constitution's "National Objectives and Directive Principles of State Policy" are quite detailed and provide for political objectives (such as democratic principles, national unity and stability, national sovereignty, independence and territorial integrity); the protection and promotion of fundamental and other human rights and freedoms (eg. gender balance, rights of the aged, management of national resources, right to development, role of the people in development); social and economic objectives (eg. social and economic objectives, the role of women in society, the dignity of persons with disabilities, recreation and sport, education, protection of the family, medical services, clean and safe water, food security, natural disasters); cultural objectives; accountability of office-holders; the environment; foreign policy objectives; and duties of the citizen.

It is, perhaps, right that Kenya's constitutional development should borrow a leaf from the new generation of African Constitutions such as those considered above. If this proposition is accepted, then our new Constitution should ideally, have an entry point marked by a clear and focussed statement of directive principles of state policy. The purpose would be to acknowledge the broad social context in which Kenya's Constitution must operate, to identify the ideal social policy choices that should guide the constitutional and legal process, and to provide inspiring beacons for the people in their political life, and controls and accounting and responsibility trajectories for officials in whom public power is reposed.

iii) The Unitary versus the Decentralised Governance Structure

The Unitarian and the federalistic themes are ingrained in Kenya's post-

independence history and, even on this account alone, the Commission needs to address the question. In addition, this theme has already been recurrent in Kenyan Constitutional talk. Therefore, the Commission should formulate specific queries regarding the two alternatives in governance structure, to be put to the people throughout the county.

The issue is still somewhat blurred in the minds of the interlocutors, and more certainly so, as regards the understanding of ordinary Kenyan people. Since government in Kenya has been conducted on the basis of a unitary constitutional structure since the mid -1960s, most citizens today have known no other practice. It can thus be concluded that the vast majority of Kenyans have had a feel of the unitary Constitution. But they know little about federalistic systems. Therefore, the current debate regarding majimbo is not yet fully understood b the people of Kenya and they will be unable to make any useful contribution about it during the forthcoming consultations with the Commission — ie., in the absence of effective civic education on majimboism.

It should be made clear that majimboism is neither a term of art, nor a subject already made conceptually clear by any scholar or writer at any time. It should be understood that majimbo essentially looks towards the decentralised system of government. Decentralised governmental structures work well in many countries of the world — the U.S.A.Switzerland, Belgium, etc. But in those countries national integrity is by no means compromised; there are more than sufficient resources to keep the decentralised units permanently running; all the people in the nation have full freedoms of movement, residence and work throughout the federal units; and the rule of law and democracy are in full play to protect the dignity of all the people wherever they are in those countries.

For Kenya, it will be relevant to consider the political psychology and the social behaviour that would be evoked by the subdivision of the country into semi-federalised units; the human, material and institutional capacity in place to ensure the efficient running of the decentralised units; the need to ensure the freedom and dignity as well as the right to work of all Kenyans, where they may choose within the Republic; etc. All such issues should be identified and the people of Kenya asked, in simple language, whether they would prefer the unitary or the semi-federalised constitutional order.

iv)The Executive and its Impacts upon and Implications/or the Entire Governmental Process

Kenya set off at independence with the dual Executive: the Queen (represented by the Governor-General) (as Head of State and Commander-in-

Chief of the Armed Forces), and the Prime Minister (Head of Government and leader of the largest political party in the National Assembly). This contained an element of check-and-balance: the Head of State held a ceremonial position while the Head of Government was the "efficient" Executive organ. Yet the instruments of constitutional action were in the custody of the Head of State. Therefore, the real power -holder had to work in consultation with the constitutional Head (the Head of State).

All the thirty-some constitutional changes that took place from the date of inauguration of Republican Status (December 12, 1963) boil down to one reality, in terms of governmental power: the pluralistic check-and-balance constitutional model of 1963 was debunked, and replaced with a monolithic constitutional structure in which Head of Government merged with Head of State, in the person of an Executive President with the fullest control over government, and very substantial influence and control over Parliament, in addition to constitutional authority over the make-up of the judiciary. This scenario is indeed the very kernel of the agenda of Kenya's current process of constitutional reform.

The Commission will need to undertake a careful study of the several possible executive leadership scenarios: (i) the single leadership vested in an Executive President elected by the people and essentially accountable to the voters; (ii) a diverse executive leadership, with President and Prime Minister, with executive powers either remaining with the President (eg. Uganda, Zambia, etc) or with the Prime Minister (eg. India,

Ethiopia, Germany, etc); (iii) a French-style Presidency with a fixed Septennal, with a Prime Minister responsible to Parliament; (iv) a South African type - of Presidency in which election is by Parliament, but the President is an executive President; (v) an enlarged team at the top, with a President, one or more Vice-Presidents, a Prime Minister with one or more Deputy Prime Ministers

These possibilities should be carefully considered and expressed in simple language, so as to facilitate the enlightened expression of opinion by the people as the Commission consults with them. The explanations should set out both strengths and weaknesses of the several alternatives, and the people should be given abundant opportunity to indicate their preferences. They should be encouraged to give reasons for their preferences.

The Constitution as it stands today carries potential conflicts regarding, firstly, the mandate to establish Government Ministries, and secondly, the prerogative to hire and fire in the civil service. Should it be for the Executive to determine the number, name and remit of Government Ministries, or should this be done by parliamentary enactment? Should the Executive Head have the fullest freedom in hiring and firing, or should this matter be handled by independent agencies established under the Constitution?

v) Constitutional Interpretation and the Judicial Hierarchy

It is not clear today, under the Constitution, whether the highest court, namely the Court of appeal, has a final authority in constitutional interpretation. The term "constitutional court" is used loosely and largely informally to refer exclusively to the High Court of Kenya, which falls at the second level in the hierarchy. This confusion must be removed. The task should involve an inquiry into the concept of a Supreme Court. Should there be one? What should be its size? What volume of work is it likely to have? How should it relate to the other courts? Should there then be a Court of Appeal? What should be its size? How should it conduct its operations? What should be the size of the High Court Bench?

vi) The Foreign Affairs Power

As the globalisation process proceeds apace, Kenya has to deal with numerous states, International Organisations and other international bodies, largely within the framework of treaty law. Such law must be negotiated, signed and adopted, ratified, and implemented within the national jurisdiction. This means that the acts done with regard to treaty law "out there" have implications for Kenyan constitutional processes involving her Executive, her- Parliament and her Judiciary. Now although the exercise of the foreign affairs power is so intrinsically constitutional in character, up till now this subject has virtually been left entirely in the hands of the Executive, without any substantial constitutional provision nor any detailed scheme of legal regulation. The Commission should now consider whether or not certain clear procedures regarding the foreign affairs power should be set out in the Constitution. Specific questionnaires may be formulated for eliciting public opinion on this matter.

vii) Emergencies — Natural and Human — originated

Ever since the wave of political reform set in, in the early 1990s, the position of emergencies has been thrown into disarray. No country can permanently exclude the occurrence of emergencies, and particularly natural-

disaster emergencies — such as earthquakes, crippling droughts, large - scale flooding, outbreak of epidemics and pandemics, etc. Whenever such things occur, quick protective action must be taken by Government. To some extent the Executive can work closely with Parliament, in such situations; but most of the time the Executive must take responsibility for decision-

making. Of course, the danger of abuse of power in those situations is ever present. Therefore, the Commission should work towards incorporating in a new Constitution a progressive, workable and effective law on natural disaster emergencies. This must be expected to give certain definite empowerment to the Executive, subject to well designed control devices.

But we should note that the kind of progressive and people-oriented constitution that we contemplate, which is to be the purveyor and reinforce of democratic principles, on account of its openness, visibility and predictability, always opens the door to the "bad guy" who wants to defeat it and to steal the power of governmental control. We are all familiar with military coups, large-scale political insurrections and secessions in Africa (eg. Republic of Congo; Republic of Somalia, etc). Such developments create human-originated emergencies, in the course of which serious harm to life and limb may come about, to the grave detriment of the people who are, by a new Constitution, seeking to achieve democratic governance in the context of constitutionalism and the rule of law.

The Commission will need to provide in their report for clear procedures, for dealing with such emergency situations. The guiding principle should be to ensure that any special empowerment reposed in the Executive is counter-

balanced by responsible consultation procedures involving the National Assembly, and leaving room for judicial adjudication.

viii) Multipartyism and Collective Cabinet Responsibility

Parliamentarianism is now an essential element in Kenya's constitutional heritage. But this system, traditionally, has been integrally lodged into the multiparty system. The multiparty system may, perhaps, now be regarded as an evolving fixed principle of Kenyan constitutional practice. Yet, considering that we have at the moment more than 40 registered political parties we must recognise that virtually none of them could have the desired constitutional impact and functioning. Unless the number of these parties falls to two or three or four or five only, the essential political environment for Kenya's Parliamentarianism could only be provided by the coalition system, in which constellations of parties could claim legitimacy as the basis of control and exercise of executive power subject to parliamentary control.

The Commission, therefore, needs to consult with the people on the subject of party coalitions, and to have suitable provisions on the subject made in their final report for constitutional reform.

The concept of collective cabinet responsibility, which is provided for in Sections 16 and 17 of the present Constitution, needs to be re-visited by the Commission. For parliamentary government to function properly, the cabinet must stand or fall together, but its binding formula cannot be the prescription of the Constitution, as this will defeat the voluntariness of party formation and party alignments in and outside Parliament. A party in government, or any constellation of parties in government, should recognise that their unity purposes of holding the reins of power is a political and not a juridical act. Only this recognition will enable the National Assembly as a constitutional entity to play its check-and-balance role in relation to the Executive's exercise of power.

Linked to this question is the no-confidence vote and the censure vote. Some have argued in Kenya's media that the calendar of Parliament should be determined by law, and that there should be no occasion for a sudden dissolution, or even prorogation. It we adhere to the recognised parliamentary tradition, then we cannot abolish Parliaments power to bring a no-confidence or censure vote against the Executive and to terminate the life of the Executive any time. Yet if this position prevails, then the Executive's power to prorogue or dissolve Parliament cannot also be abolished.

The Commission should consult with the people of Kenya, on whether we want to keep the parliamentary heritage, or whether we want to go the American style of separation of powers in which Congress runs through its full term and the President and his Vice-President remain office assuredly up to the end of their four year terms.

viii) Second Chamber

Generally, second parliamentary chambers are an inseparable concomitant of federal constitutional structures. This is because the disparate interests to be protected in the federal states, must also have a forum of expression at the national level, hence the Senate to represent the federal units or the provinces, etc. Such was also the case under Kenya's Independence Constitution which provided for semi-federal Regions. However, second chambers can be adopted independently of federal systems — as is the case, for different historical reasons, with Great Britain's House of Lords.

It will be in order for the Commission to canvas with the Kenyan people the need for a second parliamentary chamber. There may be a good case for it, dependent on the social vitality of such interests as it may come to represent,

ix) The Law of Citizenship and the Issue of Sex Discrimination

The Commission will need to address the law of citizenship, as contained both in the Constitution and the Kenya Citizenship Act. Although the Constitution gives protection against sex discrimination, it (and the Kenya Citizenship Act) results in discrimination against Kenyan mothers who, while abroad, have a child with foreign fathers, as their issue are not regarded as Kenya citizens. This does not apply where the child is born of a Kenyan father who is a broad and a foreign mother.

One other area of the citizenship law calls for the Commission's attention. Section 94 of the Constitution empowers the minister to deprive a person of citizenship, in those cases where citizenship was obtained through registration or naturalisation. In this case the Minister acts on his or her own judgement as to whether the person in question "has shown himself by act or speech to be disloyal or disaffected towards Kenya", inter alia.

The Commission should consider the full meaning and effect of the concept of citizenship. Should any citizen be exposed to the risk of loss of citizenship, just on account of the category of his or her citizenship? Should the categorisation of citizenship be a constitutionally relevant matter in the people's access to the State's protection? Or in relation to occupancy of particular public offices, etc? The Commission should deliberate upon this question and should, if possible, seek the people's opinions on it.

x) The Fundamental Rights Provisions of the Constitution

In the last decade or so, a number of international legal instruments have been adopted (to some of which Kenya is a Party) which introduce new fundamental rights. Relevant examples are the United Nations Convention on the Rights of the Child (1989);

and the African Charter on the Rights and Welfare of the Child (1990). The Commission will need to identify such Conventions and to endeavor to draw from them such elements as would serve to enrich our constitutional law on the fundamental rights of the individual.

There has also been judicial pronouncement on the modalities of enforcement of fundamental rights under the Constitution. The Commission should consider whether such rights should be "self-executing", or whether their enforcement should be contingent on certain decisions and acts taken or done by particular officers of the State.

xi) Nomination of Members of Parliament

The rationale of Parliament as a constitutional organ is that it is representative of the people. Election, therefore, ought to be the sole path leading to membership of Parliament. However, in Kenya's constitutional history right from the later years of the colonial period, a certain number of legislators have earned their membership through some mode of appointment.

The Commission will need to return to this question and to take the people's opinion about it. The nomination of some parliamentarians obviously compromises the elective principle and, furthermore, Kenyan's experience has not yet raised a rational and generally - agreed basis for the nominations that have been made in the post-independence period.

xiii) Should the Attorney-General be a Public Officer Holding a Constitutional Office, or should he be an Elected Member of Parliament?

Kenya's Constitution has held on to certain well established principles of the British Constitution. One of these is the regular parliamentary elections. Another is the centrality of Parliament in relation to law-

making and to financial approvals. But one clear departure from the British tradition has been the protection of the office of Attorney-General by the Constitution rather than treating this office as a purely political office to be occupied by a "minister" appointed by the Prime Minster from the government party team that wins election at the polls. In Britain, both the Attorney -General and the Solicitor-General are MPs and are assigned these responsibilities on the basis of their known competence and their potential resourcefulness within the Government-ruling party team.

Now although Kenya's Attorneys-General are accorded constitutional tenure and are members of Parliament and chief legal advisers for Government at Cabinet level, they were not candidates for election and have attained their positions purely by appointment. This means they sit astride the political stall and the professional public service stall. Experience has shown that this duplicity is not readily understood by most people, apart from standing potential risks of compromising either the constitutional, public service mandate or the political expectations. The Commission needs to give further thought to : this issue, and to elicit the people's opinions on the matter.

xiv) The Electoral Process

The integrity of the electoral process is fundamental to the success of • parliamentary democracy. A critical organ in the conduct of national and local elections is the Electoral Commission, which is provided for in Section 41 of the Constitution. It is possible that this Commission is far too large for efficient operations, quite apart from the fact that the criteria for service as an Electoral Commissioner may need to be carefully considered. So many times during elections, accusations have been made against the Commission, with charges that free and fair elections were not realised. It will be necessary for the Commission to reconsider the composition and functioning of the Electoral Commission, and consultations with the people on this subject will be necessary.

xv) Public Finance

Virtually every year the Controller and Auditor-General has made critical reports on the management of public funds. But any "control" through such reports has been too late, because misappropriations or over-expenditures had already taken place quite a while back. It will be necessary for the Commission to have another look at Chapter VII of the Constitution, which provides for parliamentary control over public finance. The people should have an opportunity to make their contribution in this matter.

xvi) Land and Other Natural Resources

The broad natural resource question should be taken together with environment and environmental rights. The environment not only provides essential life's amenities, but also gives vital resources for the social welfare of the human being. Kenya is already party to large number of international environment conventions which impose a duty to protect the environment and its resources. The Commission should give attention to the subject "environmental rights", and consult with the people to the intent that certain provisions be included in the reformed Constitution regarding right to environment. It should be noted, in this regard, that every one of the new-generation African Constitutions has made provisions for environmental protection and the quest for sustainable development.

As regards land specifically, Chapter IX of the present Constitution is devoted to "Trust Land", to the exclusion of other categories of land. The Commission needs to consider whether land as such should be provided for at all, in such detail, in the Constitution. Would it not be appropriate to deal only with fundamental juridical issues such as property rights in general, but leave the details of land law to ordinary statutes? The Commission will need to take the views of the public on this issue.

xvi) Public Office-holding and Transitional Arrangements

In the relatively monolithic constitutional order of the 1960s, 1970s and 1980s, there was an apparent reluctance to make free-flowing power-change arrangements within the Constitution. On this account, the element of luck has been depended on, to secure that opportunistic disruptions do not occur at times of change of leadership. Older countries such as the USA, the U.K.. and others have practically fail-safe arrangements for orderly power transfers. The Commission should draw lessons from these countries, consult with the Kenyan people, and propose sound power - transfer arrangements that will guarantee stability and continuity in existing democratic structures.

xvii) Possible Creation of a New Check - and - Balance Institution — Ombudsman

Several commissions or committees have since the early 1970s recommended the establishment of an Ombudsman institution in Kenya. However, the play of politics throughout this period has not favoured the Ombudsman idea, and indeed all debates on the subject have not been conducted with the advantage of the full facts regarding the merits or demerits of the institution.

The Commission needs to conduct and facilitate an open debate on this matter. It should take the people's opinion and make appropriate

The Ombudsman institution has existed in the older nations for many years: in the Scandinavian countries; in Great Britain; in New Zealand, etc. Even in the countries of Africa the Ombudsman has been generally accepted, and this public institution is well established in Tanzania, Uganda, Zambia, etc.

The essential purpose of the Ombudsman is to check administrative abuses which take many forms, including incompetence, discourtesy, dilatoriness, rudeness, denial of service, corruption in public office, etc. In most developing countries such as Kenya, the ordinary person finds himself or herself completely helpless before the powerful, secretive and faceless bureaucrats. Indeed, most of the injustice the common person ever comes across is at the hands of administrators. Unfortunately, there is no ready access to the judicial process for these wrongs.

The institution of Ombudsman is a clear option in any scheme for remedying the sufferings of the common person who has to deal with administration.

In the event that the Commission finds it to be the view of most people that the Ombudsman institution be set up, consideration will have to be given to the best way of providing for it in the Constitution. The structure of this institution would have to be formulated in such a manner as would give effectiveness; and a decision would have to be taken as to the reporting procedure for the Ombudsman, and the sanctions to be attached to the decisions of the Ombudsman.

5. Concluding Remarks

The object of this paper has been to contribute to the Commission's definition of its work agenda as it discusses the path of reform with the people, in accordance with its mandate. Some of the potential matters of reform are rather technical in nature, and soliciting the public's view on them may prove problematic. It will be desirable that the Commission formulate simple questionnaires addressing the various areas of concern, and it should then communicate the specific questions to members of the public who will state their preferences in clear, specific responses. On the basis of such consultations it will be possible to determine the more popular position on the respective constitutional issues. The popular opinion should then guide the Commission in the formulation of a draft constitution.